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Judicial and statutory definitions of words and phrases

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TABLE OF ABBREVIATIONS.

A

Abb. Adm.....Abbott's Admiralty (U. S.)
 Abb. Dec.....Abbott's Decisions (N. Y.)
 Abb. N. C.....Abbott's New Cases (N. Y.)
 Abbott's Law Dict.. Abbott's Law Dictionary.
 Abb. Prac.....Abbott's Practice (N. Y.)
 Abb. Prac. (N. S.)..Abbott's Practice, New Series (N. Y.)
 Abb. Shipp.....Abbott on Shipping.
 Abb. (U. S.).....Abbott's United States.
 Abr.Abridgment.
 AdamsAdams (N. H.)
 Adams, Eq.....Adams' Equity.
 Add.Addams' Ecclesiastical Reports.
 Add.Addison (Pa.)
 Add. Cont.Addison on Contracts.
 Add. Ecc.....Addams' Ecclesiastical Reports.
 Add. TortsAddison on Torts.
 Adol. & E.....Adolphus and Ellis' English King's Bench Reports.
 Adol. & E. (N. S.)..Adolphus and Ellis' English Queen's Bench Reports, New Series.
 Aik. Dig.....Aikin's Digest of Laws (Ala.)
 AikensAikens (Vt.)
 A. K. Marsh.....A. K. Marshall (Ky.)
 Ala.Alabama.
 Alb. Law J.....Albany Law Journal.
 AllenAllen (Mass.)
 Allison's Am. Dict..Allison's American Dictionary.
 Amb.Ambler's English Chancery Reports.
 Am. Bankr. Reg....National Bankruptcy Register (U. S.)
 Am. Bankr. Rep....American Bankruptcy Reports.
 Am. Dec.....American Decisions.
 Am. Ed.....American Edition.
 Am. Enc. Dict.....American Encyclopedic Dictionary.
 Amend.Amendment.
 Am. Eng. Enc. Law..American and English Encyclopedia of Law.
 Am. Ina.....Arnold on Marine Insurance.
 Am. Law J.....American Law Journal.
 Am. Law Rec.....American Law Record (Cin.)
 Am. Law Reg. (N. S.)American Law Register, New Series.
 Am. Law Reg. (O. S.)American Law Register, Old Series.
 Am. Law Rev.....American Law Review.
 Am. Law T. Rep...American Law Times Reports.
 Am. Lead. Cas....American Leading Cases (Hare & Wallace's).
 Amos & F. Fixt...Amos and Ferard on Fixtures.
 Am. Reg.....American Law Register.
 Am. Rep.....American Reports.
 Am. St. Rep.....American State Reports.
 Am. & Eng. Dec. Eq..American and English Decisions in Equity.
 Am. & Eng. Enc. LawAmerican and English Encyclopedia of Law.

Am. & Eng. Ry. Cas.. American and English Railway Cases.
 And. Law Dict....Anderson's Law Dictionary.
 Ang. Car.....Angell on Carriers.
 Ang. Highw.....Angell & Durfee on Highways.
 Ang. Ins.....Angell on Insurance.
 Ang. Lim.....Angell on Limitation of Actions.
 Ang. Tide Waters...Angell on Tide Waters.
 Ang. Waters.....Angell on Tide Waters.
 Ang. & A. Corp....Angell and Ames on Corporations.
 Ann.Queen Anne (as 8 Ann. c. 19).
 Ann. Code.....Annotated Code.
 Ann. Codes & St....Bellinger and Cotton's Annotated Codes and Statutes (Or.)
 Ann. St.....Annotated Statutes.
 Ann. St. Ind. T....Annotated Statutes of Indian Territory.
 Anstr.Anstruther's English Exchequer Reports.
 Anth. N. P.....Anthon's Nisi Prius Reports (N. Y.)
 App.Appleton (Me.)
 App. Cas.....Appeal Cases, English Law Reports.
 App. D. C.....Appeal Cases (D. C.)
 App. Div.....Appellate Division (N. Y.)
 Archb. Cr. Law....Archbold's Pleading and Evidence in Criminal Cases.
 Archb. Cr. Prac. & Pl.Archbold's Pleading and Evidence in Criminal Cases.
 Arch. Cr. Pl.....Archbold's Criminal Pleading.
 Arch. N. P.....Archbold's Law of Nisi Prius.
 Ariz.Arizona.
 Ark.Arkansas.
 Arn. Ina.....Arnold's Marine Insurance.
 Ashm.Ashmead (Pa.)
 Assem.Assembly (State Legislature).
 Atk.Atkyns' English Chancery Reports.
 Atl.Atlantic Reporter.
 Aust. Jur.....Austin's Jurisprudence.

B

Bac. Abr.Bacon's Abridgment.
 Bac. Ins.....Bacon on Benefit Societies and Life Insurance.
 Bac. Max.....Bacon's Maxims of the Law.
 Bacon, Ben. Soc....Bacon on Benefit Societies and Life Insurance.
 Ball.Bailey (S. C.)
 BaileyBailey (S. C.)
 Bailey, Dict.....Nathan Bailey's English Dictionary.
 Bailey, Eq.....Bailey's Equity (S. C.)
 Bainb. Mines.....Bainbridge on Mines and Minerals.
 Baldw.Baldwin (U. S.)
 Ballinger's Ann. Codes & St.....Ballinger's Annotated Codes and Statutes (Wash.)

Bankr. Act.....	Bankruptcy Act.	Bish. Mar. & Div...	Bishop on Marriage and Divorce.
Bankr. Form.....	Bankruptcy Forms.	Bish. New Cr. Law..	Bishop's New Criminal Law.
Ban. & A.....	Banning & Arden's Patent Cases (U. S.)	Bish. New Cr. Prac..	Bishop's New Criminal Procedure.
Barb.	Barbour (N. Y.)	Bish. St. Crimes....	Bishop on Statutory Crimes.
Barb. (Ark.).....	Barber (Ark.)	Bisp. Eq.....	Bispham's Principles of Equity.
Barb. Ch.....	Barbour's Chancery (N. Y.)	Biss.	Bissell (U. S.)
Barb. Ch. Pr.....	Barbour's Chancery Practice.	Bissett, Est.....	Bisset on Estates for Life.
Barb. Cr. Law.....	Barbour's Criminal Law.	Bl.	Henry Blackstone's English Common Pleas Reports.
Barn. & Adol.....	Barnewall and Adolphus' English King's Bench Reports.	Black	Black (U. S.)
Barn. & Ald.....	Barnewall and Alderson's English King's Bench Reports.	Blackb. Sales.....	Blackburn on Sales.
Barn. & C.....	Barnewall and Cresswell's English King's Bench Reports.	Black. Com.....	Blackstone's Commentaries on the Laws of England.
Barb. & C. Ky. St.	Barbour and Carroll's Kentucky Statutes.	Black, Const. Law..	Black on Constitutional Law.
Barn. & S.....	Best and Smith's English Queen's Bench Reports.	Black. Dict.....	Black's Law Dictionary.
Barr	Barr (Pa.)	Blackf.	Blackford (Ind.)
Bates' Ann. St....	Bates' Annotated Revised Statutes (Ohio).	Black, Interp. Laws..	Black on the Construction and Interpretation of Laws.
Bat. Rev. St.....	Battle's Revisal of the Public Statutes of North Carolina.	Black, Judg.....	Black on Judgments.
Batts' Ann. Civ. St. }	Batts Annotated Revised	Black, Law Dict....	Black's Law Dictionary.
Batts' Rev. St. }	Civil Statutes (Tex.)	Bland	Bland (Md.)
Baxt.	Baxter (Tenn.)	Blatchf.	Blatchford (U. S.)
Bay	Bay (S. C.)	Blatchf. Prize Cas..	Blatchford's Prize Cases (U. S.)
Bayley, Bills.....	Bayley on Bills.	Blatchf. & H.....	Blatchford & Howland (U. S.)
Baylies, Sur.....	Baylies on Sureties and Guarantors.	Bl. Comm.....	Blackstone's Commentaries on the Laws of England.
Beach, Contrib. Neg..	Beach on Contributory Negligence.	Bliss, Code Pl.....	Bliss on Code Pleading.
Beach, Inj.....	Beach on Injunctions.	Bliss, Life Ins.....	Bliss on Life Insurance.
Beach, Mod. Eq. Jur.	Beach's Commentaries on Modern Equity Jurisprudence.	B. Mon.....	B. Monroe (Ky.)
Beach, Priv. Corp...	Beach on Private Corporations.	Bond	Bond (U. S.)
Beach, Pub. Corp...	Beach on Public Corporations.	Bosw.	Bosworth (N. Y.)
Beasl.	Beasley (N. J.)	Bos. & P.....	Bosanquet and Puller's English Common Pleas Reports.
Beav.	Beavan's English Court Reports.	Bos. & P. (N. R.)..	Bosanquet and Puller's New Reports, English Common Pleas.
Beavan, Ch.....	Beavan's English Court Reports.	Bouv. Inst.....	Bouvier's Institutes of American Law.
Bee	Bee (U. S.)	Bouv. Law Dict....	Bouvier's Law Dictionary.
Bell, Comm.....	Bell's Commentaries on the Law of Scotland.	Bradf. Sur.	Bradford's Surrogate (N. Y.)
Ben.	Benedict (U. S.)	Bradw.	Bradwell (Ill.)
Benj. Sales.....	Benjamin on Sales.	Branch	Branch (Fla.)
Benn.	Bennett (Cal.)	Brandt, Sur.....	Brandt on Suretyship and Guaranty.
Benth. Jud. Ev....	Bentham's Judicial Evidence.	Brayt.	Brayton (Vt.)
Rest, Ev.....	Best on Evidence.	Breese	Breese (Ill.)
Best & S.....	Best and Smith's English Queen's Bench Reports.	Brev.	Brevard (S. C.)
Bibb	Bibb (Ky.)	Brev. Dig.....	Brevard's Digest of the Public Statute Law (S. C.)
Bid. Ins.....	Biddle on Insurance.	Brewst.	Brewster (Pa.)
Bid. War. Sale Chat..	Biddle on Warranties in Sale of Chattels.	Brick. Dig.....	Brickell's Digest (Ala.)
Big.	Bignell's Reports (India).	Brightly, Dig.....	Brightly's Analytical Digest of the Laws of the United States.
Bigelow, Estop....	Bigelow on Estoppel.	Brightly, Elect. Cas..	Brightly's Leading Election Cases (Pa.)
Bigelow, Lead. Cas..	Bigelow's Leading Cases on Bills and Notes, Torts, or Wills.	Brightly, N. P.....	Brightly's Nisi Prius Reports (Pa.)
Big. Torts.....	Bigelow on Torts.	Bro. C. C.....	Brown's English Chancery Cases or Reports.
Bin.	Binney (Pa.)	Bro. Civ. Law.....	Browne's Civil and Admiralty Law.
Bing.	Bingham's English Common Pleas Reports.	Brock.	Brockenbrough (U. S.)
Bing. N. C.....	Bingham's New Cases, English Common Pleas.	Brock. & H.....	Brockenbrough & Holmes (Va.)
Bish. Cont.....	Bishop on Contracts.	Brod. & B.....	Broderip & Bingham's English Common Pleas Reports.
Bish. Cr. Law.....	Bishop on Criminal Law.	Brooke, Abr.....	Brooke's Abridgment.
Bish. Cr. Proc.....	Bishop on Criminal Procedure.	Broom, Leg. Max....	Broom's Legal Maxims.
Bish. Eq.....	Bispham's Principles of Equity.	Broom's Com. Law..	Broom's Commentaries on the Common Law.
Bish. Mar., Div. & Sep.	Bishop on Marriage, Divorce, and Separation.	Brown, Adm.....	Brown's Admiralty (U. S.)

TABLE OF ABBREVIATIONS.

v

Brown, Ch.....Brown's English Chancery Reports.
 Brown, Civ. Law...Brown's Civil and Admiralty Law.
 BrowneBrown's (Pa.)
 Browne, Jud. Interp.. Browne's Judicial Interpretation of Common Words and Phrases.
 Browne's Roman LawBrown's Epitome and Analysis of Salgny's Treatise on Obligations in Roman Law.
 Browne, St. Frauds.. Browne on Statute of Frauds.
 Brownl. & G.....Brownlow and Goldsborough, English Common Pleas Reports.
 Brunner, Col. Cas.. Brunner's Collected Cases (U. S.)
 Bull. N. P.....Buller's Law of Nisi Prius.
 Bulst.Bulstrode's English King's Bench Reports.
 Bump. Fraud. Conv..Bump on Fraudulent Conveyances.
 Burge, Sur.....Burge on Suretyship.
 Burn.Burnett (Wis.)
 Burn, J. P.....Burn's Justice of the Peace.
 Burns' Ann. St....Burns' Annotated Statutes (Ind.)
 Burns' Rev. St....Burns' Annotated Statutes (Ind.)
 Burr.Burrows' English King's Bench Reports.
 Burrill, Assignm....Burrill on Assignments.
 Burrill, Circ. Ev...Burrill on Circumstantial Evidence.
 Burr. L. Dict.....Burrill's Law Dictionary.
 Burr. Pr.....Burrill's New York Practice.
 Burt. Real Prop....Burton on Real Property.
 Busb.Busbee (N. C.)
 Busb. Eq.....Busbee's Equity (N. C.)
 BushBush (Ky.)
 B. & Ald.....Barnewall and Alderson's English King's Bench Reports.
 B. & C.....Barnewall and Cresswell's English King's Bench Reports.
 B. & C. Comp....Bellinger and Cotton's Annotated Codes and Statutes (Or.)
 B. & P.....Bosanquet & Puller's English Common Pleas Reports.

C

Cab. & El.....Cababé and Ellis' Queen's Bench Reports.
 CainesCaines (N. Y.)
 Caines, Cas.....Caines' Cases (N. Y.)
 Cal.California.
 CallCall (Va.)
 Calvin, Lex.....Calvin's Lexicon Juridicum.
 Calv. Parties.....Calvert's Parties to Suits in Equity.
 Camp.Campbell's English Nisi Prius Reports.
 Cam. & N.....Cameron & Norwood's Conference (N. C.)
 Car.Carolus (as 22 & 23 Car. II.)
 Car. Law Repos....Carolina Law Repository (N. C.)
 Carr. & M.....Carrington and Marshman's English Nisi Prius Reports.
 Cart.Carter (Ind.)
 Carth.Carthew's English King's Bench Reports.
 Cary. Carr.....Carver's Treatise on the Law Relating to the Carriage of Goods by Sea.

Car. & K.....Carrington and Kirwan's English Nisi Prius Reports.
 Car. & P.....Carrington & Payne's English Nisi Prius Reports.
 CaseyCasey (Pa.)
 O. B.English Common Bench Reports (Manning, Granger & Scott).
 O. B. (N. S.).....English Common Bench Reports, New Series, by John Scott.
 O. C. A.....Circuit Court of Appeals (U. S.)
 O. E. Green.....C. E. Green (N. J.)
 Cent. Dict.....Century Dictionary.
 Cent. Law J.....Central Law Journal, St. Louis, Mo.
 Chand.Chandler (Wis.)
 Chan. SentinelChancery Sentinel (N. Y.)
 Ch. App.....Chancery Appeal Cases, English Law Reports.
 Charl't., R. M.....R. M. Charlton (Ga.)
 Charl't., T. U. P....T. U. P. Charlton (Ga.)
 ChaseChase (U. S.)
 Chase, Steph. Dig. Ev.Chase on Stephens' Digest of Evidence.
 Ch. Cas.....English Cases in Chancery.
 Ch. Div.....Chancery Division, English Law Reports.
 Chest. Co. Rep....Chester County Reports (Pa.)
 ChevesCheves (S. C.)
 Cheves, Eq.....Cheves' Equity (S. C.)
 Chi. Leg. N.....Chicago Legal News (Ill.)
 Chip., D.....D. Chipman (Vt.)
 Chip., N.....N. Chipman (Vt.)
 Chit. BillsChitty on Bills.
 Chit. Bl. Comm....Chitty's Edition of Blackstone's Commentaries.
 Chit. Cont.....Chitty on Contracts.
 Chit. Cr. LawChitty's Criminal Law.
 Chit. Gen. Pr.....Chitty's General Practice.
 Chit. Pl.....Chitty on Pleading.
 Chit. Pr.....Chitty's General Practice.
 ChittyChitty on Bills.
 Chitty, Bl. Comm...Chitty's Edition of Blackstone's Commentaries.
 Oh. Pl.Chitty on Pleading.
 Cin. R.....Cincinnati Superior Court Reports (Ohio)
 Cin. Super. Ct. Rep'rCincinnati Superior Court Reporter (Ohio)
 Cir. Ct. Dec.....Circuit Decisions (Ohio)
 Cir. Ct. R.....Circuit Court Reports (Ohio)
 City Ct. R.....City Court Reports (N. Y.)
 City Ct. R. Supp...City Court Reports, Supplement (N. Y.)
 City H. Rec.....City Hall Recorder (N. Y.)
 Civ. Code.....Civil Code.
 Civ. Code Practice..Civil Code of Practice.
 Civ. Prac. Act.....Civil Practice Act.
 Civ. Proc. R.....Civil Procedure Reports (N. Y.)
 O. L.....English Common Law Reports (American Reprint).
 Clancy, Husb. & W. } Clancy's Treatise of the Rights, Duties, and Liabilities of Husband and Wife.
 ClarkClark (Pa.)
 ClarkeClarke (Iowa)
 Clarke, Ch.....Clarke's Chancery (N. Y.)
 Clark's Code.....Clark's Annotated Code of Civil Procedure (N. C.)
 Clark & F.....Clark and Fennelly's House of Lords Reports.
 Clay's Dig.....Clay's Digest of Laws of Alabama.
 Cleve. Law Rec....Cleveland Law Recorder (Ohio)
 Cleve. Law Rep....Cleveland Law Reporter (Ohio)

Clev. Insan.....	Clevenger's Medical Jurisprudence of Insanity.	Cow. Cr. Rep.....	Cowen's Criminal Reports (N. Y.)
Cliff.	Clifford (U. S.)	Cowp.	Cowper's English King's Bench Reports.
Co.	Coke's English King's Bench Reports.	Cox	Cox (Ark.)
Cobb, Dig.....	Cobb's Digest of Statute Laws (Ga.)	Cox	Cox's English Chancery Cases.
Cobbey's Ann. St..	Cobbey's Annotated Statutes (Neb.)	Cox, C. C.....	Cox's English Criminal Cases.
Code Civ. Proc.....	Code of Civil Procedure.	Cox, Cr. Cas.....	Cox's English Criminal Cases.
Code Cr. Proc.....	Code of Criminal Procedure.	Coxe	Coxe (N. J.)
Code Gen. Laws....	Code of General Laws.	C. P. Div.....	Common Pleas Division, English Law Reports.
Code Prac.....	Code of Practice.	C. P. Rep.....	Common Pleas Reporter (Pa.)
Code Proc.	Code of Procedure.	Crabbe	Crabbe (U. S.)
Code Pub. Gen. Laws	Code of Public General Laws.	Crabb, Eng. Synonyms	Crabb's English Synonyms.
Code Pub. Loc. Laws	Code of Public Local Laws.	Cr. Act.....	Criminal Act.
Code R. (N. S.)....	Code Reports, New Series (N. Y.)	Craig, Dict.....	Craig's Etymological, Technical, and Pronouncing Dictionary.
Code Rep.....	Code Reporter (N. Y.)	Craig & P.....	Craig and Phillips' English Chancery Reports.
Code Supp.....	Supplement to the Code.	Cranch	Cranch (U. S.)
Co. Inst.....	Coke's Institutes.	Cranch, C. C.....	Cranch's Circuit Court (U. S.)
Coke	Coke's English King's Bench Reports.	Cranch, Pat. Dec..	Cranch's Patent Decisions (U. S.)
Cold.	Coldwell (Tenn.)	Cr. Cir. Comp.....	Crown Circuit Companion (Irish).
Colem. Cas.....	Coleman's Cases (N. Y.)	Cr. Code.....	Criminal Code.
Colem. & C. Cas...	Coleman & Caines' Cases (N. Y.)	Cr. Law Mag.....	Criminal Law Magazine (N. J.)
Co. Litt.....	Coke on Littleton.	C. Rob. Adm.....	Charles Robinson's English Admiralty Reports.
Collier, Partn.....	Collyer on Partnership.	Cro. Car.....	Croke's English King's Bench Reports temp. Charles I (3 Cro.)
Colly.	Collyer's English Chancery Cases.	Cro. Cas.....	Croke's English King's Bench Reports temp. Charles I (3 Cro.)
Colo.	Colorado.	Cro. Ellis.....	Croke's English King's Bench Reports, temp. Elizabeth (1 Cro.)
Colo. App.....	Colorado Appeals Reports.	Cro. Jac.....	Croke's English King's Bench Reports temp. James (Jacobus) I (2 Cro.)
Colo. Law Rep.....	Colorado Law Reporter.	Crompt. Just.....	Crompton's Office of Justice of the Peace.
Colq. Rom. Civ. Law	Colquhoun's Roman Civil Law.	Crompt., M. & R....	Crompton, Meeson, and Roscoe's English Exchequer Reports.
Com. Dig.....	Comyn's Digest of the Laws of England.	Crompt.	Star Chamber Cases by Crompton.
Comm.	Commentaries.	Crompt. & J.....	Crompton & Jervis' English Exchequer Reports.
Com. on Con.....	Comyn's Law of Contracts.	Cr. Prac. Act	Criminal Practice Act.
Comp. Laws.....	Compiled Laws.	Cr. Proc. Act	Criminal Procedure Act.
Comp. St.....	Compiled Statutes.	Cr. St.....	Criminal Statutes.
Comst.....	Comstock (N. Y.)	Cruise's Dig.....	Cruise's Digest of the Law of Real Property.
Comyn	Comyns' English King's Bench Reports.	Ct. Cl.....	Court of Claims (U. S.)
Comyn, Usury.....	Comyn on Usury.	Curt.	Curtis (U. S.)
Conf. R.	Conference Reports (N. C.)	Curt. Ecc.....	Curtis' English Ecclesiastical Reports.
Cong.	Congress.	Curt. Pat.....	Curtis on Patents.
Conn.	Connecticut.	Cush.	Cushing (Mass.)
Con. St.....	Consolidated Statutes.	Cush. Law & Prac. Leg. Assem.....	Cushing's Law and Practice of Legislative Assemblies.
Const.	Constitution.	Cushm.	Cushman (Miss.)
Const. Amend.....	Amendment to Constitution.	Cyc.	Cyclopedia of Law and Procedure.
Const. U. S. Amend..	Amendment to the Constitution of the United States.	Cyc. Law & Proc...	Cyclopedia of Law and Procedure.
Con. Sur.....	Connolly's Surrogate (N. Y.)	Cyclop. Dict.....	Shumaker & Longsdorf's Cyclopedic Dictionary.
Cooke	Cooke (Tenn.)	C. & K.....	Carrington and Kirwan's English Nisi Prius Reports.
Cooke, Ins.....	Cooke on Life Insurance.	C. & P.....	Carrington and Payne's English Nisi Prius Reports.
Cook's Pen. Code..	Cook's Penal Code (N. Y.)		
Cook, Stock, Stockh. & Corp. Law.....	Cook on Stock, Stockholders, and General Corporation Law.		
Cooley, Bl. Comm...	Cooley's Edition of Blackstone's Commentaries.		
Cooley, Const. Law..	Cooley's Constitutional Law.		
Cooley, Const. Lim..	Cooley's Constitutional Limitations.		
Cooley, Tax'n	Cooley on Taxation.		
Cooley, Torts.....	Cooley on Torts.		
Coop. Eq. Pl.....	Cooper's Equity Pleading.		
Copp, Pub. Land Laws	Copp's United States Public Land Laws.		
Co. Rep.....	Coke's English King's Bench Reports.		
Corn. Deeds	Cornish on Purchase Deeds.		
Cornish, Purch. Deeds	Cornish on Purchase Deeds.		
Cow.	Cowen (N. Y.)		

D

Dak. Dakota.
 Dall. (Pa.)..... Dallas (Pa.)
 Dall. (U. S.)..... Dallas (U. S.)
 Dall. Dig..... Dallam's Digest and Opinions (Tex.)
 Dall. Laws..... Dallas' Laws (Pa.)
 Daly Daly (N. Y.)
 Dana Dana (Ky.)
 Dane's Abr..... Dane's Abridgment of American Law.
 Daniell, Ch. Pl. & Prac. Daniell's Chancery Pleading and Practice.
 Daniell, Ch. Prac... Daniell's Chancery Pleading and Practice.
 Daniel, Neg. Inst... Daniel's Negotiable Instruments.
 Davis, Cr. Law..... Davis' Criminal Law.
 Dawson's Code..... Dawson's Code of Civil Procedure (Colo.)
 Day Day (Conn.)
 D. C. District of Columbia.
 D. Chip..... D. Chipman (Vt.)
 Deac. Cr. Law..... Deacon on Criminal Law of England.
 Deady Deady (U. S.)
 Dears. & B. Crown Cas. Dearsly and Bell's English Crown Cases.
 De Gex, F. & J.... De Gex, Fisher & Jones' English Chancery Reports.
 De Gex, J. & S.... De Gex, Jones, and Smith's English Chancery Reports.
 De Gex, M. & G.... De Gex, Macnaghten, and Gordon's English Chancery Reports.
 Del. Delaware.
 Del. Ch. Delaware Chancery.
 Del. Co. R. Delaware County Reports (Pa.)
 Del. Term R. Delaware Term Reports.
 Dem. Sur..... Demarest's Surrogate (N. Y.)
 Denio Denio (N. Y.)
 Denison, Cr. Cas... Denison's English Crown Cases.
 Desaus. Desaussure's Equity (S. C.)
 Desty, Tax'n..... Desty on Taxation.
 Dev. Devereux (N. C.)
 Dev. Ct. Cl. Devereux's Court of Claims (U. S.)
 Dev. Eq. Devereux's Equity (N. C.)
 Devl. Deeds..... Devlin on Deeds.
 Dev. & B. Devereux & Battle (N. C.)
 Dev. & B. Eq. Devereux & Battle's Equity (N. C.)
 Dicey, Dom..... Dicey's Law of Domicil.
 Dick. Dickinson (N. J.)
 Dickens Dickens' English Chancery Reports.
 Dict. Dictionary.
 Dict. Droit Civil.... Dictionnaire Droit Civil.
 Dig. Digest.
 Dig. English's Digest of the Statutes (Ark.)
 Dig. Public Laws (R. I.)
 Dig. Fla..... Thompson's Digest of Laws (Fla.)
 Dig. L. K. Littell and Swigert's Digest of Statute Law (Ky.)
 Dig. St. English's Digest of the Statutes (Ark.)
 Dill. Dillon (U. S.)
 Dill. Laws Eng. & Am. Dillon's Laws and Jurisprudence of England and America.
 Dill. Mun. Corp.... Dillon on Municipal Corporations.
 Disn. Disney (Ohio)

Doct. & Stud. Dial.. Doctor and Student; or, Dialogues between a Doctor of Divinity and a Student in the Laws of England by C. St. Germain.
 Dom. Civ. Law.... Domat's Civil Law.
 Doug. Douglas' English King's Bench Reports.
 Doug. Douglass (Mich.)
 Dowl. Dowling's English Ball Court Cases.
 Dowl. & L. Dowling & Lowndes' English Ball Court Reports.
 Dowl. & R. Dowling and Ryland's English King's Bench Reports.
 Drake, Attachm.... Drake on Attachment.
 Dud. Dudley (Ga.)
 Dud. Eq. Dudley's Equity (S. C.)
 Dud. Law..... Dudley's Law (S. C.)
 Duer Duer's Superior Court (N. Y.)
 Dup. Jur..... Duponceau on Jurisdiction of United States Courts.
 Durn. & E. Durnford and East's English King's Bench Reports (Term Reports).
 Dutch. Dutcher (N. J.)
 Duv. Duval (Ky.)
 Dyer Dyer's English King's Bench Reports.

E

East East's English King's Bench Reports.
 East, P. C. East's Pleas of the Crown.
 Eccl. R. English Ecclesiastical Reports.
 E. C. L. English Common Law Reports (American Reprint).
 Ed. Edition.
 Eden, Pen. Law.... Eden's Principles of Penal Law.
 Eden's Prin. P. L.. Eden's Principles of Penal Law.
 Edm. Rev. St. Edmonds' Statutes at Large (N. Y.)
 Edm. Sel. Cas. Edmonds' Select Cases (N. Y.)
 E. D. Smith..... E. D. Smith (N. Y.)
 Edw. King Edward (as 4 Edw. I.)
 Edw. Ballm..... Edwards on the Law of Bailments.
 Edw. Bills & N.... Edwards on Bills and Notes.
 Edw. Brok. & F.... Edwards on Factors and Brokers.
 Edw. Ch. Edwards' Chancery (N. Y.)
 El., Bl. & El. Ellis, Blackburn, and Ellis' English Queen's Bench Reports.
 Elis. Queen Elizabeth (as 18 Eliz.).
 Elliot, Deb..... Elliot's Debates on the Federal Constitution.
 Elliott, Supp..... Elliott Supplement to the Indiana Revised Statutes.
 Elliott, Roads & S. Elliott on Roads and Streets.
 Elliott, R. R. Elliott on Railroads.
 Ellis & B. Ellis and Blackburn's English Queen's Bench Reports.
 Elm. Dig. Elmer's Digest of Laws (N. J.)
 Elph. Interp. Deeds.. Elphinstone's Rules for Interpretation of Deeds.
 El. & Bl. Ellis and Blackburn's English Queen's Bench Reports.

E. L. & Eq.	English Law and Equity (American Reprint).	Gabb. Cr. Law	Gabbett's Criminal Law.
Emerig. Ins.	Emerigon on Insurance.	Ga. Dec.	Georgia Decisions.
Enc. Amer.	Encyclopædia Americana.	Gale & Whatley	
Enc. Brit.	Encyclopædia Britannica.	Easem.	Gale and Whatley (afterwards Gale) on Easements.
Enc. Dict.	Encyclopædic Dictionary, Edited by Robert Hunter 1879-1888.	Gall.	Gallison (U. S.)
Enc. Ins. U. S.	Insurance Year-Book.	Gantt's Dig.	Gantt's (& Caldwell's) Digest of Statutes (Ark.)
Enc. Law.	American and English Encyclopædia of Law.	Gav. & H. Rev. St.	Gavin and Hord's Revised Statutes (Ind.)
Enc. Pl. & Prac.	Encyclopedia of Pleading and Practice.	Gen. Assem.	General Assembly.
End. Interp. St.	Endlich's Commentaries on the Interpretation of Statutes.	Gen. Laws.	General Laws.
Endlich, Bldg. Ass'ns.	Endlich on Building Associations.	Gen. St.	General Statutes.
Eng.	English (Ark.)	Geo.	King George (as 15 Geo. II).
Eng. C. L.	English Common Law Reports (American Reprint).	George	George (Miss.)
Eng. Ecc. R.	English Ecclesiastical Reports (American Reprint).	Gibbon	Gibbon on Nuisances.
Eng. Law & Eq.	English Law and Equity Reports (American Reprint).	Gil.	Gilfillan (Minn.)
Eq.	Equity.	Gilbert, Ev.	Gilbert's Law of Evidence.
Eq. Cas. Abr.	English Equity Cases Abridged.	Gilbert, Tenures.	Gilbert on Tenures.
Ersk. Inst.	Erskine's Institutes of the Law of Scotland.	Gild.	Gildersleeve Reports (N. M.)
Ersk. Speeches.	Erskine's Speeches.	Gill	Gill (Md.)
Escriche, Dict.	Escriche's Dictionary of Jurisprudence.	Gillet, Cr. Law.	Gillet's Treatise on Criminal Law and Procedure in Criminal Cases.
Ev.	Evidence.	Gill & J.	Gill & Johnson (Md.)
Ex.	English Exchequer Reports (Welsby, Hurlstone & Gordon).	Gilman	Gilman (Ill.)
Exch.	English Exchequer Reports (Welsby, Hurlstone & Gordon).	Gilmer	Gilmer (Va.)
Ex. Sess.	Extra Session.	Gilp.	Gilpin (U. S.)
E. & B.	Ellis and Blackburn's English Queen's Bench Reports.	Godd. Easem.	Goddard on Easements.
F		Gould, Pl.	Gould on the Principles of Pleading in Civil Actions.
Fairf.	Fairfield (Me.)	Gould's Dig.	Gould's Digest of Laws (Ark.)
Falc. Marine Dict.	Falconer's Marine Dictionary.	Gould, Wat.	Gould on Waters.
Fearne, Rem.	Fearne on Contingent Remainders.	Grah. & W. New Trials	Graham and Waterman on New Trials.
Fed.	Federal Reporter (U. S.)	Grant, Cas.	Grant's Cases (Pa.)
Fed. Cas.	Federal Cases (U. S.)	Grant's Dig.	Gantt's (& Caldwell's) Digest of Statutes (Ark.)
Fernald, Eng. Synonyms	Fernald's English Synonyms.	Grat.	Grattan (Va.)
Field, Corp.	Field on Corporations.	Gray	Gray (Mass.)
Finch, Law.	Finch, Sir Henry; a Discourse of Law (1759).	Green, C. E.	C. E. Green (N. J.)
Fish. Pat. Cas.	Fisher's Patent Cases (U. S.)	Green, Cr. Law R.	Green's Criminal Law Reports (N. Y.)
Fish. Pat. Rep.	Fisher's Patent Reports (U. S.)	Green, H. W.	H. W. Green (N. J.)
Fish. Prize Cas.	Fisher's Prize Cases (U. S.)	Green, J. S.	J. S. Green (N. J.)
Fitz. Abridg.	Fitzherbert's Abridgment.	Greene, G.	G. Greene (Iowa)
Fla.	Florida.	Greenl.	Greenleaf (Me.)
Flip.	Flippin (U. S.)	Greenl. Cruise, Real Prop.	Greenleaf's Edition of Cruise's Digest of Real Property.
Fost.	Foster (N. H.)	Greenl. Ev.	Greenleaf on Evidence.
Foster	Foster's English Crown Law or Crown Cases.	Gross, St.	Gross' Illinois Compiled Laws (or Statutes).
Fost. & F.	Foster and Finlason's English Nisi Prius Reports.	H	
Fras. Dom. Rel.	Fraser on Personal and Domestic Relations, Scotland.	Hagg. Adm.	Haggard's English Admiralty Reports.
Freem.	Freeman (Ill.)	Hagg. Cons.	Haggard's English Consistory Reports.
Freem. Ch.	Freeman's Chancery (Miss.)	Hagg. Ecc.	Haggard's English Ecclesiastical Reports.
Freem. Judgm.	Freeman on Judgments.	Hale, Com. Law.	Hale's History of the Common Law.
G		Hale, P. C.	Hale's Pleas of the Crown.
G.	King George (as 15 Geo. II).	Hale, Tort.	Hale on Torts.
Ga.	Georgia.	Hall	Hall's Superior Court (N. Y.)
		Halleck, Int. Law.	Halleck's International Law.
		Hall, Mex. Law.	Hall's Mexican Law.
		Halst.	Halsted (N. J.)
		Halst. Ch.	Halsted's Chancery (N. J.)
		Ham.	Hammond (Ohio)
		Ham. Cont.	Hammon on Contracts.
		Hand	Hand (N. Y.)
		Handy	Handy (Ohio)
		Har. (Del.)	Harrington (Del.)
		Har. (Mich.)	Harrington (Mich.)
		Har. (N. J.)	Harrison (N. J.)

Hardin	Hardin (Ky.)	Hobart	Hobart's English King's Bench Reports.
Hardw. Cas. Temp.	Cases temp. Hardwicke, by Lee and Hardwicke.	Hodge, Presb. Law.	Hodge on Presbyterian Law.
Hare	Hare's English Vice Chancellors' Reports.	Hoff. Ch.	Hoffman's Chancery (N. Y.)
Harg. Co. Litt.	Hargrave's Notes to Coke on Littleton.	Hoff. Land Cas.	Hoffman's Land Cases (U. S.)
Harp.	Harper (S. C.)	Holl. Jur.	Holland's Elements of Jurisprudence.
Harp. Eq.	Harper's Equity (S. C.)	Holmes	Holmes (U. S.)
Harris	Harris (Pa.)	Holt, N. P.	Holt's English Nisi Prius Reports.
Harrison, Ch.	Harrison's Chancery Practice.	Holt, Shipp.	Holt on Shipping.
Hart. Dig.	Hartley's Digest of Laws, (Tex.)	Hopk. Ch.	Hopkins' Chancery (N. Y.)
Har. & G.	Harris & Gill (Md.)	Horner's Ann. St.	Horner's Annotated Revised Statutes (Ind.)
Har. & J.	Harris & Johnson (Md.)	Horner's Rev. St.	Horner's Annotated Revised Statutes (Ind.)
Har. & McH.	Harris & McHenry (Md.)	Horr. & T. Cas. Self-Def.	Horrigan and Thompson's Cases on Self-Defence.
Hasb.	Hasbrouck's Reports (Idaho)	Houst.	Houston (Del.)
Hask.	Haskell (U. S.)	Houst. Cr. Cas.	Houston's Criminal Cases (Del.)
Hats.	Hatsell's Parliamentary Precedents.	How. (Miss.)	Howard (Miss.)
Haw.	Hawaiian Reports.	How.	Howard (U. S.)
Hawes, Jur.	Hawes on Jurisdiction of Courts.	How. Ann. St.	Howell's Annotated Statutes (Mich.)
Hawk.	Hawkins' Pleas of the Crown.	Howell, N. P.	Howell's Nisi Prius Reports (Mich.)
Hawkins' Wills.	Hawkins' Construction of Wills.	Howell, St. Tr.	Howell's English State Trials.
Hawk. P. C.	Hawkins' Pleas of the Crown.	How. Prac.	Howard's Practice (N. Y.)
Hawks	Hawks (N. C.)	How. Prac. (N. S.)	Howard's Practice, New Series (N. Y.)
Hayes	Hayes' Irish Exchequer Reports.	How. St.	Howell's Annotated Statutes (Mich.)
Hayw. (N. C.)	Haywood (N. C.)	How. & H. St.	Howard and Hutchinson's Statutes (Miss.)
Hayw. (Tenn.)	Haywood (Tenn.)	Hughes (Ky.)	Hughes (Ky.)
Hayw. & H.	Hayward & Hazelton (U. S.)	Hughes	Hughes (U. S.)
Haz. Reg.	Hazard's Register (Pa.)	Hume's Hist. Eng.	Hume's History of England.
H. Bl.	Henry Blackstone's English Common Pleas Reports.	Humph.	Humphrey (Tenn.)
Head	Head (Tenn.)	Hun	Hun (N. Y.)
Heisk.	Heiskell (Tenn.)	Hurd's Rev. St.	Hurd's Revised Statutes (Ill.)
Hemp.	Hempstead (U. S.)	Hurl. Bonds.	Hurlstone on Bonds.
Hen.	King Henry (as 8 Hen. VI.)	Hurl. & C.	Hurlstone & Coltman's English Exchequer Reports.
Hen. St.	Hening's Statutes (Va.)	Hurl. & G.	Hurlstone and Gordon's Reports (10, 11, English Exchequer Reports).
Hen. & M.	Hening & Munford (Va.)	Hurl. & N.	Hurlstone and Norman's English Exchequer Reports.
Herm. Chat. Mortg.	Herman on Chattel Mortgages.	Hutch. Carr.	Hutchinson on Carriers.
Herm. Estop.	Herman's Law of Estoppel.	Hutch. Code.	Hutchinson's Code (Miss.)
High, Extr. Rem.	High on Extraordinary Legal Remedies.	Hutch. Dig. St.	Hutchinson's Code (Miss.)
High, Inj.	High on Injunctions.		
Hil. Abr.	Hilliard's American Law.		
Hill	Hill (N. Y.)		
Hill. Cont.	Hilliard on Contracts.		
Hill. Elem. Law.	Hilliard's Elements of Law.		
Hill. Eq.	Hill's Equity (S. C.)		
Hilliard, R. R.	Hilliard on Real Property.		
Hill, Law.	Hill's Law (S. C.)		
Hill's Ann. Codes & Laws	Hill's Annotated Codes and General Laws (Or.)		
Hill's Ann. St. & Codes	Hill's Annotated General Statutes and Codes (Wash.)		
Hill's Code.	Hill's Annotated Codes and General Laws (Or.)		
Hill's Code.	Hill's Annotated General Statutes and Codes (Wash.)		
Hill & D. Supp.	Hill & Denio, Lator's Supplement (N. Y.)		
Hilt.	Hilton (N. Y.)		
Hil. Term 4, Will. IV.	Hilary Term 4, William IV.		
Hil. Torts.	Hilliard on the Law of Torts.		
H. L. Cas.	House of Lords' Cases, English.		

Idaho	Idaho.
Ill.	Illinois.
Ill. App.	Illinois Appellate Court Reports.
Imp. Dict.	Imperial Dictionary.
Ind.	Indiana.
Ind. App.	Indiana Appellate Court Reports.
Ind. T.	Indian Territory.
Ins. Law J.	Insurance Law Journal (Pa.)
Inst.	Coke's Institutes.
Internat. Dict.	Webster's International Dictionary.
Interst. Com. R.	Interstate Commerce Reports.
Iowa	Iowa.
Ired.	Iredell's Law (N. C.)
Ired. Eq.	Iredell's Equity (N. C.)
Irwin's Code.	Clark, Cobb and Irwin's Code (Ga.)

J

Jac. King James (as 21 Jac. I).
 Jac. Law Dict. Jacob's Law Dictionary.
 Jagg. Torts. Jaggard on Torts.
 Jarm. Wills. Jarman on Wills.
 Jeff. Jefferson (Va.)
 Jellett, Cr. Law. Gillett's Treatise on Criminal Law and Procedure in Criminal Cases.
 Jeremy, Eq. Jeremy's Equity Jurisdiction.
 J. J. Marsh. J. J. Marshall (Ky.)
 John. Johnson (N. M.)
 John. Eng. Ch. Johnson's English Vice-Chancellors' Reports.
 Johns. Johnson (N. Y.)
 Johns. Cas. Johnson's Cases (N. Y.)
 Johns. Ch. Johnson's Chancery (N. Y.)
 Johnson's Quarto Dict. Johnson's Quarto Dictionary.
 Jones Jones (Pa.)
 Jones, Bailm. Jones on Bailments.
 Jones, Chat. Mortg. Jones on Chattel Mortgages.
 Jones, Easem. Jones' Treatise on Easements.
 Jones, Eq. Jones' Equity (N. C.)
 Jones, Law. Jones' Law (N. C.)
 Jones, Liens. Jones on Liens.
 Jones, Mortg. Jones on Mortgages.
 Jones, Securities. Jones on Railroad Securities.
 Jones & S. Jones & Spencer (N. Y.)
 Jour. Juris. Journal of Jurisprudence.
 Joyce, Ins. Joyce on Insurance.
 J. P. The Justice of the Peace, London (periodical).
 J. P. Smith. J. P. Smith's English King's Bench Reports.
 J. Scott (N. S.). English Common Bench Reports, New Series by John Scott.
 Jud. Repos. Judicial Repository (N. Y.)
 Jur. The Jurist, London.
 Jur. (N. S.). The Jurist, New Series, London.
 Just. Inst. Institutes of Justinian.

K

Kan. Kansas.
 Kan. App. Kansas Appeals.
 Kay & J. Kay and Johnson's English Vice Chancellors' Reports.
 Keb. Keble's English King's Bench Reports.
 Keen Keen's English Rolls Court Reports.
 Keene, Ch. Keen's English Rolls Court Reports.
 Keener, Quasi Cont. Keener on Quasi Contracts.
 Kel. Sir John Kelyng's English Crown Cases.
 Kelly Kelly (Ga.)
 Kent, Comm. Kent's Commentaries on American Law.
 Kern. Kernan (N. Y.)
 Kerr, Inj. Kerr on Injunctions.
 Kersey Dict. John Kersey's English Dictionary, 1708.
 Keyes Keyes (N. Y.)
 Kielway Keilwey's English King's Bench Reports.
 Kinney, Law Dict. & Glos. Kinney's Law Dictionary and Glossary.
 Kirby Kirby (Conn.)
 Knight, Mech. Dict. Knight's American Mechanical Dictionary.
 Kulp Kulp (Pa.)
 Ky. Kentucky.
 Kyd Kyd on Bills of Exchange.

Kyd, Corp. Kyd on Corporations.
 Ky. Dec. Kentucky Decisions.
 Ky. Law Rep. Kentucky Law Reporter.
 K. & R. Kent and Radcliff's Law of New York (Revision of 1801).

L

La. Louisiana.
 La. Ann. Louisiana Annual.
 Lack. Jur. Lackawanna Jurist (Pa.)
 Lack. Leg. N. Lackawanna Legal News (Pa.)
 Lalor, Supp. Lalor's Supplement to Hill & Denio's Reports (N. Y.)
 Lamb. Elr. Lambard's Eiranarcha.
 Lanc. Bar Lancaster Bar.
 Lanc. Law Rev. Lancaster Law Review.
 Lans. Lansing (N. Y.)
 Lans. Ch. Lansing's Chancery (N. Y.)
 Law J. Ch. Law Journal, New Series, Chancery.
 Law J. Q. B. Law Journal, New Series, Queen's Bench (English).
 Law of Trusts (Tiff. & Bul.) Tiffany and Bullard on Trusts and Trustees.
 Law Rep. Monthly Law Reporter, Boston, Mass.
 Law Rep. Ex. English Law Reports, Exchequer.
 Lawson, Exp. Ev. Lawson on Expert and Opinion Evidence.
 Lawson, Rights, Rem. & Pr. Lawson on Rights, Remedies and Practice.
 Law T. English Law Times Reports.
 Law T. (N. S.). English Law Times Reports, New Series.
 Ld. Raym. Lord Raymond's English King's Bench Reports.
 Lea Lea (Tenn.)
 Leach, Cr. Cas. Leach's English Crown Cases.
 Leach's C. L. Leach's Club Cases, London.
 L. Ed. Lawyers' Edition Supreme Court Reports.
 Lee Lee (Cal.)
 Leg. Acts of the Legislature.
 Leg. Chron. Legal Chronicle.
 Leg. Gaz. Legal Gazette (Pa.)
 Leg. Gaz. R. Legal Gazette Reports (Pa.)
 Leg. Int. Legal Intelligencer (Pa.)
 Leg. News. Legal News, Chicago.
 Leg. Op. Legal Opinions.
 Leg. Rec. Rep. Legal Record Reports.
 Leg. Rep. Legal Reporter (Tenn.)
 Leg. & Ins. Rep. Legal & Insurance Reporter.
 Lehigh Val. Law Rep. Lehigh Valley Law Reporter.
 Leigh Leigh (Va.)
 Leigh & O. Leigh and Cave's English Crown Cases.
 Leon. Leonard's English King's Bench Reports.
 Lev. Levinz's English King's Bench Reports.
 Lewin, Cr. Cas. Lewin's English Crown Cases Reserved.
 Lewis, Em. Dom. Lewis on Eminent Domain.
 Lex Mercatoria Americana An Enquiry into the Law Merchant of the United States by George Caines.
 Lieb. Herm. Lieber's Hermeneutics.
 Lil. Conv. Lilly's Conveyancer.
 Lill. Ab. Lilly's Abridgment, or Practical Register.
 Lindl. Partn. Lindley's Law of Partnership.

Litt. Coke on Littleton.
 Litt. Littell (Ky.)
 Litt. Comp. Laws... Littell's Statute Law (Ky.)
 Litt. Sel. Cas. Littell's Select Cases (Ky.)
 Litt. & S. St. Law... Littell and Swigart's Digest of Statute Law (Ky.)
 Liv. Law Mag. Livingston's Law Magazine (N. Y.)
 L. J. Ch. Law Journal, New Series, Chancery, English.
 L. J. M. Cas. Law Journal, New Series, Magistrates' Cases.
 Loc. Acts. Local Acts.
 Loc. Laws. Local Laws.
 Loft Loft's English King's Bench Reports.
 Lomax, Ex'rs. Lomax on Executors.
 Lom. Dig. Lomax's Digest of Real Property.
 Long, Irr. Long on Irrigation.
 Low. Lowell (U. S.)
 Lower Ct. Dec. Lower Court Decisions (Ohio)
 L. R. A. Lawyers' Reports Annotated.
 L. R. App. Cas. English Law Reports, Appeal Cases, House of Lords.
 L. R. C. P. English Law Reports, Common Pleas.
 L. R. Eq. English Law Reports, Equity.
 L. R. Ex. Cas. English Law Reports, Exchequer.
 L. R. Exch. English Law Reports, Exchequer.
 L. R. H. L. English Law Reports, English and Irish Appeal Cases.
 L. R. H. L. Sc. English Law Reports, Scotch and Divorce Appeal Cases.
 L. R. Prob. & Div. English Law Reports, Probate and Divorce.
 L. R. Prov. & Div. See L. R. Prob. & Div.
 L. R. Q. B. English Law Reports, Queen's Bench.
 Lut. Lutwyche's English Common Pleas Reports.
 Luz. Law T. Luzerne Law Times (Pa.)
 Luz. Leg. Obs. Luzerne Legal Observer (Pa.)
 Luz. Leg. Reg. Luzerne Legal Register (Pa.)

M

McAdam, Landl. & T. McAdam on Landlord and Tenant.
 McAll. McAllister (U. S.)
 MacArthur MacArthur (D. C.)
 MacArthur, Pat. Cas. MacArthur's Patent Cases (U. S.)
 MacArthur & M. MacArthur & Mackey (D. C.)
 Macaulay, Hist. Eng. Macaulay's History of England.
 McCahon McCahon (Kan.)
 McCart McCarter (N. J.)
 McCarty, Civ. Proc. McCarty's Civil Procedure Reports (N. Y.)
 McClain, Cr. Law. McClain's Criminal Law.
 McClain's Code. McClain's Annotated Code and Statutes (Iowa)
 McClell. Dig. McClellan's Digest of Laws (Fla.)
 McCord McCord's Law (S. O.)
 McCord, Eq. McCord's Equity (S. O.)
 McCrary McCrary (S. O.)
 McCul. Dict. McCulloch's Commercial Dictionary.
 McGloin McGloin (La.)
 McKelvey, Ev. McKelvey on Evidence.
 Mackey Mackey (D. C.)
 McLean McLean (U. S.)

McMul. McMullan (S. O.)
 McMul. Eq. McMullan's Equity (S. O.)
 Macn. & G. Macnaghten and Gordon's English Chancery Reports.
 Macq. Macqueen's Scotch Appeal Cases.
 Madd. Maddock's Reports, English Chancery.
 Maine, Anc. Law. Maine's Ancient Law.
 Man. Manning (Mich.)
 Man, G. & S. Manning, Granger, and Scott's English Common Pleas Reports.
 Mansf. Dig. Mansfield's Digest of Statutes (Ark.)
 Manson, Bankr. Cas. Manson's Bankruptcy and Winding-Up Cases.
 Man. Unrep. Cas. Manning's Unreported Cases (La.)
 Man. & G. Manning & Granger's English Common Pleas Reports.
 Man. & R. Manning & Ryland's English Magistrates' Cases.
 Marsh. Marshall's English Common Pleas Reports.
 Marsh., A. K. A. K. Marshall (Ky.)
 Marsh. Ins. Marshall on Marine Insurance.
 Marsh., J. J. J. J. Marshall (Ky.)
 Martin, Dict. Edward Martin's English Dictionary.
 Mart. (N. C.) Martin (N. C.)
 Mart. (N. S.) Martin's New Series (La.)
 Mart. (O. S.) Martin's Old Series (La.)
 Mart. & Y. Martin & Yerger (Tenn.)
 Marv. Marvel's Reports (Del.)
 Mason Mason (U. S.)
 Mass. Massachusetts.
 Maule & S. Maule and Selwyn's English King's Bench Reports.
 Maxw. Adv. Gram. W. H. Maxwell's Advanced Lessons in English Grammar.
 Maxw. Cr. Proc. Maxwell's Treatise on Criminal Procedure.
 May, Ins. May on Insurance.
 Md. Maryland.
 Md. Ch. Maryland Chancery.
 Me. Maine.
 Mechem, Ag. Mechem on Agency.
 Mees. & W. Meeson and Welsby's English Exchequer Reports.
 Meigs Meigs (Tenn.)
 Mer. Merivale's English Chancery Reports.
 Metc. (Ky.) Metcalfe (Ky.)
 Metc. (Mass.) Metcalf (Mass.)
 Mich. Michigan.
 Mich. N. P. Michigan Nisi Prius.
 Miles Miles (Pa.)
 Mill, Const. Mill's Constitutional Reports (S. O.)
 Miller, Const. Miller on the Constitution of the United States.
 Miller's Code. Miller's Revised and Annotated Code (Iowa)
 Mills' Ann. St. Mills' Annotated Statutes (Colo.)
 Mills, Em. Dom. Mills on Eminent Domain.
 Mill. & V. Code. Milliken & Vertrees' Code (Tenn.)
 Minn. Minnesota.
 Minor Minor (Ala.)
 Minor, Inst. Minor's Institutes of Common and Statute Law.
 Misc. Laws. Miscellaneous Laws (Or.)
 Misc. Rep. Miscellaneous Reports (N. Y.)
 Miss. Mississippi.
 Mitch. Mod. Geog. Mitchell's Modern Geography.
 Mitf. Eq. Pl. Mitford's Equity Pleading.
 Mo. Missouri.
 Moak, Eng. R. Moak's English Reports.

Mo. App.	Missouri Appeal Reports.	Newb. Adm.	Newberry's Admiralty (U. S.)
Mo. App. Rep'r ..	Missouri Appellate Reporter.	Newell, Defam.	Newell on Defamation, Slander and Libel.
Mod.	Modern Reports, English King's Bench.	Newell, Eject.	Newell's Treatise on the Action of Ejectment.
Monag.	Monaghan (Pa.)	Newell, Mal. Pros.	Newell's Treatise on Malicious Prosecution.
Mon., B.	B. Monroe (Ky.)	N. H.	New Hampshire.
Mon., T. B.	T. B. Monroe (Ky.)	Nisi Prius & Gen. T. Rep.	Nisi Prius & General Term Reports (Ohio)
Mont.	Montana.	Nix. Dig.	Nixon's Digest of Laws (N. J.)
Montg. Co. Law Rep'r	Montgomery County Law Reporter (Pa.)	N. J. Eq.	New Jersey Equity.
Month. Law Bul.	Monthly Law Bulletin (N. Y.)	N. J. Law	New Jersey Law.
Mont. & B.	Montagu & Bligh's English Bankruptcy Reports.	N. J. Law J.	New Jersey Law Journal.
Mont. & M.	Montagu and MacArthur's English Bankruptcy Reports.	N. M.	New Mexico.
Moody, Cr. Cas.	Moody's Crown Cases, English Courts.	Norris	Norris (Pa.)
Moody & M.	Moody and Malkin's English Nisi Prius Reports.	Northam. Law Rep.	Northampton County Law Reporter (Pa.)
Moody & R.	Moody and Robinson's English Nisi Prius Reports.	Northumb. Co. Leg. N.	Northumberland County Legal News (Pa.)
Moore	Moore (Ark.)	Nott & McC.	Nott & McCord (S. C.)
Moore	Sir Francis Moore's English King's Bench Reports.	N. R. L.	Revised Laws 1813 (N. Y.)
Moore, Cr. Law.	Moore's Criminal Law and Procedure.	N. S.	New Series.
Moore, P. C.	Moore's Privy Council Reports.	N. W.	Northwestern Reporter.
Moore, Presb. Dig.	Moore's Presbyterian Digest.	N. Y.	New York.
Mor. Corp.	Morawetz on Private Corporations.	N. Y. Ann. Cas.	New York Annotated Cases.
Moreau & Carleton's Partidas	Moreau and Carleton's Laws of Las Sièté Partidas in force in Louisiana.	N. Y. Cr. R.	New York Criminal Reports.
Mor. Priv. Corp.	Morawetz on Private Corporations.	N. Y. Daily Reg.	New York Daily Register.
Morrell, Bankr. Cas.	Morrell's English Bankruptcy Cases.	N. Y. Law J.	New York Law Journal.
Morris	Morris (Iowa)	N. Y. Leg. Obs.	New York Legal Observer.
Morse, Banks	Morse on the Law of Banks and Banking.	N. Y. St. Rep.	New York State Reporter.
Mos.	Mosely's English Chancery Reports.	N. Y. Super. Ct.	New York Superior Court.
Mun. Code.	Municipal Code.	N. Y. Supp.	New York Supplement.
Munf.	Munford (Va.)		
Murfree, Off. Bonds.	Murfree on Official Bonds.		
Murph.	Murphey (N. C.)		
Murray's Eng. Dict.	Murray's English Dictionary.		
Myl. & C.	Mylne & Craig's English Chancery Reports.		
Myl. & K.	Mylne and Keen's English Chancery Reports.		
Myr. Prob.	Myrick's Probate Court Reports (Cal.)		
M. & W.	Meeson and Welsby's English Exchequer Reports.		

N

Nat. Bankr. Law.	National Bankruptcy Law.
Nat. Bankr. R.	National Bankruptcy Register (U. S.)
N. B. R.	National Bankruptcy Register (U. S.)
N. C.	North Carolina.
N. C. Term R.	North Carolina Term Reports.
N. Chip.	N. Chipman (Vt.)
N. D.	North Dakota.
N. E.	Northeastern Reporter.
Neb.	Nebraska.
Nev.	Nevada.
Nev. & M.	Neville and Manning's English King's Bench Reports.

O

O. C. D.	Ohio Circuit Decisions.
Odgers, L. & Sland.	Odgers on Libel and Slander.
Ohio	Ohio.
Ohio Cir. Ct. R.	Ohio Circuit Court Reports.
Ohio Dec.	Ohio Decisions.
Ohio Law J.	Ohio Law Journal.
Ohio Leg. N.	Ohio Legal News.
Ohio N. P.	Ohio Nisi Prius.
Ohio St.	Ohio State.
Ohio S. & C. P. Dec.	Ohio Superior and Common Pleas Decisions.
Okl.	Oklahoma.
Olcott	Olcott (U. S.)
O. L. D.	Ohio Lower Court Decisions.
Ont.	Ontario Reports.
Op. Attys. Gen.	Opinions of the United States Attorneys General.
Or.	Oregon.
O. S.	Old Series.
Outerbridge	Outerbridge (Pa.)
Overt	Overton (Tenn.)
Owen	Owen's English King's Bench Reports.

P

Pa.	Pennsylvania State.
Pac.	Pacific Reporter.
Pa. Co. Ct. R.	Pennsylvania County Court Reports.
Pa. Com. Pl.	Pennsylvania Common Pleas Reporter.
Pa. Dist. R.	Pennsylvania District Reports.
Paige	Paige's Chancery (N. Y.)
Paine	Paine (U. S.)

Paine, Elect.....	Paine on Elections.	Pom. Rem. & Rem.	
Pa. Law J.....	Pennsylvania Law Journal.	Rights	Pomeroy on Civil Remedies & Remedial Rights.
Paley, Ag.....	Paley on Principal and Agent (or Agency).	Pom. Spec. Perf....	Pomeroy on Specific Performance of Contracts.
Paley, Mor. Ph....	Wm. Paley's Moral Philosophy—English.	Poph.	Popham's English King's Bench Reports.
Pamphl. Laws....	Pamphlet Laws (Acts).	Port. (Ala.)	Porter (Ala.)
Park, Ins.....	Park on Marine Insurance.	Posey, Unrep. Cas..	Posey's Unreported Cases (Tex.)
Parker, Cr. R.....	Parker's Criminal Reports (N. Y.)	Poth. Oblig.....	Pothier on Obligations.
Para. Bills & N....	Parsons on Bills and Notes.	Pow. Cont.....	Powell on Contracts.
Para. Cont.....	Parsons on Contracts.	Prac. Act.....	Practice Act.
Para. Eq. Cas.....	Parsons' Select Equity Cases (Pa.)	Pr. Ch.	Precedents in Chancery, by Finch.
Para. Mar. Law....	Parsons on Maritime Law.	Prest. Est.....	Preston on Estates.
Partidas	Moreau and Carleton's Laws of Las Sièdes Partidas in force in Louisiana.	Priv. Laws.....	Private Laws.
Paschal's Ann.		Priv. St.....	Private Statutes.
Const.	Paschal's United States Constitution, Annotated.	Prob.	English Probate and Admiralty Reports for year cited.
Pasch. Dig.....	Paschal's Texas Digest of Decisions.	Prob. Div.	Probate Division, English Law Reports.
Pa. Super. Ct.....	Pennsylvania Superior Court Reports.	Prob. R.	Probate Reports (Ohio)
Pat.	Paterson's Laws.	Prov. St.	Statutes (Laws) of the Province of Massachusetts.
Pat. & H.....	Patton & Heath (Va.)	Pub. Acts	Public Acts.
Pears.	Pearson (Pa.)	Pub. Gen. Laws....	Public General Laws.
Peck (Ill.).....	Peck (Ill.)	Pub. Laws.....	Public Laws.
Peck (Tenn.).....	Peck (Tenn.)	Pub. Loc. Laws....	Public Local Laws.
Pen. Code.....	Penal Code.	Pub. St.....	Public Statutes.
Pen. Laws.....	Penal Laws.	Pub. & Loc. Laws..	Public and Local Laws.
Pennewill	Pennewill Reports (Del.)	Puffendorf	Puffendorf's Law of Nature and Nations.
Penning.	Pennington (N. J.)	Purd. Dig. Laws...	Purdon's Digest of Laws (Pa.)
Penny.	Pennypacker (Pa.)	Purple's St.....	Purple's Statutes, Scates' Compilation.
Pen. & W.....	Penrose & Watts (Pa.)	P. Wms.....	Peere Williams' English Chancery Reports.
Pepper & L. Dig.		P. & L. Dig. Laws..	Pepper & Lewis' Digest of Laws (Pa.)
Laws	Pepper and Lewis' Digest of Laws (Pa.)		
Perry, Trusts.....	Perry on Trusts.		
Pet.	Peters (U. S.)		
Pet. Ab.....	Petersdorff's Abridgment.		
Pet. Adm.....	Peters' Admiralty (U. S.)		
Pet. C. C.....	Peters' Circuit Court (U. S.)		
Petersd. Ab.	Petersdorff's Abridgment.		
P. F. Smith	P. F. Smith (Pa.)		
Phil.	Phillips' Treatise on Insurance.		
Phila.	Philadelphia (Pa.)		
Phil.	Phillips' Law (N. C.)		
Phil. Ch.....	Phillips' English Chancery Reports.		
Phil. Eq.....	Phillips' Equity (N. C.)		
Phil. Ev.	Phillips on Evidence.		
Phil. Ins.....	Phillips' Law of Insurance.		
Phil. Mech. Liens..	Phillips on Mechanics' Liens.		
Pick.	Pickering (Mass.)		
Pickle	Pickle (Tenn.)		
Pierce & King's Re-			
visory Legislation..	Pierce, Taylor and King's Revised Statutes (La.)		
Pike	Pike (Ark.)		
Pin.	Pinney (Wls.)		
Pittsb. Leg. J.....	Pittsburgh Legal Journal (Pa.)		
Pittsb. R.	Pittsburgh Reports (Pa.)		
P. L.	Public Laws.		
Platt, Leas.....	Platt on Leases.		
Ploud.	Plowden's English King's Bench Reports.		
Plow.	Plowden's English King's Bench Reports.		
Poe, PL.....	Poe on Pleading and Practice.		
Pol. Code	Political Code.		
Pol. Cont.....	Pollock on Principles of Contract at Law and Equity.		
Pom. Eq. Jur.	Pomeroy's Equity Jurisprudence.		
Pom. Rem.	Pomeroy on Civil Remedies.		

Q

Q. B.	Queen's Bench Reports, Adolphus & Ellis, N. S. (English)
Q. B. Div.....	Queen's Bench Division (English Law Reports)
Quincy	Quincy (Mass.)

R

Rand.	Randolph (Va.)
Rand. Com. Paper..	Randolph on Commercial Paper.
Rand. Em. Dom....	Randolph on Eminent Domain.
Rap. Contempt	Rapalje on Contempt.
Rap. Wit.....	Rapalje's Treatise on Witnesses.
Rap. & L. Law Dict..	Rapalje and Lawrence Law Dictionary.
Rawle	Rawle (Pa.)
Rawle, Const. U. S..	Rawle on the Constitution of the United States.
Rawle, Cov.	Rawle on Covenants for Title.
Raym.	Lord Raymond's English King's Bench Reports.
Ray, Med. Jur....	Ray's Medical Jurisprudence of Insanity.
R. C.....	Revised Statutes 1855 (Mo.)
Redf. Carr.....	Redfield on Carriers and Bailments.
Redf. Railways....	Redfield on Railways.
Redf. Sur.....	Redfield's Surrogate (N. Y.)
Redf. Wills.....	Redfield on the Law of Wills.

Rees' Cyclopædia...	Abraham Rees' English Cyclopædia.	Sandf. Ch.	Sandford's Chancery (N. Y.)
Reeves, Dom. Rel...	Reeve on Domestic Relations.	Sand. Inst. Just. Introd.	Sandars' Edition of Justinian's Institutes.
Rep.	Coke's English King's Bench Reports.	Sand. & H. Dig....	Sandels and Hill's Digest of Statutes (Ark.)
Reports	The Reports, English.	Saund.	Saunders' English King's Bench Reports.
Rev.	Revision of the Statutes.	Saund. Pl. & Ev....	Saunders' Pleading and Evidence.
Rev. Civ. Code....	Revised Civil Code.	Sawy.	Sawyer (U. S.)
Rev. Civ. St....	Revised Civil Statutes.	Saxt. Ch.	Saxton's Chancery (N. J.)
Rev. Code....	Revised Code.	Sayles' Ann. Civ. St.	Sayles' Annotated Civil Statutes (Tex.)
Rev. Code Cr. Proc.	Revised Code of Criminal Procedure.	Sayles' Civ. St....	Sayles' Revised Civil Statutes (Tex.)
Rev. Laws....	Revised Laws.	Sayles' Rev. Civ. St..	Sayles' Revised Civil Statutes (Tex.)
Rev. Ord.	Revised Ordinances.	Sayles' St....	Sayles' Revised Civil Statutes (Tex.)
Rev. Pen. Code....	Revised Penal Code.	Sayles' Supp....	Supplement to Sayles' Annotated Civil Statutes (Tex.)
Rev. Pol. Code....	Revised Political Code.	S. C.	South Carolina.
Rev. St....	Revised Statutes.	Scam.	Scammon (Ill.)
R. I.	Rhode Island.	Scates' Comp. St....	Treat, Scates & Blackwell Compiled Statutes (Ill.)
Rice	Rice's Law (S. C.)	Schmidt, Civ. Law..	Schmidt on the Civil Law of Spain and Mexico.
Rice, Eq.	Rice's Equity (S. C.)	Schoales & L....	Schoales and Lefroy's Irish Chancery Reports.
Rich. Dict....	Richardson's New Dictionary of the English Language.	Schouler, Bailm....	Schouler on Bailments.
Rich. Eq.	Richardson's Equity (S. C.)	Schouler, Pers. Prop.	Schouler on the Law of Personal Property.
Rich. Eq. Cas....	Richardson's Equity Cases (S. C.)	S. D.	South Dakota.
Rich. Law....	Richardson's Law (S. C.)	S. E.	Southeastern Reporter.
Rich. (S. C.)....	Richardson (S. C.)	Sedg. St. & Const. Law	Sedgwick on Statutory and Constitutional Law.
Riddle's Lex....	Riddle's Lexicon.	Sedg. & W. Tr. Title Land....	Sedgwick and Wait on the Trial of Title to Land.
Riley	Riley's Law (S. C.)	Seld.	Selden (N. Y.)
Riley, Eq.	Riley's Equity (S. C.)	Seld. Notes....	Selden's Notes (N. Y.)
R. L.	Revised Laws.	Serg. & R....	Sergeant & Rawle (Pa.)
R. M. Charlt.	R. M. Charlton (Ga.)	Sess.	Session.
Rob.	Charles Robinson's English Admiralty Reports.	Sess. Acts....	Session Acts.
Rob. (N. Y.)....	Robertson (N. Y.)	Sess. Laws....	Session Laws.
Rob. (La.)	Robinson (La.)	Shan. Cas....	Shannon's Tennessee Cases.
Rob. (Va.)	Robinson (Va.)	Shankland's St....	Shankland's Public Statutes (Tenn.)
Robb, Pat. Cas....	Robb's Patent Cases (U. S.)	Shannon's Code....	Shannon's Annotated Code (Tenn.)
Rob. Pat.	Robinson on Patents.	Shars. Bl. Comm...	Sharswood's Edition of Blackstone's Commentaries.
Rolle	Rolle's English King's Bench Reports.	Shars. & B. Lead. Cas. Real Prop....	Sharswood and Budd's Leading Cases of Real Property.
Rolle, Abr.	Rolle's Abridgment of the Common Law.	Shear. & R. Neg...	Shearman and Redfield on Negligence.
Roll. Rep....	Rolle's English King's Bench Reports.	Sheld.	Sheldon (N. Y.)
Root	Root (Conn.)	Shep.	Shepley (Me.)
Roper, Leg....	Roper on Legacies.	Shep. Abr....	Sheppard's Abridgment.
Rorer, Jud. Sales...	Rorer on Void Judicial Sales.	Shep. Touch.	Sheppard's Touchstone of Common Assurances.
Rorer, R. R....	Rorer on Railways.	Show.	Shower's English King's Bench Reports.
Roscoe, Cr. Ev....	Roscoe on Criminal Evidence.	Silvernall	Silvernall (N. Y.)
R. S.	Revised Statutes.	Sim.	Simons' English Vice Chancery Reports.
R. S. Comp....	Statutes of Connecticut, Compilation of 1854.	Sim. (N. S.)....	Simon's English Vice Chancery Reports, New Series.
Russ.	Russell's English Chancery Reports.	Sim. & S....	Simons & Stuart's English Vice Chancery Reports.
Russ. Crimes....	Russell on Crimes and Misdemeanors.	Skin.	Skinner's English King's Bench Reports.
Russ. Fact....	Russell on Factors and Brokers.	Smedes & M....	Smedes & Marshall (Miss.)
Russ. & M....	Russell and Mylne's English Chancery Reports.	Smedes & M. Ch...	Smedes & Marshall's Chancery (Miss.)
Russ. & R. Cr. Cas.	Russell and Ryan's English Crown Cases Reserved.		
Ruth. Inst....	Rutherford's Institutes of Natural Law.		
Ry. & Corp. Law J..	Railway and Corporation Law Journal.		
R. & Ry. C. C....	Russell and Ryan's English Crown Cases.		

S

Salk.	Salkeld's English King's Bench Reports.
Sanb. & B. Ann. St.	Sanborn and Berryman's Annotated Statutes (Wis.)
Sanders, Pl. & Ev...	Saunders' Pleading and Evidence.
Sandf.	Sandford (N. Y.)

Smith, Com. Law.... Smith's Manual of Common Law.

Smith, Cont. Smith on Contracts.

Smith, E. D. E. D. Smith (N. Y.)

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Smith, Man. Eq. Jur. Smith's Manual of Equity Jurisprudence.

Smith, Merc. Law.. Smith on Mercantile Law.

Smith (N. H.)..... Smith (N. H.)

Smith (N. Y.)..... Smith (N. Y.)

Smith, P. F. P. F. Smith (Pa.)

Smith's Laws..... Smith's Laws (Pa.)

Smith's Lead. Cas. Smith's Leading Cases.

Sneed Sneed (Tenn.)

Sol. J. Solicitors' Journal, London.

Soule, Syn..... Soule's Dictionary of English Synonyms.

South. Southern Reporter.

Southard Southard (N. J.)

Sp. Acts..... Special Acts.

Speers Speers' Law (S. C.)

Speers, Eq. Speers' Equity (S. C.)

Spell Extr. Rel.... Spelling in Extraordinary Relief in Equity and in Law.

Spence, Eq. Jur.... Spence's Equitable Jurisdiction of the Court of Chancery.

Spencer Spencer (N. J.)

Sp. Laws..... Special Laws.

Spr. Sprague (U. S.)

Sp. Sess. Special Session.

St. Laws or Acts (in some states).

St. State, Statutes.

Stand. Dict..... Standard Dictionary.

Stanton's Rev. St.. Stanton's Revised Statutes (Ky.)

Starkie, Sland. & L. Starkie, on Slander and Libel.

Starkie Starkie's English Nisi Prius Reports.

Starkie, Ev. Starkie on Evidence.

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Stat. Statutes at Large (U. S.)

St at Large..... Statutes at Large (S. C.)

Steph. Bailm..... Story on Bailment.

Steph. Comm. Stephen's Commentaries on the Laws of England.

Steph. Cr. Law.... Stephen's General View of the Criminal Law.

Steph. Dig. Cr. Law.. Stephen's Digest of the Criminal Law.

Steph. Dig. Ev..... Stephen's Digest of the Law of Evidence.

Steph. Pl. Stephen on Pleading.

Stew. (Ala.)..... Stewart (Ala.)

Stew. Dig. Stewart's Digest of Decisions of the Courts of Law and Equity (N. J.)

Stew. (N. J.) Stewart (N. J.)

Stew. & P..... Stewart & Porter (Ala.)

Stiles Stiles (Iowa)

St. Law..... Loughborough's Digest of Statute Law (Ky.)

Stockt. Stockton's Equity (N. J.)

Sto. Const..... Story's Commentaries on the Constitution of the United States.

Story Story (U. S.)

Story, Ag..... Story on Agency.

Story, Bailm. Story on Bailment.

Story, Bills Story on Bills.

Story, Comm. Const.. Story's Commentaries on the Constitution of the United States.

Story, Confl. Laws.. Story on the Conflict of Laws.

Story, Const. Story's Commentaries on the Constitution of the United States.

Story, Cont. Story on Contracts.

Story, Eq. Jur. Story on Equity Jurisprudence.

Story, Eq. Pl..... Story on Equity Pleading.

Story, Partn..... Story on Partnership.

Story, Prom. Notes.. Story on Promissory Notes.

Story, Sales..... Story on Sales of Personal Property.

Story's Laws..... Story's United States Laws.

Strange Strange's English King's Bench Reports.

Strob. Strobhart's Law (S. C.)

Strob. Eq. Strobhart's Equity (S. C.)

Sub. Rev..... Supplement to the Revision.

Sumn. Sumner (U. S.)

Sup. Ct. Supreme Court Reporter.

Super. Ct. Rep.... Superior Court Reports (Pa.)

Supp. Code..... Supplement to Code.

Supp. Gen. St..... Supplement to the General Statutes.

Supp. Rev..... Supplement to the Revision.

Supp. Rev. Code.... Supplement to the Revised Code.

Supp. Rev. St..... Supplement to the Revised Statutes.

Supp. U. S. Comp. St. 1903 Supplement 1903 to the United States Compiled Statutes of 1901.

Sus. Leg. Chron.... Susquehanna Legal Chronicle (Pa.)

Suth. Dam..... Sutherland on Damages.

Suth. St. Const.... Sutherland on Statutes and Statutory Construction.

S. W. Southwestern Reporter.

Swab. Swabey's English Admiralty Reports.

Swab. & T..... Swabey and Tristram's English Probate and Divorce Reports.

Swan Swan (Tenn.)

Swan's St..... Swan's Statutes (Ohio)

Swanet. Swanston's English Chancery Reports.

Swan & C. Rev. St.. Swan and Critchfield's Revised Statutes (Ohio)

Swan & S. St..... Swan and Sayler's Supplement to the Revised Statutes (Ohio)

Sweeny Sweeny (N. Y.)

Swift, Dig..... Swift's Digest of Laws (Conn.)

S. & C. Rev. St.... Swan and Critchfield's Revised Statutes (Ohio)

S. & R. on Neg.... Shearman and Redfield on Negligence.

S. & S..... Swan and Sayler's Supplement to the Revised Statutes (Ohio).

T

Taney Taney (U. S.)

Tapp. Tappan (Ohio)

Tariff Ind., New... New's Tariff Index.

Taunt. Taunton's English Common Pleas Reports.

Tayl. Taylor (N. C.)

Tayl. Corp..... Taylor on Private Corporations.

Tayl. Ev. Taylor on the Law of Evidence.

Tayl. Landl. & Ten.. Taylor's Landlord and Tenant.

Tayl. Med. Jur.... Taylor's Manual of Medical Jurisprudence.

Tayl. Priv. Corp.... Taylor on Private Corporations.

Tayl. St..... Taylor's Revised Statutes (Wis.)

T. B. Mon..... T. B. Monroe (Ky.)

Tenn. Tennessee.

Tenn. Cas..... Shannon's Tennessee Cases.

T

Taney	Taney (U. S.)
Tapp.	Tappan (Ohio)
Tariff Ind., New....	New's Tariff Index.
Taunt.	Taunton's English Common Pleas Reports.
Tayl.	Taylor (N. C.)
Tayl. Corp.....	Taylor on Private Corporations.
Tayl. Ev.	Taylor on the Law of Evidence.
Tayl. Landl. & Ten..	Taylor's Landlord and Tenant.
Tayl. Med. Jur....	Taylor's Manual of Medical Jurisprudence.
Tayl. Priv. Corp....	Taylor on Private Corporations.
Tayl. St.....	Taylor's Revised Statutes (Wis.)
T. B. Mon.....	T. B. Monroe (Ky.)
Tenn.	Tennessee.
Tenn. Cas.	Shannon's Tennessee Cases.

West. Law Month.	Western Law Monthly (Ohio)	Winch	Winch's Entries.
West. L. M.	Western Law Monthly (Ohio)	Winfield, Words & Phrases	Winfield's Adjudged Words and Phrases, with Notes.
Whart.	Wharton (Pa.)	Winst.	Winston (N. C.)
Whart. Ag.	Wharton on Agency.	Winst. Eq.	Winston's Equity (N. C.)
Whart. Am. Cr. Law.	Wharton's American Criminal Law.	Wis.	Wisconsin.
Whart. Cr. Ev.	Wharton on Criminal Evidence.	Witthaus & Becker's Med. Jur.	Witthaus and Becker's Medical Jurisprudence.
Whart. Cr. Law.	Wharton's American Criminal Law.	Wkly. Dig.	Weekly Digest (N. Y.)
Whart. Cr. Pl. & Prac.	Wharton's Criminal Pleading & Practice.	Wkly. Law Bul.	Weekly Law Bulletin (Ohio)
Whart. Ev.	Wharton on Evidence in Civil Issues.	Wkly. Law Gas.	Weekly Law Gazette (Ohio)
Whart. Law Dict.	Wharton's Law Dictionary (or Law Lexicon).	Wkly. Notes Cas.	Weekly Notes Cases (Pa.)
Whart. Law Lexicon	Wharton's Law Dictionary (or Law Lexicon).	Wkly. Rep.	Weekly Reporter, London (English).
Whart. Neg.	Wharton on Negligence.	Wm.	William (as 9 Wm. III).
Whart. St. Tr.	Wharton's State Trials (U. S.)	Wm. Bl.	Sir William Blackstone's English King's Bench Reports.
Whart. & S. Med. Jur.	Wharton and Stille's Medical Jurisprudence.	Wm. Rob. Adm.	William Robinson's English Admiralty Reports.
Wheat.	Wheaton (U. S.)	Wms. Ex'rs	Williams on Executors.
Wheat. Int. Law.	Wheaton's International Law.	Wm. & Mary.	William and Mary (as 2 Wm. & Mary, c. 1).
Wheeler, Am. Cr. Law	Wheeler's Abridgment of American Common Law Cases.	Woodb. & M.	Woodbury & Minot (U. S.)
Wheeler, Cr. Cas.	Wheeler's Criminal Cases (N. Y.)	Wood, Ins.	Wood on Fire Insurance.
White's Recop.	White's Recopilacion (Laws of Spain and Mexico).	Wood, Inst.	Wood's Institutes of the (Common) Laws of England.
White & T. Lead. Cas. Eq.	White and Tudor's Leading Cases in Equity.	Wood, Landl. & Ten.	Wood on Landlord and Tenant.
White & W. Civ. Cas. Ct. App.	White & Willson's Civil Cases Court of Appeals (Tex.)	Wood, Lim.	Wood on Limitation of Actions.
Wig. Wills.	Wigram on Wills.	Wood, Nuis.	Wood on Nuisances.
Wilcox	Wilcox (Pa.)	Woods	Woods (U. S.)
Will.	William (as 1 Will. IV).	Wood's Civ. Law.	Wood's Institutes of the Civil Law of England.
Will. Eq. Jur.	Willard's Equity Jurisprudence.	Woodw. Dec.	Woodward's Decisions (Pa.)
Willes	Willes' English Common Pleas Reports.	Woolw.	Woolworth (U. S.)
Williams (Vt.)	Williams (Vt.)	Worcest. Dict.	Worcester's Dictionary.
Williams, Ex'rs	Williams on Executors.	Wor. Dict.	Worcester's Dictionary.
Wills, Cir. Ev.	Wills on Circumstantial Evidence.	Works, Courts	Works on Courts and Their Jurisdiction.
Willson, Civ. Cas. Ct. App.	Willson's Civil Cases Court of Appeals (Tex.)	Works, Pr.	Works' Practice, Pleading, and Forms.
Willson, Tex. Cr. Law	Willson's Revised Penal Code, Code of Criminal Procedure, and Penal Laws of Texas.	Wright	Wright (Ohio)
Wils.	Wilson (Ind.)	Wright (Pa.)	Wright (Pa.)
Wils.	Wilson's English Common Pleas Reports.	W. Rob.	W. Robinson's English Admiralty Reports.
Winch	Winch's English Common Pleas Reports.	W. S.	Wagner's Statutes (Mo.)
		W. Va.	West Virginia.
		Wyo.	Wyoming.
		Wythe	Wythe's Chancery (Va.)

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Yeates	Yeates (Pa.)
Yerg.	Yerger (Tenn.)
York. Leg. Rec.	York Legal Record (Pa.)
Younge & Col. Ch.	Younge & Collyer's English Chancery Reports.

Z

Zab.	Zabriskie (N. J.)
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JUDICIAL AND STATUTORY DEFINITIONS

OF

WORDS AND PHRASES.

VOLUME 5.

KEROSENE.

Naphtha, benzine, benzol, and kerosene are all refined coal or earth oils, not differing in their nature, but only in the degree of inflammability; kerosene being much less inflammable than either of the others. *Morse v. Buffalo Fire & Marine Ins. Co.*, 30 Wis. 534, 536, 11 Am. Rep. 587.

In the American Encyclopædia "kerosene" is said to be a term originally employed as a trade-mark for a mixture of certain liquid hydrocarbons used for purposes of illumination. It has been prepared from bituminous coal, bituminous shales, asphaltum, malthus, wood, resin, fish oil, and candle tar; but it is doubtless true that at the present time its practical business source is petroleum, from which it is obtained by a process of distillation and refinement. It is therefore, in a commercial sense, a refined coal or earth oil. *Bennett v. North British & Mercantile Ins. Co.*, 81 N. Y. 273, 275, 37 Am. Rep. 501.

Judicial notice cannot be taken of the fact that kerosene is explosive, as the Legislature has in fact declared that there is a degree of purity to which it may be brought and at which it may be kept on sale in cities with comparative safety, and judicial notice will only be taken of those matters which must happen according to the constant and invariable course of nature, or of such general and public notoriety that every one may fairly be presumed to be acquainted with them. *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421, 424.

KEY.

The term "key," as used in a statute prohibiting any person from having in his possession at night burglars' tools, a key, pick-

lock, etc., comprehends a skeleton key and any kind of a key employed for purposes of house-breaking. *Reg. v. Oldham*, 14 Eng. L. & Eq. 568, 570.

The words "stole a key," in a charge that a certain person broke into a room and stole a key, are actionable, as a key may be the subject of larceny. *Hoskins v. Tarrence* (Ind.) 5 Blackf. 417, 35 Am. Dec. 129.

KEYAGE.

"Keyage" is the money or toll taken for lading or unlading wares at a key, or port. *Rowan's Ex'rs v. Town of Portland*, 47 Ky. (8 B. Mon.) 232, 253.

KICK—KICKING.

The term "kick," as applied to railroad cars, describes the operation of placing a car on the siding. It may be described as follows: "The car to be kicked standing between the engine and the switch, the switch is thrown to the proper position, the car uncoupled from the engine, and the engine started, shoving the uncoupled cars as it moves. When sufficient momentum has been given the car to move it to the desired spot, the movement of the engine is stopped, and the car allowed to move on; some one riding on the car to apply the brakes at the proper place for stopping." *Erb v. Eggleston*, 60 N. W. 98, 99, 41 Neb. 860.

What is known in railroad parlance as "kicking" refers to the practice of uncoupling one car from the other cars of a train and imparting to such car sufficient momentum by the switch engine, so that the car will be carried a short distance by force of such momentum. *Chicago & A. R. Co. v. O'Neil*, 50 N. E. 216, 217, 172 Ill. 527; *Chicago, St. L. & P. R. Co. v. Champion*, 36 N. E. 221,

222, 9 Ind. App. 510, 53 Am. St. Rep. 357; *Mark v. St. Paul, M. & M. Ry. Co.*, 20 N. W. 131, 132, 32 Minn. 208; *Howard v. St. Paul, M. & M. Ry. Co.*, 20 N. W. 93, 32 Minn. 214.

To transfer a car to another track or switch by what is called in the language of railroad men a "kicking switch," the engine is moved forward at sufficient speed to give the car the momentum which will move it to a place where it is desired to have it, and while in motion the engine is uncoupled from the car, and is then stopped. *Pringle v. Chicago, R. I. & P. Ry. Co.*, 21 N. W. 108, 64 Iowa, 613.

Making a switch by "kicking," or shunting, means by pushing a car backward by the remainder of the train, uncoupling, and then stopping the train, allowing the car to run on by force of the momentum received by the train. *Pinney v. Missouri, K. & T. Ry. Co.*, 71 Mo. App. 577, 580.

Flying switch distinguished.

"Making flying switch" and "kicking cars" are terms denoting nearly the same thing. In the former, the engine may be in front, and, upon being disconnected, the rear cars may be run upon another track while still rolling. In "kicking cars" the disconnected cars are given their impetus by a backward motion of the engine, which does not follow them. *Bradley v. Ohio River & C. Ry. Co.*, 36 S. E. 181, 183, 126 N. C. 735.

KICK SIGNAL.

There is a difference between a "back-up signal" and a "kick signal." A back-up signal means that the engineer shall back up the train. A kick signal means that the speed shall be sufficiently increased to throw the cut-off car into the side track by the force of the increased momentum, without following the car into the switch with the rest of the train. *Gulf, C. & S. F. Ry. Co. v. Hill*, 70 S. W. 103, 105, 29 Tex. Civ. App. 12.

KICKER.

A "kicker" is a device for opening the door of stoves by the use of the foot. *Lowman v. Excelsior Stove Pattern Co.*, 16 South. 17, 19, 104 Ala. 367.

KIDNAPPING.

Kidnapping is an aggravated species of false imprisonment. *Costello v. State*, 14 S. W. 1011, 29 Tex. App. 127 (citing Pen. Code, art. 521; *Click v. State*, 3 Tex. 282); *Smith v. State*, 23 N. W. 879, 881, 63 Wis. 453.

Kidnapping, under the common law, is false imprisonment aggravated by carrying the imprisoned person to some other place, and is changed somewhat by Rev. St. 1881, §

1915, providing that any person who kidnaps, or forcibly carries away, or decoys, or arrests, or imprisons any person, with the intention of having him carried away from his place of residence under the laws, is guilty of kidnapping. *Eberling v. State*, 35 N. E. 1023, 1024, 136 Ind. 117.

Kidnapping is said to be the forcible abduction and carrying away of a man, woman, or child from his or her own country, and sending him or her to another. *Click v. State*, 3 Tex. 282, 285 (citing 2 Toml. Law Dict. 335; 4 Bl. Comm. 219; 1 East, P. C. 430, § 4); *Smith v. State*, 23 N. W. 879, 881, 63 Wis. 453.

A person who willfully seizes, confines, or inveigles another, with intent to cause him without authority of law to be secretly confined, or in any way held or kept or detained, against his will, is guilty of "kidnapping." *Dehn v. Mandeville*, 52 N. Y. St. Rep. 281, 282, 22 N. Y. Supp. 984.

Whoever kidnaps, or forcibly or fraudulently carries off or decoys from his place of residence, or imprisons or arrests, any person, with the intention of having such person carried away from his place of residence, etc., shall be guilty of kidnapping. Rev. St. Ind. 1881, § 1915; *Boes v. State*, 125 Ind. 205, 206, 25 N. E. 218.

"Kidnapping" is defined by the statutes to be the forcible or fraudulent carrying off from his place of residence, or arresting or imprisoning any person with intent to have such person carried away from his residence, unless in pursuance of law. *State v. Sutton*, 116 Ind. 527, 530, 19 N. E. 602.

"Kidnapping" is defined by statute as where a person willfully seizes, confines, inveigles, or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within the state, or be sent out of the state, or be sold as a slave, or in any way held or kept or detained against his will. *Dehn v. Mandeville*, 22 N. Y. Supp. 984, 985, 68 Hun. 335.

The crime of "kidnapping" may be committed in either one of two ways: (1) By forcibly or fraudulently carrying one off or decoying him from his place of residence, unless it be done in pursuance of law, state or federal; (2) by arresting or imprisoning a person, with the intention of having him carried away, unless it be done in pursuance of like authority. *State v. Kimmerling*, 124 Ind. 382, 384, 24 N. E. 722.

Actual force or fraud.

In 2 Rev. St. p. 664, § 28, providing that every person who shall without lawful authority forcibly seize, etc., any other, or shall inveigle or kidnap any other, etc., shall be punished, etc., "kidnap" includes procuring the intoxication of a sailor with the design

of getting him on shipboard without his consenting and taking him on board in that condition as much so as if the kidnapping had been done by force, overcoming his resistance while in full strength. *Hadden v. People*, 25 N. Y. 373, 378.

The word "kidnap," in a statute providing that one who without lawful authority seizes, inveigles, or kidnaps another, with intent to cause her to be securely confined or imprisoned in the state, or to be sent out of the state, etc., or detained against her will, is guilty of kidnapping, ordinarily implies actual force. *People v. De Leon*, 16 N. E. 46, 47, 109 N. Y. 226, 4 Am. St. Rep. 444.

It is not necessary, in order to constitute the crime of kidnapping, that there should be actual violence. In *Designey's Case*, T. Raym. 474, it appears that the defendant spirited away the son of another and was adjudged guilty. *State v. Rollins*, 8 N. H. 550, 567. See, also, *Cochran v. State*, 18 S. E. 16, 17, 91 Ga. 763.

Purpose of act immaterial.

Under Pen. Code, § 207, every person who forcibly steals, takes, or arrests any person in this state and carries him into another country is guilty of kidnapping. This language necessarily implies that the arrest and conveyance to another country must be without the consent of the person injured and without any lawful authority therefor. But the particular purpose intended to be accomplished by such unlawful act is immaterial. The crime consists of a false imprisonment, aggravated by a removal to another country. The allegation in an indictment as to the purpose of defendant is therefore surplusage. *People v. Fick*, 26 Pac. 759, 760, 89 Cal. 144.

Removal.

Pen. Code, § 207, declaring that every person who forcibly takes, steals, or arrests any person in this state and carries him into another country, state, or county, or who forcibly takes or arrests another person, with the design to take him out of this state, without having established a claim according to a law of the United States or of this state, or who persuades, entices, decoys, or induces, by false pleas, misrepresentations, or otherwise, any person to go out of the state, or to be taken or removed therefrom, for the purpose of intending to sell such person into slavery or involuntary servitude, or employ him for his own use or the use of another without the free will of such person, is guilty of kidnapping under such statute. Where the person is removed from one country to an island, which is also a part of the same county, though separated by the high seas, the person so acting is not guilty of kidnapping. *Ex parte Keil*, 24 Pac. 742, 85 Cal. 309.

It is not necessary, in order to complete the offense of kidnapping, that the party

should be carried out of one country and sent into another. If he is seized, and an actual transportation takes place with that view, the offense would seem to be complete. Nor is it material that the intention was to transport to some other country than the United States. For this purpose the various states are foreign, each to the others. It is questionable indeed whether it is necessary that the transportation to another state or country should be in contemplation. East says: "The most aggravated species of false imprisonment is the stealing and carrying away or secreting of any person, sometimes called 'kidnapping,' which is an offense at the common law. * * * Of this nature is the offense pointed out by St. 43 Eliz. c. 13, which, reciting that many subjects dwelling * * * within the counties of Cumberland, Northumberland," etc., "had been taken * * * and carried out of the same counties, or to some other place within the same, as prisoners, * * * enacts," etc. But he says, further: "The forcible abduction * * * of any person is greatly aggravated by sending them away from their own country into another, properly called 'kidnapping.'" *State v. Rollins*, 8 N. H. 550, 567. See, also, *People v. Fick*, 26 Pac. 759, 760, 89 Cal. 144.

Want of consent.

To constitute kidnapping the detention must be against the consent of the person detained. The fact that under Pen. Code Tex. art. 513, force is not an essential element, if the person kidnapped is a female under the age of 15 years, does not dispense with the necessity of her nonconsent. *Costello v. State*, 14 S. W. 1011, 29 Tex. App. 127.

A female 14 years of age, being by law as competent to contract marriage as one of 18 years and upward, and the validity of her marriage not depending in any degree upon the consent of her parents or guardians, it is not "kidnapping," under section 436S of the Code, providing that any person who shall forcibly, maliciously, or fraudulently lead, take, or carry away, or decoy or entice, any child under the age of 18 years from its parents or guardians, against his or their wills and without her or their consent, shall be indicted for kidnapping, for a man not himself under any disability to lead, take, or carry her away from her parents against their will and without their consent for the bona fide purpose of marrying her, which marriage is actually consummated; the girl herself freely consenting, and no force or fraud being used by the man, either against her or her parents. *Cochran v. State*, 18 S. E. 16, 17, 91 Ga. 763. See, also, *People v. Fick*, 26 Pac. 759, 760, 89 Cal. 144.

KIDNEY TROUBLE.

An answer in the proofs of death that insured had had "kidney trouble" should not

be construed as inconsistent with an answer in an application that he never had disease of the kidneys, since there might have been a kidney trouble from accident, or from some other temporary cause, such as to produce sickness when it could not properly be said that there was disease of such organs. *Hogan v. Metropolitan Life Ins. Co.*, 41 N. E. 663, 664, 164 Mass. 448.

KILL

See "Assault with Intent to Kill"; "Pre-meditated Killing."

Other kind of killing, see "Other."

Person killed or otherwise, see "Otherwise."

Within a statute punishing any person who shall kill any fur seal within the limits of Alaska territory, "kill" means actual killing of the seal. A person cannot be punished for preparing, attempting, or intending to kill seal. Until the deed is done, the locus penitentiæ is open to him, and he may abandon the illegal purpose, and avoid the punishment prescribed by the act. So with the vessel. It can only be engaged in violating this section when it is successfully used or employed to accomplish the same result. *The Ocean Spray* (U. S.) 18 Fed. Cas. 558, 559.

"Kill any dog," as used in Rev. St. c. 58, § 12, providing that any person may kill any dog, being without a collar, should not be construed to include authority to convert a dog without a collar to a person's own use. The object of the statute is not to confer a benefit on the individual, but to rid society of a nuisance by killing a dog. *Cummings v. Perham*, 42 Mass. (1 Metc.) 555, 556.

In popular language, as well as in legal phraseology, a party is said to have "killed" one on whom he has inflicted a blow of which the wounded person soon dies. The recognized doctrine is that where a mortal wound is given, and the wounded person dies within a year and a day, the intentment of the law is that the wound caused the death. *Martin v. Copiah County*, 15 South. 73, 74, 71 Miss. 407.

One person may be said to have "killed" another from the time of the infliction of the wound. *Newton County v. Doolittle*, 18 South. 451, 452, 72 Miss. 929.

"Kill," as used in a statute providing that every person who shall be convicted of an assault and battery on another by means of any deadly weapon with the intent to kill or maim, shall be indicted, etc., the words "to kill" are used in a general sense and mean any felonious homicide. *People v. Kerpains* (N. Y.) 1 Thomp. & C. 333, 339.

The words "to kill with a pistol," as used in an information charging an assault with

intent to commit murder, are of more extensive significance than either of the words, "touch," "strike," "beat" or wound, used in the statute defining the offense, and include all that is signified by either or all of them. *State v. Feamster*, 41 Pac. 52, 53, 12 Wash. 461.

As importing crime.

The word "kill," when applied to persons, implies force, violence, a destruction of the organs necessary to life, and, if unaccompanied by any explanation or qualifying words, has a felonious signification, so that words charging a physician and surgeon with having killed six children within one year, if spoken of him in his professional capacity, are actionable per se. *Carroll v. White* (N. Y.) 33 Barb. 615, 620.

A recognizance, providing that the accused would appear and answer on a charge "of killing one T.," is the same as if the recognizance contained the word "feloniously" immediately before the word "killing," as such word imports a felonious killing against the accused; for the law presumes and holds that every killing of a human being is a felonious killing until the contrary appears. *State v. Williams*, 17 Ark. 371, 377.

The word "kill," in a charge that another has killed one negro and nearly killed another, made with reference to slaves, does not necessarily impute a charge of felonious killing. The word is capable of two constructions—the one innocent and the other defamatory—and it is a question for the jury in a slander suit to determine in which sense the word was used. *Hays v. Hays*, 20 Tenn. (1 Humph.) 402.

A charge of "killing" a human being signifies a voluntary and unlawful killing, and therefore is actionable. *O'Conner v. O'Conner*, 24 Ind. 218, 220.

The words, "He killed her with his bad conduct, and I think he knows more about her being drowned than anybody else," do not, in their natural sense, import any charge of criminal homicide, and therefore the words are not actionable per se. But the words, "He killed her," when taken in connection with other words, that he is to blame for her death and that there was foul play there, may fairly be considered to impute a crime, and therefore are actionable. *Thomas v. Blasdale*, 18 N. E. 214, 215, 147 Mass. 438.

Words alleging that others "killed cattle no more theirs than mine" in themselves import only a trespass, and not a crime, and therefore are not actionable in themselves. *Porter v. Hughey*, 5 Ky. (2 Bibb) 232.

As murder.

An instruction that defendant's offense would not be reduced to an aggravated as-

sault, if he assaulted the deceased with a knife, which was a deadly weapon, with intent to kill, was erroneous in concluding with the word "kill," instead of the word "murder," as there exists an intention to kill in manslaughter. *Peterson v. State*, 12 Tex. App. 650, 656.

In an action on a recognizance, conditioned that accused should appear to answer on a charge of assault and battery with intent to kill, to which there was a demurrer on the ground that the recognizance does not describe an offense known to our laws, the court said: "The inference would be correct, were the premises true. The words 'with intent to kill' certainly do not aggravate the charge, which they were meant to qualify, into a penitentiary offense. To have done that, the intent must have been to 'murder.' But although these words do not add to, they do not destroy, the meaning of those which do actually charge a crime—an assault and battery." *Sweetser v. State (Ind.)* 4 Blackf. 528.

Where a statute provided that any slave, free negro, or mulatto, who should administer to any person medicine with intent to kill such person, should be adjudged guilty of felony, the words "with intent to kill" were construed to mean with intent to commit murder. *Sarah v. State*, 28 Miss. (6 Cushm.) 267, 278, 61 Am. Dec. 544.

The words "kill and murder," in an indictment for assault with a dangerous weapon, which charges by way of aggravation that the assault was made with the intent to kill and murder, does not invalidate the indictment, as charging two distinct offenses, as the usual form of charging murder has always been to use in conclusion the words, "kill and murder." *Commonwealth v. Clarke*, 39 N. E. 280, 162 Mass. 495.

KILL

"Kill" is a Dutch word, signifying a channel or bed of the river, and hence the river or stream itself. *French v. Carhart*, 1 N. Y. (1 Comst.) 96, 107.

KILO.

A "kilo" is equivalent to slightly more than 2.20 pounds. *Richard v. Haebler*, 86 App. Div. 94, 103, 55 N. Y. Supp. 583, 586.

KIN.

See "Next of Kin."

Primarily the words "nearest of kin" indicate the nearest degree of consanguinity, and they are perhaps more frequently used in

this sense than in any other. *Swasey v. Jaques*, 10 N. E. 758, 761, 144 Mass. 135, 59 Am. Rep. 65.

The words "nearest of kin," as used in a residuary clause of a will, mean nearest blood relation, when the context does not imply the contrary. *Keniston v. Mayhew*, 47 N. E. 612, 613, 169 Mass. 166.

The word "kin," as used in Rev. St. c. 120, § 48, providing that, when it shall appear that the justice before whom an action is brought is near of kin to either party, he shall remove the case to some other justice, etc., includes both relations by blood and marriage; and hence a justice of the peace is disqualified from trying a cause to which his son-in-law is a party. The word "kin" is not used here in its strictest sense, as including only relations by blood, but is used in its more general sense, including both relations by blood and marriage. *Hibbard v. Odell*, 16 Wis. 633, 635.

Rev. St. 1879, § 1894, providing that, when any indictment or information alleges an offense against the person or property of another, neither the injured party nor any "person of kin to him" shall be a competent juror, etc., includes a person whose father was a second cousin to defendant's mother. *State v. Walton*, 74 Mo. 270, 285.

The word "kin," when standing alone in a will, without anything else to show what kin the testator meant, has received an interpretation to the effect that the kin meant are such kin as could take under the statute of descent and distribution. *Lusby v. Cobb*, 82 South. 6, 7, 80 Miss. 715.

The words "kin" and "kindred," as applied to the descent of estates, shall be construed to signify kin or kindred by blood, and the degrees of consanguinity shall be computed by the civil-law method; but collateral kindred, claiming through a nearer common ancestor, shall be preferred to those claiming through a more remote ancestor. *Rev. Code Del. 1893*, p. 43, c. 5, § 1, subd. 6.

KIND.

"Kind of property," as used in St. 11 & 12 Vict. c. 63, called the "Public Health Act," declaring that if any kind of property, before the passing of the act, has been exempt from rating by any local act in respect of purposes for which district rates may be levied under the public health act, the same kind of property in respect of the same purposes unto the same extent shall be exempt from district rates, refers to sort of property and not to its locality. That is clearly the meaning of the words in a former part of the statute, and this exempting proviso must use

them in the same sense. *Taite v. Carlisle Local Board of Health*, 2 El. & Bl. 492, 511.

As class.

In Rev. St. § 3449, providing a penalty for any person removing any liquors under any other name than that known to the trade as designating the kind of the contents of the package, the word "kind" does not refer to the maker or quality, or the excellence, of the goods. It means a well-known classification of spirituous and fermented liquors, as whisky, gin, etc. The standard of excellence of a product of any distiller is too varying and indefinite a standard for the measurement of a forfeiture and punishment. *United States v. 132 Packages of Spirituous Liquors* (U. S.) 65 Fed. 980, 982.

As synonymous with grade.

In an action involving the question whether certain lumber, ordered and charged for as "No. 3 siding," was in fact No. 3 or No. 4 siding, where the witnesses and the court sometimes use the word "grade" to designate the difference between the different kinds of lumber, and it was objected that the word "grade" really distinguished only a quality, and not a "kind," the court said: "We can see no difference in the words themselves as expressive of the same idea. The word 'grade' is perhaps somewhat more technical, but it is perfectly manifest that the classification of the lumber into numbered grades, as Nos. 1, 2, 3, and 4, was in the trade a practical division of it into different kinds. At any rate, this was the sense in which the witnesses and the court used the word 'grade,' and the jury could not be misled by it. It is a mere play upon words to say that, because grade means also quality, therefore only quality was meant when the word 'grade' was used. It is true that No. 4 siding was in quality inferior to No. 3, and this was necessarily developed in the examination of the witnesses; but that circumstance does not alter, but rather confirms, the fact that in the trade No. 3 siding was one kind, and No. 4 another." *Whitehall Mfg. Co. v. Wise*, 13 Atl. 298, 299, 119 Pa. 484.

As kin.

In a will by which testator, who leaves as his only heirs two half-brothers and one nephew of the whole blood residing in Louisiana and certain other nephews and nieces living in Texas, gave, devised, and bequeathed all his property "to all my blood kind in Louisiana and Texas," it was held that "blood kind" should be construed to mean "kin"; and as the testator had only one relative of the whole blood located in Louisiana to which the word "all" would apply, if he had intended to exclude his two brothers of the half blood, the will must be construed to mean such brothers of the half blood. *Lusby v. Cobb*, 32 South. 6, 7, 80 Miss. 715.

As relating to quantity.

In a statute providing for the partition of land held by joint tenants, and that, if partition be not made between them, "whether they be such as might have been compelled to make partition or not, or of whatever kind the estates or things holden or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts, charges, curtesy, or dower," the word "kind" describes the quantity, not the quality, of the estate. The quality was already marked, by calling them "joint tenants." But, as there may be a joint estate in fee, for life, or years, and as it was the intention of the act to abolish the right of survivorship in all joint estates, it uses the expression "of whatever kind the estate" may be. *Thornton v. Thornton* (Va.) 3 Rand. 179, 187.

KIND AND SOUND.

A representation that a horse is "sound, kind, and true" is a false representation, within the meaning of a statute providing a punishment for obtaining goods by false pretenses, if made knowingly during negotiations for the sale of the horse, with intent to cheat and defraud the purchaser, and the latter is induced to purchase by reason thereof; the falsity not being apparent at the time. *Watson v. People*, 87 N. Y. 561, 564, 41 Am. Rep. 397.

A statement in the negotiations of a sale that a horse is sound and kind may be a mere affirmation or expression, and may thus come under what is sometimes designated as "dealer's talk" and be treated as only the mere language of commendation by which the seller seeks to enhance the price of his goods. It may be also the assertion of a fact material to the negotiations, which the seller may properly make, if justified in so doing by his knowledge of the animal, as the basis on which the sale is to be made. When so made and intended, if it be false and known to him to be such, the seller is guilty of obtaining property by false pretenses, within the prohibition of the statute, if he thereby induces the buyer to part with his property. *Commonwealth v. Jackson*, 132 Mass. 16.

The words "sound and kind in every respect," when used to characterize a team of horses, imports that the horses are not in the habit of making sudden plunges without cause, and therefore a warranty in such language is broken if the horses have such habits. *Hall v. Colyer*, 8 N. Y. Supp. 801, 55 Hun, 611.

KINDERGARTEN.

The name "kindergarten," meaning literally a "garden of children," was devised by Froebel, a German philosopher and educator,

to apply to a system which he elaborated for the instruction of children of very tender years. "Children's garden" ought to be taken in its allegorical sense. The child is a plant, the school is a garden, and Froebel calls teachers "gardeners of children." His system guides the children's inclination for activity into organized movement, and invests the games, unknown to the child, with an ethical and educational value, teaching, besides physical exercises, the habits of discipline, self-control, and harmonious action and purpose, together with some definite lesson of fact; and an act making a city a school district, to be governed by a city board of education, and giving such board control over the public schools, with the power to determine the course of study, warranted an action of the board in adopting such a system into the methods of schools under its supervision. *Sinnott v. Colombet*, 40 Pac. 329, 330, 107 Cal. 187, 28 L. R. A. 594.

KINDLE.

The words "coal for fuel, with sufficient wood to kindle or start the fire," in a policy excepting fires caused by the use of steam engines on the premises insured, other than threshing machine engines, using coal as fuel, with sufficient wood to kindle or start the fire, meant that wood was permitted to be used only with coal, and for the one purpose of igniting the coal by aid of the more combustible quality of the wood, and that when the coal was once sufficiently ignited the use of wood was no longer allowed. *Thurston v. Burnett & Beaver Dam Farmers' Mut. Fire Ins. Co.*, 74 N. W. 181, 182, 98 Wis. 476, 41 L. R. A. 816.

KINDLY TREAT.

A bond given in consideration that the parties to a bastardy suit should marry, and that the bond and mortgage should be security to the wife that the husband would "support and kindly treat" her, should be considered so that the condition is violated where the conduct of the husband is such as to drive his wife from home. *Porter v. Caylor*, 45 N. E. 648, 649, 146 Ind. 448.

KINDRED.

See "Next of Kindred."

"Kindred," as used in Rev. St. c. 89, § 1, cl. 6, providing that if any intestate leaves a widow or surviving husband, and no "kindred," his or her estate shall descend to such widow or surviving husband, means "such kindred as are capable of inheriting." *Wunderle v. Wunderle*, 33 N. E. 195, 201, 144 Ill. 40, 19 L. R. A. 84.

The word "kindred," when used in a will, without any specification of what kindred is meant, denotes only such as are within the statute of distributions. *Varrell v. Weddell*, 20 N. H. 431, 435.

The word "kindred" means a relation by birth or consanguinity. *Makea v. Naha*, 4 Hawaii, 221, 230.

Adopting parent.

"Kindred," as used in Pub. St. c. 148, § 7, relating to adopted children, and providing that the adopted child shall inherit from the adopting parent, but that such child shall not by such adoption become incompetent to inherit from his natural "kindred," cannot be construed as including the adopting parent. It is intended by this statute to save the right of inheritance from other parties than the adopting parent. Hence a grandson, who had been adopted by his grandfather, could not inherit both as an adopted son and as the representative of his deceased parent. *Delano v. Bruerton*, 20 N. E. 308, 309, 148 Mass. 619, 2 L. R. A. 698.

Collateral relations.

Kindred means relations by blood, and includes collateral as well as lineal relations. It includes children and their descendants, brothers and sisters, nieces and nephews, cousins, uncles, aunts, and other next of kin. *Butler v. Elyton Land Co.*, 4 South. 675, 676 84 Ala. 384.

"Kindred," as used in Hurd's St. 1897, p. 629, § 1, subd. 6, providing that, if any intestate leaves a widow or surviving husband and no kindred, his or her estate shall descend to such widow or surviving husband, will not be construed in a restrictive sense, so as to apply only to parents, brothers, and sisters, and their descendants, but should be construed in the larger sense, so as to include the phrase "next of kin," and hence the surviving husband of a woman dying intestate without issue, but leaving uncles and aunts, inherits a part only of her estate. *Lockwood v. Moffett*, 52 N. E. 260, 262, 177 Ill. 49.

"Kindred on the part of the mother," as used in Rev. St. Tex. art. 1657, providing that illegitimate children shall also be entitled to distributive shares of the personal estates of any of their kindred on the part of the mother, etc., embrace solely the mother's collateral relations, and import capacity in such child to take only personal estates from such collaterals. *Blair v. Adams* (U. S.) 59 Fed. 243, 246.

Illegitimates.

"Kindred," as used in Civ. Code, § 1387, one of the provisions of which, relating to the inheritable blood of an illegitimate child, is as follows: "But he does not represent

his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried"—relates to the kindred referred to in section 1386, and means lawful kindred, and is used for the purpose of qualifying the general words used in section 1387, and excluding an illegitimate from inheriting through the latter section the estate of all relatives. In re Magee's Estate, 63 Cal. 414, 416.

In Laws 1820, c. 38, § 19, providing that after the payment of debts, funeral expenses, etc., if there be no kindred of the said intestate, then the widow shall be entitled to the whole of said residue, the term "kindred" means lawful kindred; and where the husband was illegitimate and left no issue, his widow was entitled to the whole of his estate, to the exclusion of his mother and her collateral kindred. Hughes v. Decker, 38 Me. 153, 161.

The word "kindred," in Pub. Laws 1887, c. 14, authorizing a bastard child to inherit from its parents, or their lineal and collective kindred, is not confined to lawful kindred, but is to be construed, in connection with the subject of the statute, to include actual kindred. Messer v. Jones, 34 Atl. 177, 179, 88 Me. 349.

By the rules of the common law the term "all kindred" includes only those who are legitimate, unless a different intention is clearly manifested. McCool v. Smith, 66 U. S. (1 Black) 459, 470, 17 L. Ed. 218.

As kindred by blood.

Rev. St. c. 46, § 5, provides that the kindred of any pauper in the line or degree of father, grandfather, etc., by consanguinity, etc., shall be bound to support such pauper, etc. Section 6 declares that the court of common pleas in the county where any one of such kindred to be charged shall reside, on complaint made by any town or by any kindred who shall have been at any expense for the relief and support of such pauper, may, on due hearing, assess and apportion on such of the kindred a certain amount of the expense for the relief and support of such pauper, etc. Held, that the word "kindred," as used in section 6, should be construed to mean the kindred enumerated in section 5, and who are previously, in the same section 6, termed "kindred to be charged"—that is, kindred by consanguinity; and hence the kindred by affinity of any poor person cannot maintain a complaint under the statute against the father of such person for the expense of his relief and support. Farr v. Flood, 65 Mass. (11 Cush.) 24, 25.

The term "kindred," in a statute making a lunatic's kindred liable for his sup-

port, only includes blood relations, and therefore the statute does not make the husband of a lunatic liable for her support. "A husband," said Lord Loughborough, "is not of kin to a wife, nor she to him." Watt v. Watt, 3 Ves. 247. The kin obligated by law, within the meaning of the statute, are manifestly those only who, by Gen. St. c. 70, § 4, are made chargeable for the support of poor persons, namely, kindred in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, of consanguinity. Inhabitants of Brookfield v. Allen, 88 Mass. (6 Allen) 585, 586.

"A man's kindred, in the proper signification of the word, means such persons as are related to him by blood, and does not include relatives by marriage." Wetter v. Walker, 62 Ga. 142, 144.

Primarily the words "nearest kindred" indicate the nearest degree of consanguinity, and they are perhaps more frequently used in this sense than in any other. Swasey v. Jaques, 10 N. E. 753, 761, 144 Mass. 135, 59 Am. Rep. 65.

"Kindred," as used in the statute of descents, is not confined to blood relations, but may include in its meaning a relation by blood and a relation by law. Power v. Hafley, 4 S. W. 683, 685, 85 Ky. 671.

The word "kin" and "kindred," as applied to the descent of estates, shall be construed to signify kin or kindred by blood, and the degrees of consanguinity shall be computed by the civil law method; but collateral kindred, claiming through a nearer common ancestor, shall be preferred to those claiming through a more remote ancestor. Rev. Code Del. 1893, p. 43, c. 5, § 1, subd. 6.

KINDRED OF THE HALF BLOOD.

See "Half Blood."

KINETOSCOPE.

The kinetoscope, briefly described, is a mechanical contrivance involving, among other things, a transparent or translucent narrow film of very great length, on which a series of photographs, very extensive in number, are taken which photographs consecutively represent the continuous development of movement or action in the persons or things which are the subjects of such photographs. This film by a photographic device is caused to pass with great rapidity by a set of lenses, through which, by use of a powerful electric light, the scenes which are the subject of the series of photographs are much enlarged and thrown upon a white screen. As one picture of the scene photographed succeeds another upon the screen with great rapidity, the impression produced

upon the retina of the eye by the preceding picture continues longer than does the existence on the screen of the picture which produces the impression. As a result the impression produced by one picture lasts approximately until the impression produced by the next succeeding picture occurs. The result is substantially that one sees a continuous moving picture, reproducing the action and movement of the scenes photographed upon the film. *Barnes v. Miner* (U. S.) 122 Fed. 480, 487.

KING.

Before the King, see "Before."

KINGDOM.

See "Foreign Kingdom."

The term "kingdom," in its strict sense, means territories belonging to the king. *Lonsdale v. Brown* (U. S.) 15 Fed. Cas. 855, 857.

KINSMAN.

A kinsman of the whole blood is "he that is derived not only from the same ancestor, but from the same couple of ancestors." *Wood v. Mitcham*, 92 N. Y. 875, 879 (citing 2 Bl. Comm. p. 227).

KISS MY FOOT.

The words "Kiss my foot," when written by a drawee, together with his signature, on a draft presented to him for acceptance, are equivalent to and signify a refusal to accept. The words should be construed, as they are used in common parlance, to mean and express contempt for the person to whom the words were addressed, and, when used as a reply to a request, they imply, and are understood to mean, a decided, unqualified, and contemptuous refusal to comply with such request. *Norton v. Knapp*, 19 N. W. 867, 868, 64 Iowa, 112.

KITCHEN FURNITURE.

"Household and kitchen furniture," within the meaning of a statute exempting from execution to the head of a family his household and kitchen furniture, is limited to household and kitchen furniture for the use of the family, and does not include such furniture used in hotels and restaurants beyond that which is used by the family. *Heldenheimer v. Blumenkron*, 56 Tex. 308, 314.

The household and kitchen furniture of a family, which is exempt by statute from

execution, does not include household and kitchen furniture belonging to the head of a family and used in the conduct of a restaurant. *Dodge v. Knight* (Tex.) 16 S. W. 626, 628.

"Household and kitchen furniture," within the meaning of a statute exempting from execution all household and kitchen furniture of the debtor, includes all the furniture of a widow with one child, who occupies a house of seven or eight rooms, and incidentally keeps boarders for the purpose of support, although a portion of such furniture is in the rooms occupied by the boarders. *Mueller v. Richardson*, 18 S. W. 693, 694, 82 Tex. 361.

KITING.

"Kiting," in commercial parlance, means the lending of one commercial firm to another of its credit. Thus one friendly firm would borrow from another its check, draft, note, bill, or indorsement to tide over an immediate necessity for money, and when occasion arose the other firm would return the favor. *Johnson v. Marx Levy & Bro.*, 34 South. 68, 71, 109 La. 1036.

As explained by a witness, the term "kiting" means mailing checks out of town for larger amounts than the drawer had in the bank; he at the time knowing or feeling sure that he would have enough money in the bank to meet them when presented. *Wood v. American Nat. Bank*, 40 S. E. 931, 932, 100 Va. 300.

KITTY.

A "kitty" is a receptacle in a poker table into which a certain number of chips are placed or dropped when hands of a certain value are held by any of the players, and the contents belong to the proprietors of the place or table. *Cochran v. State*, 29 S. E. 438, 102 Ga. 631.

KLEPTOMANIA.

As insanity, see "Insane—Insanity."

Kleptomania is a well-defined symptom of mania, consisting of an irresistible propensity to steal. *Looney v. State*, 10 Tex. App. 520, 525.

Kleptomania is a species of insanity which renders its subject morally irresponsible for the crime of theft. *Harris v. State*, 18 Tex. App. 287, 293.

"Kleptomania" is the scientific name for the disease of stealing. Persons who are victims of it will steal in spite of all restraints. They may be sane in mind in all other respects, may know perfectly well that

stealing is wrong in every way, and may have no occasion to steal whatever, not being in want, or having prospect of it, and yet steal they will, at the risk of the terrible exposure detection produces. The disease is of that character which undermines and overthrows the will, rendering its victim powerless to control his conduct with respect to his temptation, though he possesses his will in its entire vigor in all other things. There is no lack of the reasoning power as to the rightfulness or wrongfulness of his conduct or behavior, and yet the power, the ability, to do otherwise than what they do, is wanting. No enlightened criminal system of law punishes him for acts which, if the will was in a healthy state, would never be done, any more than it does the mere idiot, or person who never had any reason at all. *State v. Reidell* (Del.) 14 Atl. 550, 551, 552. 9 Houst. 470.

The authorities define "kleptomania" as a species of mania, consisting of an irresistible impulse to steal. See 1 Clev. Insan. p. 177. Some of the books, however, regard it as a morbid propensity to steal, whether consciously or unconsciously. If kleptomania is simply an irresistible impulse to steal, regardless of the right and wrong test, then, notwithstanding it was formerly recognized in the state as a defense in theft by the courts of the state, that doctrine has more recently been repudiated. *Lowe v. State*, 70 S. W. 206, 44 Tex. Cr. R. 224 (citing *Hurst v. State*, 40 Tex. Cr. R. 378, 46 S. W. 635, 50 S. W. 719).

KNAVE.

Calling one a "knave" imports that he is dishonest, and is actionable per se. *Harding v. Brooks*, 22 Mass. (5 Pick.) 244, 247.

KNEW.

See "Know"; "Well Knew."

KNIT GOODS.

"Knit goods," as used in *Tariff Act Oct. 1, 1890*, although frequently used interchangeably with "knit fabrics," more appropriately describes manufactured articles, while knit fabrics refer more especially to manufactured material as piece goods. *Arnold v. United States*, 13 Sup. Ct. 406, 407, 147 U. S. 494, 37 L. Ed. 253.

KNITTING MACHINE

"A knitting machine has nothing in common with a loom for weaving, except that each has a roller, upon which the completed fabric is rolled, and a take-up. The office of the take-up in each machine is to regulate

the tension of the cloth. In a loom it is necessary that the warp should be kept tight between the yard beam and the cloth beam. A knitting machine produces a fabric made by a succession of loops, and, as the necessities of manufacture do not require that the yarn or threads should be kept tightly drawn, a smaller expenditure of force is necessary in the take-up than in a loom take-up." *Holmes v. Plainville Mfg. Co.* (U. S.) 9 Fed. 757, 759.

KNOCKED DOWN.

In common parlance and in the language of the auction room property is understood to be "knocked down" or "struck off" when the auctioneer, by the fall of his hammer or by any other adequate or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount of his bid according to the terms of the sale. *Sherwood v. Reade* (N. Y.) 7 Hill, 431, 439.

KNOT.

"Knot," as used when the term is applied to a measure of distance, means a marine mile. *Rockland, Mt. D. & S. S. Co. v. Fessenden*, 8 Atl. 550, 552, 79 Me. 140.

KNOW.

See "Carnally Know."

"Know," as defined by Webster, means "to have knowledge; to possess information, instruction, or wisdom." *State v. Ransberger*, 17 S. W. 290, 291, 106 Mo. 135.

Code, § 3441, providing that, where the tracks of two railroads cross each other, the engineers and conductors must stop their trains within 100 feet of the crossing, and not proceed until they "know" the way is clear, means that the officers in charge shall be informed or made aware of the situation, shall be certain or made familiar with, and not be doubtful thereof. *Southern Ry. Co. v. Bryan*, 28 South. 445, 448, 125 Ala. 297.

An allegation in a taxpayer's action to restrain the carrying out of a contract, which alleges that the municipal officer making the contract "knew it to be extravagant," is not equivalent to an allegation that it is extravagant. *Madden v. Van Wyck*, 72 N. Y. Supp. 135, 137, 35 Misc. Rep. 645.

A verdict by a jury, in answer to a question contained therein that "We do not know," is equivalent to a simple denial. *Union Pac. Ry. Co. v. Shannon*, 16 Pac. 836, 38 Kan. 476.

"Know," in reference to the liability of one who destroys personal property on which

he knows there is a mortgage, conveys the idea of actual knowledge or information, and not mere notice. *De Vaughn v. Harria*, 29 S. E. 613, 614, 103 Ga. 102.

KNOWING.

"Knowing" is equivalent to knowing and understanding. *Chicago, R. I. & P. Ry. Co. v. Kinnare*, 60 N. E. 57, 59, 190 Ill. 9.

As actual knowledge or scienter.

The word "knowing," in Gen. St. p. 1334, which enacts that any person who shall cause or procure his name or that of any other person to be registered, "knowing" that he or the person whose name he has procured to be registered is not entitled to vote, shall be punished, etc., means knowledge, mental assurance, or scienter. It is positive, not negative. Such knowledge must be clearly proved, or shown by such circumstances as leave no reasonable doubt on a fair mind. The proof of the knowledge must be clear, not a mere inference that he could have found out by further inquiry. There must have been culpable intent shown, not mere ignorance. *State v. McBarron*, 51 Atl. 146, 147, 66 N. J. Law, 680 (citing *Pier v. Hanmore*, 86 N. Y. 95; *Stebbins v. Edmands*, 78 Mass. [12 Gray] 203; *Meirrelles v. Banning*, 2 Barn. & Adol. 909).

In Act 1848, § 15, providing that, if any certificate or report made by the officers of any manufacturing corporation shall be false in any material representation, "all the officers who shall have signed the same, knowing it to be false," shall be jointly and severally liable for all the debts of the company contracted while they were stockholders thereof, the phrase "knowing it to be false" imports a willful misrepresentation with actual knowledge of its falsity, and not merely such constructive knowledge as can be imputed from the presumption that the officer signing the report knew the law and comprehended the precise import of the language used, when considered with reference to statutory provisions. *Pier v. Hanmore*, 86 N. Y. 95, 102.

In order to charge an officer of a corporation with signing a statutory report "knowing it to be false," some fact or circumstance must be shown indicating that it was made in bad faith, willfully, or for some fraudulent purpose, and not ignorantly or inadvertently; and this is a question of fact, which must be passed upon before the liability can be adjudged. *Pier v. Hanmore*, 86 N. Y. 95, 102; *Bonnell v. Griswold*, 89 N. Y. 122, 125.

As information inducing belief.

As used in reference to a conveyance by a debtor to a person knowing that the debtor

was insolvent or in contemplation of insolvency, "knowing" means knowledge of such facts as to induce a reasonable belief of his debtor's insolvency. *Morey v. Milliken*, 30 Atl. 102, 105, 86 Me. 464.

The word "knowing," as used in Code, § 3384, providing that it shall not be lawful for any person to geld any animal, knowing that such animal is kept, etc., for covering mares, does not imply exact knowledge. It is such information as would lead a prudent man to believe that the fact existed, and, if followed by inquiry, must bring knowledge of the fact home to him. *Tucker v. Constable*, 19 Pac. 13, 14, 16 Or. 407.

KNOWINGLY.

The primary definition of the word "knowingly" is "with knowledge." *West v. Wright*, 98 Ind. 335, 339.

Pub. St. c. 247, § 3, providing that every person not standing in the relation of husband or wife, parent or grandchild, child or grandchild, brother or sister, by consanguinity or affinity, to another, who shall have committed any offense, or been accessory before the fact to the commission of any offense, who shall be convicted of knowingly harboring or relieving such other person, with intent that he shall escape or avoid detection, arrest, trial, or punishment, shall be punished, etc., must be construed to mean that the person harboring an offender must have knowledge that the principal offense has been committed and that the person harbored had committed it. *State v. Davis*, 14 R. I. 281, 284.

"Knowingly," as used in Laws 1865, c. 361, authorizing the bringing of actions to recover certain penalties against whoever shall knowingly sell, supply, etc., milk in an improper condition specified, should be construed to mean actual personal knowledge. *Verona Cent. Cheese Factory v. Murtaugh* (N. Y.) 4 Lans. 17, 22.

Where the president of a corporation did not know of the obstruction of a public road, and had no part therein, he is not guilty of willfully or knowingly obstructing such road. *State v. White*, 69 S. W. 684, 685, 96 Mo. App. 34.

An indictment alleging that defendant knowingly uttered a forged note is sufficient to charge defendant with uttering a note knowing it to be forged. *State v. Williams*, 38 N. E. 339, 139 Ind. 43, 47 Am. St. Rep. 255.

An information under Rev. St. 1894, § 2164 (Rev. St. 1881, § 2070), making it a penal offense for any one to have in his possession with intent to sell the meat of any diseased animal, which alleges that defendant unlawfully and knowingly had such meat in his

possession, sufficiently charges defendant with knowledge that the meat was diseased. *Brown v. State*, 42 N. E. 244, 245, 14 Ind. App. 24.

An information which alleges that defendant did knowingly kill, for the purpose of selling for food, certain sick and diseased animals, sufficiently shows that defendant knew the animals were sick; the adverb "knowingly" qualifying not only the verb "did kill," but everything following and connected therewith. *Moeschke v. State*, 42 N. E. 1029, 1030, 14 Ind. App. 393.

In Act Cong. 1793 (1 Stat. 302), relative to fugitives from labor, which provides that any person who shall knowingly and willingly obstruct or hinder any claimant, his agent, or attorney in seizing or arresting a fugitive from labor, "knowingly" imports a knowledge of such facts as authorize an arrest. *Driskill v. Parrish* (U. S.) 7 Fed. Cas. 1100, 1101; *Giltner v. Gorham* (U. S.) 10 Fed. Cas. 424, 425.

In its ordinary acceptation the word "knowingly," when applied to an act or thing done, imports knowledge of the act or thing so done, as well as an evil intent or a bad purpose in doing such thing. So that a charge in an indictment that defendant knowingly deposited in the mails a printed book, etc., the character of which was obscene, lewd, and lascivious, sufficiently charges, after verdict, both that the book is in fact obscene and that the defendant knew it to be so. *Price v. United States*, 17 Sup. Ct. 366, 367, 165 U. S. 311, 41 L. Ed. 727; *Rosen v. United States*, 16 Sup. Ct. 434, 435, 161 U. S. 29, 40 L. Ed. 606.

In commenting on an instruction that if defendant had by his acts, declarations, or silence knowingly given reasonable cause to people to believe that the agent had such authority, then he will be bound by the act of the agent, the court said: "This did not mean, as it was taken by the counsel for the plaintiff, that the defendant must know the effect of his conduct, but that he must know what had been the conduct of his agent. The difference between the court and the plaintiff's counsel, aimed at, if not quite accurately hit, by the charge, and brought out more fully and clearly in the charge, was that the court thought and told the jury that the defendants would not be liable simply because, if they had been sharper or more careful, they would have discovered [the agent's] course of dealing, but that they must actually have known of acts of his conveying to the public the impression that his authority was greater than it was in fact, before their silence could be held to sanction his course, and to give him ostensible authority to continue it." *Mt. Morris Bank v. Gorham*, 48 N. E. 341, 342, 169 Mass. 519.

As used in Acts 1841, c. 31, providing that any person who shall knowingly vote, not being at the time a qualified elector in the county, shall be adjudged guilty of a misdemeanor, "knowingly" means the knowledge of a state of facts which would disqualify the voter, whether or not the voter knew that such facts did in law disqualify him. *McGuire v. State*, 26 Tenn. (7 Humph.) 54, 55.

The word "knowingly," when used in an indictment charging that the defendant did knowingly certain acts, supplies the place of a positive averment that the defendant knew the facts subsequently stated. *Dunbar v. United States*, 15 Sup. Ct. 325, 328, 156 U. S. 185, 39 L. Ed. 390.

A statement recklessly made without knowledge of its truth is a "false statement knowingly made." *Cooper v. Schlesinger*, 4 Sup. Ct. 360, 363, 111 U. S. 148, 28 L. Ed. 382.

Unlawfully distinguished,

Where a statute provides that, to constitute an offense, the act must be done knowingly, an indictment charging the act as done unlawfully is insufficient, inasmuch as the word "unlawfully" neither comprehends nor is equivalent in meaning to the word "knowingly." *Tynes v. State*, 17 Tex. App. 123, 126.

"Knowingly," as used in Rev. St. c. 131, § 1, providing a punishment for any one guilty of knowingly selling diseased, corrupted, or any unwholesome provisions, etc., means but what the word imports, that the offense must be committed with a guilty knowledge or evil intent, in order to make the party committing the offense liable according to the provisions of the statute. *Commonwealth v. Boynton*, 66 Mass. (12 Cush.) 499, 500.

"Knowingly and willfully," as used in a revenue law providing a penalty for so constructing cisterns in a distillery as to permit the abstraction of spirits, do not require an intent to defraud the revenue, but the penalty prescribed by the act is incurred and the offense is complete when the defendants "have left undone those things which they ought to have done and have done those things which they ought not to have done," without any fraudulent or criminal intent. *United States v. McKim* (U. S.) 26 Fed. Cas. 1122.

"Knowingly," in an indictment that a person "willfully, knowingly, maliciously, and falsely" said, deposed, and swore on oath, is equivalent to saying that he corruptly swore; for the words used necessarily involved "corruptly." It could not have been willfully, knowingly, maliciously, and falsely, without being corruptly, done. *State v. Bixler*, 62 Md. 354, 356.

Where a statute provided that inspectors of election, knowingly receiving the votes of persons not having all the qualifications of an elector, should be guilty of a crime, etc., it was held that the word "knowingly" was used in the sense of "corruptly," that is, with knowledge that the defendant's duty and the obligation of his oath commanded him to act otherwise, and that, where an inspector had exercised the best of his knowledge and discretion in good faith, he was not guilty of knowingly receiving an illegal vote. *Bryne v. State*, 12 Wis. 519, 527.

The term "knowingly" imports a knowledge that the facts exist which constitute the act or omission a crime, and does not require knowledge of the unlawfulness of the act or omission. Gen. St. Minn. 1894, § 6842, subd. 4; Pen. Code N. Y. 1903, § 718.

The word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of the Penal Code. It does not require any knowledge of the unlawfulness of such act or omission. Pen. Code Ariz. 1901, par. 7, subd. 5; Rev. St. Okl. 1903, § 2690; Pen. Code Idaho 1901, § 4544, subd. 5; Rev. Codes N. D. 1899, § 7717; Pen. Code S. D. 1903, § 812; Pen. Code Cal. 1903, § 7, subd. 5; Pen. Code Mont. 1895, § 7, subd. 5; Ann. Codes & St. Or. 1901, § 2182; Rev. St. Utah, 1898, § 4053.

As willfully.

"Knowingly" is equivalent to "willfully." *Fry v. Hubner*, 57 Pac. 420, 421, 35 Or. 184.

KNOWINGLY AND WILLFULLY.

As used in the statute providing that any person who shall "knowingly and willfully obstruct the passage of the mail," etc., the phrase is intended to signify that at the time of committing the offense defendant must have known what he was doing, and with such knowledge proceeded to commit the offense charged, and is used in the statute in contradistinction to "innocently," "ignorantly," or "unintentionally." *United States v. Claypool* (U. S.) 14 Fed. 127, 128.

As used in Rev. St. § 3995 [U. S. Comp. St. 1901, p. 2716], providing that any person who shall knowingly and willfully obstruct and retard the passage of the mail shall be fined, the words "knowingly and willfully" refer to those who know that the acts performed, however innocent they may otherwise be, will have the effect of obstructing and retarding the passage of the mail, and they perform the act with the intention that such will be their operation. *United States v. Cassidy* (U. S.) 67 Fed. 698, 704.

A statute providing that every person who knowingly and willfully obstructs, resists, or opposes any officer of the United

States in serving or attempting to serve or execute any mesne process or warrant or any rule or order of any court of the United States, or any legal or judicial writ or process, or assaults, wounds, or beats any officer or other person duly authorized in serving or executing any writ, etc., shall be punishable, etc., implies knowledge of the issuance of the writ or other process and an evil intent to resist the officer in the execution thereof. *United States v. Terry* (U. S.) 42 Fed. 317, 318.

A person knowingly and willfully claims more than is due in a claim for a mechanic's lien only when he claims something which he knows not to be due, and not when he claims what he honestly, though mistakenly, believes to be due him. *Gibbs v. Hanchette*, 51 N. W. 691, 692, 90 Mich. 657 (quoting *Phil. Mech. Liens*, § 355).

Act Cong. March 3, 1825, making it an offense for any person to "knowingly and willfully obstruct or retard the passage of the mail," means any obstruction which is unlawful, although the attainment of other ends may have been the primary object of the offender. *United States v. Kirby*, 74 U. S. (7 Wall.) 482, 486, 19 L. Ed. 278.

KNOWINGLY AND WILLINGLY.

The terms "knowingly and willingly" characterize the act of a carrier of live stock in confining animals in carriage for more than 28 consecutive hours without food or water, as prohibited by Rev. St. §§ 4386-4388 [U. S. Comp. St. 1901, pp. 2995, 2996], which makes carriers liable to a penalty for "knowingly and willingly" failing to comply with the act, even though the act of the carrier is caused by an accident to its train, if such accident is the result of its negligence. *Newport News & M. V. Co. v. United States*, 61 Fed. 488, 490, 9 C. C. A. 579.

KNOWINGLY PERMIT.

"Knowingly permitting" a house to be used for unlawful purposes, contrary to statute, is not shown by evidence that a lessor, having knowledge of the illegal use of the leased premises, failed to terminate the lease. *Crofton v. State*, 25 Ohio St. 249, 254.

Rev. St. c. 17, § 4, providing for the punishment of the owners of a building or tenement who "knowingly permits" it to be used for the keeping and sale of intoxicating liquors for tippling purposes, implies permission or consent, as well as knowledge. *State v. Stafford*, 67 Me. 125.

An owner of premises having knowledge that the lessee is using the same for gambling purposes, and who does nothing whatever to hinder and prevent the lessee from

so occupying and using the same, "knowingly permits" such use, within Rev. St. § 4275, providing that, if the owner of the building in which the money was lost knowingly permits this to be used for gambling purposes, such building and the real estate on which it stands shall be liable for the fines and costs and damages and costs recovered. *Thompson v. Ackerman*, 12 O. C. D. 456, 465.

Rev. St. § 3281 [U. S. Comp. St. 1901, p. 2127], forfeits personal property owned by a person who has "knowingly permitted" or suffered his premises to be used for purposes of ingress or egress to or from an illicit distillery. Held, that it is a prerequisite to such forfeiture that the person should have known that the ingress or egress over his premises was to or from a distillery. *Gregory v. United States* (U. S.) 10 Fed. Cas. 1195, 1198.

KNOWLEDGE.

See "Actual Knowledge"; "Best of His Knowledge and Belief"; "Carnal Knowledge"; "Constructive Knowledge"; "Full Knowledge"; "Means of Knowledge"; "No Knowledge or Information"; "Peculiar Knowledge"; "Personal Knowledge"; "To My Knowledge."

"Knowledge," as used in Const. art. 1, § 7, reciting that, religion, morality and knowledge being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction, should be construed in its generic or unlimited sense. "Knowledge" comprehends in itself all that is comprehended in the other two words, "religion" and "morality," and which can be the subject of human instruction. True religion includes true morality. All that is comprehended in the word "religion," or in the words "religion and morality," and that can be the subject of human instructions, must be included under the general term "knowledge." Nothing is enjoined, therefore, but the encouragement of means of instruction in general knowledge—the knowledge of truth. The fair interpretation seems to be that true religion and morality are aided and promoted by the increase and diffusion of knowledge, on the theory that knowledge is the handmaid of virtue, and that all three, religion, morality, and knowledge, are essential to good government. *Board of Education of City of Cincinnati v. Minor*, 23 Ohio St. 211, 241, 13 Am. Rep. 233.

The word "knowledge," as used in Rev. St. § 4283 [U. S. Comp. St. 1901, p. 2943] limiting the liability of owners of vessels for loss

occurring without their privity or knowledge, means some personal cognizance, or means of knowledge of which he is bound to avail himself, of a contemplated loss, or of a condition of things likely to produce or contribute to the loss, without appropriate means to prevent it. *Lord v. Goodall S. S. Co.* (U. S.) 15 Fed. Cas. 884, 887.

As ability.

In an instruction in a homicide case that if there have been circumstances proven tending to show that the defendant was connected with the homicide, and the knowledge to explain such circumstances is plainly shown to be in his possession, and he willfully declines or intentionally omits to explain such circumstances, such omission is a circumstance unfavorable to his innocence, the term "knowledge" is synonymous with "ability." *Adams v. State*, 10 South. 106, 114, 28 Fla. 511.

As actual knowledge.

The word "knowledge," as used in Code, § 2892, allowing supplementary pleadings alleging facts that have come to the party's knowledge since the filing, etc., means actual, and not constructive, knowledge. *Peoples v. Carrol*, 58 Tenn. (11 Heisk.) 417, 423.

The word "knowledge," as used in a contract by which a fidelity and casualty company bound itself to make good to a bank such pecuniary loss as the latter might sustain by reason of the fraud or dishonesty of a named employé in connection with his duties, providing that the contract would be void if the bank continued in its service an employé of whose untrustworthiness they had knowledge, means actual knowledge, and not constructive. *Fidelity & Casualty Co. v. Gate City Nat. Bank*, 25 S. E. 392, 394, 97 Ga. 634, 33 L. R. A. 821, 54 Am. St. Rep. 440.

"Knowledge," as used in a statement that the owner of property sought to be subjected to an easement by prescription must have knowledge of the claim and use of such easement, means not only knowledge on the part of the owner of the act of occupation and enjoyment, and of the party occupying and enjoying, but also knowledge that the party in fact claims the right of enjoyment adversely. *Woodruff v. North Bloomfield Gravel Min. Co.* (U. S.) 18 Fed. 753, 790.

Under the Constitution and statute, providing that the director or officer of a bank who shall receive any deposit when the bank is insolvent, if he shall have had knowledge of the fact that it is insolvent or in sinking circumstances when he assented to the receipt of the deposit, shall be punished, the word "knowledge," so employed, must be taken in its common acceptation; that is, in

the plain or ordinary meaning and usual sense of the word. It ought to be so construed that no man who is innocent can be punished or endangered. So treated, we may properly look to the source to which men generally apply for the meaning of the word "knowledge." Webster's Dictionary defines "knowledge" as: "(1) The certain perception of truth; belief which amounts to or results in moral certainty; indubitable apprehension; information, intelligence, as to have knowledge of a fact." The knowledge which the law requires that a director shall have had means a guilty knowledge, not an innocent, bona fide ignorance arising from negligence to keep posted or to inquire. It must be construed as to have been intended as a sword with which to punish the guilty, and a shield to protect the innocent. If this had not been the intention, the liability would have been made absolute and unqualified, instead of dependent upon knowledge. *Utey v. Hill*, 55 S. W. 1091, 1099, 1100, 155 Mo. 232, 49 L. R. A. 323, 78 Am. St. Rep. 569.

"Knowledge" and "actual knowledge" have been held to be synonymous. The better opinion is, we think, that they are not to be thus regarded. *Kirkham v. Moore*, 65 N. E. 1042, 1043, 30 Ind. App. 549 (citing 2 Pom. Eq. Jur. § 592).

As belief.

See, also, "Belief."

Sess. Acts 1845, p. 145, provides that if the prosecuting attorney has knowledge of the commission of an offense, or shall be informed thereof by complaint, etc., he shall file an information, etc. Held, that the word "knowledge" should be construed to mean "with settled belief and reasonable conviction," and that it was not in any case necessary for the prosecuting attorney to have "actual and personal knowledge" as distinguished from "knowledge gained by information." *State v. Ransberger*, 17 S. W. 290, 291, 106 Mo. 135.

"Knowledge" is nothing more than a man's firm belief, and is distinguished from "belief" in that the latter includes things which do not make a very deep impression on the memory. The difference is ordinarily merely in degree. *Hatch v. Carpenter*, 75 Mass. (9 Gray) 271, 274.

The meaning of the words "belief" and "knowledge," as defined by lexicographers, will show that there is a distinct and well-defined difference between them. "Believe" is defined by Webster to mean to exercise trust or confidence; and by the Century Dictionary, to exercise belief in; to be persuaded upon evidence, arguments, and deductions, or by other circumstances other than personal knowledge. "Knowledge," accord-

ing to Webster, is the act or state of knowing; clear perception of fact; that which is or may be known. According to the Century Dictionary it means acquaintance with things ascertained or ascertainable; specific information. The Supreme Court of the United States, in the case of *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 8 Sup. Ct. 598, 31 L. Ed. 466, said: "Between mere belief and knowledge there is a wide difference." This expression of Mr. Justice Field was used in criticising and holding erroneous an instruction of the United States Circuit Court for the District of Colorado, in which the words "belief" and "knowledge" were used interchangeably, as conveying the same meaning, and it was said: "The court could not make them synonymous by its charge." Hence an allegation in a complaint in an action for injuries to a servant caused by defective passageway leading to a building which had been repaired by the master, alleging that when such a passageway had been repaired the complainant believed that it was safe, is not equivalent to an averment of want of knowledge. *Ohio Valley Coffin Co. v. Goble*, 62 N. E. 1025, 1027, 28 Ind. App. 362.

Discovery distinguished.

See "Discovery."

Information distinguished.

The words "information" and "knowledge," as used in the statute requiring a denial on information and belief to allege that the pleader has no knowledge or information upon which to base a belief, are not synonymous, and therefore an allegation that the pleader had not sufficient information on which to base a belief was insufficient. *Downing North Denver Land Co. v. Burns*, 70 Pac. 413, 414, 30 Colo. 283.

As notice.

See, also, "Notice."

"Knowledge" is not synonymous with notice, but when a person is spoken of as having actual or constructive notice it means no more than that under the indicated circumstances the man is legally chargeable with knowledge. *Merrill v. Pacific Transfer Co.*, 63 Pac. 915, 917, 131 Cal. 582.

Knowledge is equivalent to notice in cases where it is not required to be in writing. *Jones v. Vanzandt* (U. S.) 13 Fed. Cas. 1047, 1049.

The terms "knowledge" and "notice" are not synonymous or interchangeable, and should not, therefore, be confounded the one with the other. That which clearly does not amount to positive knowledge may often, in a legal sense, constitute actual notice. Accordingly, in applying a statute which contemplates that only actual notice shall affect the rights of one acting in good faith, the

language used expressly or by necessary implication negating the idea that he is chargeable with constructive notice as well, the mere fact that he did not have precise and definite knowledge concerning the matter in question cannot be regarded as having any real importance whatever. On the contrary, the distinction to be drawn in a case calling for the application of such a statute is that "between actual and constructive notice, and not between actual knowledge and constructive notice. The difference in meaning between knowledge and notice must not be overlooked, for it is equally important with the distinction between the different kinds of notice. The fact to be established, when the case requires proof of actual notice, is that the party acquired his pretended rights with notice; and this may be true, although the purchase may have been made in actual ignorance of the facts of which knowledge is imputed to the purchaser." Wade, Notice (2d Ed.) § 36a. "Notice is actual when one either has knowledge of a fact, or is conscious of having the means of knowledge, although he may not use them. Actual notice may be divided into express and implied. Express notice embraces, not only what may fairly be called knowledge, from the fact that it is derived from the highest evidence to be communicated by the human senses, but also that which is communicated by direct and positive information, either written or oral, from persons who are personally cognizant of the fact communicated. The implication of notice arises when the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him by the exercise of due diligence to a knowledge of the principal fact." Clarke v. Ingram, 33 S. E. 802, 804, 107 Ga. 565.

"Knowledge" and "notice" are not synonymous, although the effects produced by notice are the same, in many cases, as result from actual knowledge. Levins v. W. O. Peoples Grocery Co. (Tenn.) 38 S. W. 733, 740.

"Knowledge" may be classified in a legal sense as positive and imputed; imputed when the means of knowledge exists, known and accessible to the party, and capable of communicating positive information. When there is knowledge, notice, as legally and technically understood, becomes immaterial. It is only material when, in the absence of knowledge, it produces the same results. However closely actual notice in many instances approximates knowledge, and constructive notice may be its equivalent in effect, there may be actual notice without knowledge; and when constructive notice is made the test to determine priorities of right, it may fall far short of knowledge and be sufficient. When the purpose is to subordinate to a prior existing equity or right in

another the subsequently acquired right of a party who has information of collateral facts sufficient to put him on inquiry, which, if pursued, would lead to the truth, such information is regarded as sufficient to charge him with notice of the ultimate fact, but is not tantamount to either knowledge or express notice, nor is either a necessary inference. Knowledge is not equivalent to and synonymous with notice. In reference to the rights of a purchaser from a fraudulent vendee for value and without notice of the fraud, there is a difference between the want of knowledge and the want of notice. Cleveland Woolen Mills v. Seibert, 1 South. 773, 776, 81 Ala. 140.

As property.

See "Property."

Science distinguished.

See "Science."

As suspicion.

"Knowledge" and "suspicion" are not synonymous terms. American Surety Co. v. Pauly (U. S.) 72 Fed. 470, 477, 18 C. C. A. 644.

KNOWLEDGE, INFORMATION, AND BELIEF.

The verification of a bill in chancery praying a discovery and the appointment of a receiver by the complainant as being true to the best of his knowledge, information, and belief, is insufficient, as the words "knowledge, information, and belief," upon the construction most favorable to the complainant, mean that the affiant has knowledge that some of the averments of the bill are true; that, while he does not know, he has been informed and believes that others of the averments are true; and that as to yet other averments he has neither knowledge or information, but, without knowing the facts or ever having been informed of their truth, he believes them to be true. Burgess v. Martin, 20 South. 506, 507, 111 Ala. 656.

The words "to the best of his knowledge, information, and belief," at the end of an affidavit of service, qualified and restricted the prior declarations contained therein; and therefore the affidavit was defective and insufficient. Harrison v. Beard, 30 Kan. 532, 2 Pac. 632.

KNOWLEDGE OF DANGER.

The "knowledge of danger" arising from walking upon a railroad track necessarily involves an appreciation of it. To say that one knows the danger of being run over by a railroad train, if upon the track, and yet does not appreciate the danger of being and

remaining upon the track, is contradictory, not only in its terms, but in the very substance of the proposition. That a person must have known the danger of being upon a railroad track is evident from the plain fact that standing upon a railroad track where trains pass necessarily involves danger. *St. Louis S. W. Ry. Co. v. Shiflet*, 58 S. W. 945, 947, 94 Tex. 131.

"Knowledge of danger" does not necessarily constitute contributory negligence. It is plain that one may exercise due care with full knowledge of the danger to which he is exposed, or to which he lawfully exposes himself. This certainly is not contributory negligence. When knowledge is fastened upon the plaintiff, it is presumptive evidence of contributory negligence, and may be rebutted by proper evidence of the exercise of ordinary care under the circumstances. *Holwerston v. St. Louis & S. Ry. Co.*, 57 S. W. 770, 777, 157 Mo. 216 (quoting *Beach*, *Contrib. Neg.* § 37).

KNOWLEDGE OF THE LAW.

"The knowledge of the law with which every man is charged includes a knowledge of the constituent facts which make the law. That the Legislature enacted a certain law is a fact, but a knowledge of the law imputed to every man comprises a knowledge of that fact. That a certain law is valid or void is another fact, but every man is presumed to know whether it is valid or void, else he could not know the law." *Evans v. Hughes County*, 52 N. W. 1062, 1065, 3 S. D. 244.

KNOWN.

See "Generally Known"; "Personally Known"; "Well Known Member."

In *St. 1825*, requiring the certificate of acknowledgment to a deed by a married woman to set forth that the "contents were made known and explained" to her, "made known" is equivalent to "made acquainted with" the contents, as used in the certificate stating that she was made acquainted with the contents of the deed. *Bohan v. Casey*, 5 Mo. App. 101, 106.

As used in *Gen. St. c. 151, § 13*, declaring that, in order for a materialman to save his lien on a vessel, he shall file a sworn statement giving a just and true account of the demands due him and the name of the owner of the vessel, "if known," includes a party who has been informed and believes that the vessel was owned by the person who in fact owned it. *Story v. Buffum*, 90 Mass. (8 Allen) 35, 38.

The owner of land is not "known," within the meaning of *Comp. St. art. 5, c. 77, § 4*, relating to foreclosure of tax certificates, when the holder of a tax certificate

is unable by reasonable diligence and inquiry in the neighborhood of the land in question to learn the whereabouts of the person or persons appearing to have estates therein, or when he is unable to ascertain who has such estates. *Leigh v. Green*, 90 N. W. 255, 258, 64 Neb. 533.

KNOWN APPLIANCES.

See "Best Known Appliances."

KNOWN AS.

These words, explained by the context in a deed, are a mere formula, to which no restricted effect can be given, so that a deed of a lot in a given plat, "known as lot 1," without further description, would convey the whole of the lot, though the same included a larger area than it was generally supposed to include. *Kneeland v. Van Valkenburgh*, 46 Wis. 434, 438, 1 N. W. 63, 32 Am. Rep. 719.

"Known as the government reservation," as used in *Act 1851*, commonly known as the "Water Lot Act," and providing for the disposition of state property, and exempting from its provisions that portion of the property "known as the government reservation," would include all property known by that name, except that part of such reservation the lease of which was confirmed by the act. It is immaterial to the validity of the exception whether the reservation had any legal existence or not. *People v. Dana*, 22 Cal. 11, 21.

KNOWN CHANNEL.

The word "known," as used in the legal proposition that subterranean waters can only be the subject of riparian rights when flowing in defined or known channels, means the knowledge by reasonable inference from existing and observed facts in the natural or pre-existing condition of the surface of the ground. "Known," in this rule of law, is not synonymous with "visible," nor is it restricted to knowledge derived from exposure of the channel by excavation. *Miller v. Black Rock Springs Imp. Co.*, 40 S. E. 27, 30, 99 Va. 747, 86 Am. St. Rep. 924; *City of Los Angeles v. Pomeroy*, 57 Pac. 585, 598, 124 Cal. 597.

Underground currents of water which flow in channels, the course of which can be distinctly traced, are known and defined, within the meaning of the law, and are governed by the same rules of law as streams flowing beneath the surface. *Medano Ditch Co. v. Adams*, 68 Pac. 431, 434, 29 Colo. 317.

The word "known," in an instruction as to the burden of showing that the course of a subterranean stream is known or no-

corious, is not synonymous with "visible," but refers to knowledge by reasonable inference. *Wyandot Club v. Sells*, 9 Ohio Dec. 106-111.

KNOWN CREDITORS.

Acts 1867, p. 19, providing that commissioners appointed to receive and act upon claims presented against the insolvent estates of deceased persons shall give notice of their meetings to all known creditors residing within the probate district, means the creditors known to the executor or the administrator, and not merely the creditors which are known by the commissioners. *Appeal of Davis*, 39 Conn. 395, 399.

KNOWN DEFECTS.

When it is said that a servant assumes the risk of danger from known defects in implements used in his employment, the obvious meaning is that he assumes the risk of such danger as is apparent to his observation, not such as, on account of his want of experience, he could not reasonably be expected to apprehend. *Demars v. Glen Mfg. Co.*, 40 Atl. 902, 904, 67 N. H. 404.

KNOWN EQUIVALENT.

"Known equivalent," in the patent law in reference to a pioneer machine, means devices which, in mechanics, were recognized as proper substitutes for the devices used by a certain patentee to effect the same results, even though the peculiar form of the work done by the device was unknown before. Otherwise a difference in the particular devices used to accomplish a particular result in a machine would always enable a person to escape the charge of infringement, provided such devices were new with such person in such a machine. *Morley Sewing Machine Co. v. Lancaster*, 9 Sup. Ct. 299, 309, 129 U. S. 263, 32 L. Ed. 715.

KNOWN INTEMPERATE HABITS.

"A man of known intemperate habits is one whose habit for intemperance is known in the community, just as a man is known in the community either as a good or bad citizen. *Zeigler v. Commonwealth* (Pa.) 14 Atl. 237, 238.

Act May 13, 1887, § 17, providing a punishment for the offense of selling intoxicating liquors to a "person of known intemperate habits," does not include a person of intemperate habits who conceals such habits. "It is only when his intemperance has become so conspicuous as to form a habit, and that habit is known, not merely to his family or to a night watchman, but to his friends and neighbors, and the com-

munity in which he lives, that the law forbids and punishes the sale of liquor to him. Every man has a reputation of sobriety or for intemperance in the community in which he resides, just as every man has a reputation for integrity and for truth, and such reputation is generally known." *Commonwealth v. Zelt*, 21 Atl. 7, 8, 138 Pa. 615, 11 L. R. A. 602.

"Known intemperate habits," within the meaning of a statute prohibiting the sale of intoxicating liquors to persons of known intemperate habits, does not import that it is necessary that the person selling liquor has seen the purchaser intoxicated. "To know of a man's intemperate habits, it is not necessary to see him drunk, and know to an absolute certainty, by personal knowledge, that such are his habits. Nor is it necessary that defendant should have had written notice, or even verbal notice, served upon him, telling him that this man was of intemperate habits. If that was his reputation in the neighborhood where he lived, and if defendant knew that such was his reputation, that would be sufficient." *Elkin v. Buschner* (Pa.) 16 Atl. 102, 104.

KNOWN LODE OR VEIN.

A vein or lode may be known to exist, within Rev. St. § 2333 [U. S. Comp. St. 1901, p. 1433], providing that a patent for a placer claim shall not include any vein or lode known to exist, so as to except it from the grant, though it has not been located according to law. *Sullivan v. Iron Silver Min. Co.*, 12 Sup. Ct. 555, 556, 143 U. S. 431, 36 L. Ed. 214 (reversing *Iron Silver Min. Co. v. Sullivan* [U. S.] 16 Fed. 829, 831).

Rev. St. § 2333 [U. S. Comp. St. 1901, p. 1433], provides that a patent for a placer claim shall not include any vein or lode known to exist within the boundaries of the grant, unless application is also made for such vein or lode, but, if its existence is not known, the title shall pass. Held, that a vein or lode may be known to exist, within the meaning of the statute, though it has not been located according to law. Our conclusions are, first, in respect to the matter of the known vein, that the reasons so clearly stated by Mr. Justice Field, speaking for the court, in the case of *Noyes v. Mantle*, 127 U. S. 348, 353, 8 Sup. Ct. 1132, 32 L. Ed. 168, are unanswerable, and forbid an adjudication that the term "known vein" is to be taken as synonymous with "located vein," and compel a reiteration of the declaration heretofore made that the term refers to a vein or lode whose existence is known, as contradistinguished from one which has been appropriated by location, and, as to the other matter, that the title to portions of this horizontal vein or deposit—"blanket vein," as it is generally called—may be ac-

quired under the sections concerning veins, lodes, etc. The fact that so many patents have been obtained under these sections, and that so many applications for patents are still pending, is a strong reason against a new and contrary ruling. *Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 12 Sup. Ct. 543, 549, 143 U. S. 394, 430, 36 L. Ed. 201.

"Known veins," mentioned in Rev. St. § 2333 [U. S. Comp. St. 1901, p. 1433], excepting from the operation of a placer patent veins known to exist at the time of the application, mean veins which have been clearly ascertained at the date of the patent, and are of such extent and value as to justify their exploitation. *Casey v. Thieviege*, 19 Mont. 341, 347, 48 Pac. 394, 398; *Brownfield v. Bier*, 89 Pac. 461, 463, 15 Mont. 403; *Davis v. Wiebbold*, 11 Sup. Ct. 628, 635, 139 U. S. 507, 35 L. Ed. 238.

The subsequent discovery of lodes upon the ground, and their successful working, do not affect the good faith of the application. That must be determined by what was known to exist at the time, and on a showing that no work was done on a claim because it was considered valueless and the location was abandoned, and that the only indication of the vein was that exposed by a ditch dug, and that it was not worth developing, it was insufficient to establish a claim for the lode or vein, within Rev. St. § 2333 [U. S. Comp. St. 1901, p. 1433], exempting such a vein from the grant of a placer patent. *Brownfield v. Bier*, 89 Pac. 461, 463, 15 Mont. 403.

To meet the designation of veins known to exist, it is not enough that there may have been some indications, by outcroppings on the surface, of the existence of lodes or veins of rock in place, bearing gold or silver, or other metals. The lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. *Butte & B. Min. Co. v. Sloan*, 16 Mont. 97, 40 Pac. 217; *Davis v. Wiebbold*, 11 Sup. Ct. 628, 635, 139 U. S. 507, 35 L. Ed. 238; *Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 12 Sup. Ct. 543, 549, 143 U. S. 394, 36 L. Ed. 201; *United States v. Iron Silver Mining Co.*, 128 U. S. 673, 683, 9 Sup. Ct. 195, 32 L. Ed. 571.

Rev. St. § 2333 [U. S. Comp. St. 1901, p. 1433], provides that a patent for a placer claim shall not include any vein or lode known to exist within the boundaries of the grant, unless application is also made for such vein or lode, but, if its existence is not known, the title shall pass. It is undoubtedly true that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may on subsequent exploration be found to

develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute. In the case of *Iron Silver Min. Co. v. Cheeseman*, 116 U. S. 529, 536, 6 Sup. Ct. 481, 29 L. Ed. 712, this court sustained an instruction as to what constitutes a lode or vein, given in these words: "To determine whether a lode or vein exists, it is necessary to define those terms; and, as in that, it is enough to say that a lode or vein is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountains. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and, if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a 'lode' or 'vein.'" *Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 12 Sup. Ct. 543, 549, 143 U. S. 394, 36 L. Ed. 201.

Within Rev. St. § 2333 [U. S. Comp. St. 1901, p. 1433], providing that, where a vein or lode is known to exist within the boundaries of a placer claim, the filing of an application for such placer claim which does not include an application for the vein or lode claim shall be construed as a declaration that the claimant of the placer claim has no right of possession to the vein or lode claim, means a vein of such extent as to render the land more valuable on that account, which is clearly ascertained and known. *United States v. Iron Silver Min. Co.*, 9 Sup. Ct. 195, 198, 128 U. S. 673, 32 L. Ed. 571.

The requisites of a known vein under Rev. St. § 2333 [U. S. Comp. St. 1901, p. 1433], excluding them from the operation of a patent, are different from those of a vein or lode which will justify a location under section 2320 [U. S. Comp. St. 1901, p. 1424]. Under the former, the ledge must be known to be so valuable for its mineral as to justify expenditures for their extraction, while under the latter comparatively slight indications of a defined and mineral-bearing ledge are sufficient. To meet the designation of a known ledge, the lodes or veins must be clearly ascertained, and the mineral that they contain must be in sufficient quantity to make them valuable as mineral lands. *Montana Cent. R. Co. v. Migeon* (U. S.) 68 Fed. 811, 813.

KNOWN PROPERTY.

The term "known property," as used in a statute providing that the statute of limitations shall not run against one who is absent from the state, excepting where he leaves within the state known property, means that the person's ownership of the property must be so notorious that a creditor would have found it by a reasonable search and inquiry. *Farnham v. Thomas*, 56 Vt. 33, 34.

The phrase "known property," in the statute relating to limitations, means property which by use of ordinary diligence might have been known. *Tucker v. Wells*, 12 Vt. 240, 243.

Actual knowledge by the plaintiff alone would be sufficient to make it known property, or it might be known property, in the sense of the statute, without knowledge by him, provided it was known by others, and the knowledge of it was so common that plaintiff, by the exercise of reasonable diligence, would have found it. *Moore v. Quint*, 44 Vt. 97, 104.

Personal property left in a state by a debtor, which fact was known to several persons, but was not generally known, and the creditor resided in another town, 20 miles distant, is not known property, within the statute. *Wheeler v. Brewer*, 20 Vt. 113, 117.

KNOWN VIOLATION OF LAW.

See "Die in Known Violation of Law."

KNUCKS—KNUCKLES.

The words "knucks" and "knuckles" mean the same thing, so that a bail bond is not insufficient because it recites that defendant is charged with the offense of having and carrying on and about his person "brass knucks," instead of "brass knuckles," on the ground that it sets out no offense against the Penal Code. *Mills v. State*, 35 S. W. 370, 371, 36 Tex. Cr. R. 71.

KUMSHAW.

The "kumshaw," in the general Canton trade, is a present made by the Hong merchant or broker to the captain or supercargo of a vessel on the completing of a sale. It is voluntary on the part of the Hong. It consists, not of money, but of shawls, fine teas, etc., and is always regarded as the perquisite and private profit of the person to whom it is made. But the kumshaw in the opium trade differs in some respects from that in the ordinary Chinese trade. It is a money fee fixed in amount, and obligatory on the purchaser. The kumshaw is paid only when the opium is delivered to a purchaser or smuggler, and not when it is transshipped. In the different opium ships at Canton, as between the owner and captain, the right to the kumshaw was usually, though not always, a matter of special agreement. In the British ships it was generally divided, while in the only American ship engaged in the opium store trade the captain received the whole kumshaw. *Wilcocks v. Phillips* (U. S.) 29 Fed. Cas. 1198, 1201.

L

L

An assessor, in making an assessment, used the abbreviations "h., l., and stable," and it was held that such assessment was intelligible, the phrase being properly used to mean "house, lot, and stable." *Alden v. City of Newark*, 86 N. J. Law (7 Vroom) 288.

L S.

In copying a writ or summons, the facsimile of a seal cannot well be made, and to do it would require more skill than pertains to the profession generally. By long usage and the general understanding of legal writers, "L. S." is regarded as the true representation of a seal in a copy of all legal precepts. If the word "Seal" were written in the place of the seal on the writ or summons, it would not be a true copy, for no such writing is upon the writ or summons. Whether we might receive that as a sufficient representation, it is not necessary to say, but we have no hesitancy in deciding that the letters "L. S." are the proper designation and copy of the seal. *Smith v. Butler*, 25 N. H. (5 Fost.) 521, 524.

The letters "L. S.," printed between brackets, and following the signatures of the makers of a promissory note, which also contained the words, "given under the hand and seal of each party," were sufficient to make it a sealed instrument. *Barnes v. Walker*, 41 S. E. 243, 115 Ga. 108.

In *O'Cain v. O'Cain* (S. C.) 1 Stro. 405, Wardlaw, J., said: "For a seal, the letters 'L. S.' with a circumflex, are usually adopted; and where a party who signs does himself make these marks plainly after his name, or with his name before them, plainly made on the paper, they furnish of themselves evidence of his intention to do what they usually denote—to seal." *McLaughlin v. Braddy*, 41 S. E. 523, 524, 63 S. C. 433, 90 Am. St. Rep. 681.

LA.

The letters "La." will not be judicially recognized as an abbreviation for the state of Louisiana. *Russell v. Martin*, 15 Tex. 238.

LA FAVORITA.

The words "La Favorita," used to designate flour sold by a certain firm, did not indicate by whom the flour was manufactured, but indicated the origin of its selection and

classification, and were equivalent to the signature of the firm to a certificate that the flour was the genuine article, which had been determined by them to possess a certain degree of excellence. They did not, of course, in themselves, indicate quality, for it was merely a fancy name in a foreign language; but they evidenced that the skill, knowledge, and judgment of the firm had been exercised in ascertaining that the particular flour so marked was possessed of a merit rendered definite by their examination, and of a uniformity rendered certain by their selecting, and is entitled to be protected as a trademark. *Menendez v. Holt*, 9 Sup. Ct. 143, 144, 128 U. S. 514, 32 L. Ed. 526.

LABEL

A notice posted in a hotel room that packages of value should be properly labeled and deposited in an iron safe kept at the office for that purpose is satisfied by the written name of the owner upon a package deposited with the clerk. The most general idea of a label is not of a separate strip of paper or parchment, but a written description of the article upon which it is placed or made, as to its ownership, or character, or quality, or extent. The name of the owner was a label. It indicated the ownership. A similar indorsement of the word "money" or "valuables" would have been a label. *Wilkins v. Earle*, 44 N. Y. 172, 185, 4 Am. Rep. 655.

As a trade-mark.

A label is a slip of paper or any other material bearing a name, title, address, or the like, affixed to something to indicate its nature, contents, ownership, destination, or other particulars. That which constitutes the real and whole value of the label is, in connection with its general form and appearance, its statements concerning the origin of the goods to which it is to be attached, and the evidence it furnishes of the genuineness of the goods, as the product of the particular manufacturer whose work is certified to by the stamp of authenticity given by the label, and the change of an immaterial statement on a label will not make it a new label. *Perkins v. Heert*, 39 N. Y. Supp. 223, 226, 5 App. Div. 335.

"A label is not a trade-mark, as recognized at common law, though it may in fact contain no words, figures, etc., except those which constitute the trade-mark. A person may adopt a label of given material, size, color, etc., and may attach the same to his goods, or the wrappers, cases, etc., in which they are packed, although another person has

previously adopted labels of the same materials, dimensions, and color, and used them in the same manner; but labels, like trademarks, may be adopted and used by a manufacturer or seller of goods, to distinguish his goods from those of others; and, when another person uses the same label, or a colorable imitation thereof, it produces the same result as would a copy or colorable imitation of a trade-mark—that is to say, it is a false representation that the goods to which it is attached were manufactured or sold by the person whose label was copied or imitated, and purchasers are deceived and are liable to be defrauded." *Burke v. Cassin*, 45 Cal. 467, 481, 13 Am. Rep. 204.

A label is only intended to indicate the article contained in the bottle, package, or box to which it is affixed, and not to distinguish it from articles of the same general nature manufactured or sold by others, thus securing to the producer the benefits of any increased sale by reason of any peculiar excellence he may have given to it, as a trademark does. *Higgins v. Keuffel*, 11 Sup. Ct. 731, 732, 140 U. S. 428, 35 L. Ed. 470.

Neither a letter nor a horseshoe, nor any such simple device, can be claimed as a label. *Lorillard v. Drummond Tobacco Co.* (U. S.) 14 Fed. 111.

That a painting only 7 by 4½ inches in size, painted by an artist employed by a corporation from a design made by its president, may be used as an advertising label, does not affect the right of copyright. The subject is not to be considered a label simply because copies may be so used. *Schumacher v. Schwencke* (U. S.) 25 Fed. 466, 467.

The manufacturer of goods has no such property interest in the words of a label adopted by him, which merely indicate the quality of the goods, but do not indicate in any manner the manufacturer or place of manufacture, or the kind of goods, as will entitle him to an injunction to restrain another manufacturer from using the same or similar words. *Stokes v. Landgraff* (N. Y.) 17 Barb. 608, 611.

LABOR.

See "Common Labor"; "Incidental Labor"; "Manual Labor"; "Mechanical Labor"; "Personal Labor"; "Servile Labor"; "Wordly Labor."

See, also, "Sue, Labor, and Travel."

All labor, see "All."

As a commodity, see "Commodity."

As property, see "Property."

Engaged in labor, see "Engaged."

For instances of men whose services are held to be labor, see subtitle "Laborer."

"The word labor comes from the Latin verb, *labo*, which is thus rendered in one of the most approved lexicons; to totter, to be ready to fall, to be on the point of falling, to waiver, to be at a loss, to hesitate. *Riddle's Lex.* By the same authority the Latin noun labor is thus translated: labor, pains combined with physical efforts, or metonymically, activity, industry, hardship, misfortune, trouble, distress. The English word labor is thus defined by Walker: the act of doing what requires a painful exertion or strength, pains, toil, work to be done, work done, performance, exercise, motion with some degree of violence, child-birth, trouble. Webster's definitions are 1, exertion of muscular strength or bodily exertion which occasions weariness, particularly the exertion of the limbs; any occupation by which subsistence is obtained as in agriculture and manufactures in distinction of exertion of strength in play or amusements which are denominated exercise rather than labor. Tollsome work, pains, trouble, any bodily exercise which is attended with fatigue. After the labors of the day the farmer retires and rest is sweet. Moderate labor contributes to the health. What is obtained by labor will of right be the property of him by whose labor it is gained. *Rambler*. 2, Intellectual exertion, application of the mind which causes weariness, as the labor of compiling and writing a history. 3, exertion of mental powers united with bodily employment, as the labors of the apostles in propagating Christianity. 4, work done or to be done; that which requires wearisome exertion being a labor of so great difficulty the exact performance thereof we may rather wish than look for. *Hooker*. 5, heroic achievement, as the labor of Hercules, trouble, the pangs and efforts of child-birth, the evils of life, trial, prosecution, etc. They rest from their labors; *Rev. 14.*" *Bloom v. Richards*, 2 Ohio St. 387, 400.

"Labor" is defined to be physical toil or bodily exertion; also to be hard muscular effort directed to some useful end, as agriculture, manufactures, and the like; also to be intellectual exertion and mental effort. *Dixon v. People*, 48 N. E. 108, 110, 168 Ill. 179, 39 L. R. A. 116.

"Labor," either as a noun or a verb, is a comprehensive word, and does not seem to carry to its derivative, "laborer," as ordinarily used, its full original meaning. The traveling salesman undoubtedly labors, but he is not a laboring man. But an allegation that a judgment is for labor is not equivalent to an allegation that it is for a laborer's wages." *Paddock v. Balgord*, 48 N. W. 840, 841, 2 S. D. 100.

Labor or service, within the meaning of Act Cong. Feb. 26, 1885, c. 164, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290], prohibiting

the importation of aliens for labor or service, is limited to cheap and unskilled labor and service, and does not include professional labor or service. *United States v. Laws*, 16 Sup. Ct. 998, 1000, 163 U. S. 258, 41 L. Ed. 151.

Buying goods.

Services of plaintiff, who expected to be manager of defendant's store, in going east with defendant and assisting him in buying goods, do not constitute labor, within How. Ann. St. § 8749m, authorizing persons having preferred claims for labor to join in chancery in cases of fraud or assignment for the benefit of creditors. *Lawton v. Richardson*, 77 N. W. 265, 266, 118 Mich. 669.

Contractor's services.

Within the meaning of the Florida statute of June 3, 1887, which gives a superior lien to any persons who shall perform any labor upon or for the benefit of any railroad, etc., the service of a contractor on a railroad is labor. *Couper v. Gaboury*, 69 Fed. 7, 8.

Execution of contract.

In Cr. Code, § 261, providing that whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted), or by amusement or diversion, on Sunday, shall be fined, etc., the term "labor" does not include mere business; and hence the entering into a contract with a certain person to sail a vessel during a certain season for the other party to the contract is not labor, within the meaning of the word as used in the statute. The word should be construed as having been used in its ordinary term, and not as synonymous with or including "business." *Richmond v. Moore*, 107 Ill. 429, 438, 47 Am. Rep. 445.

"Laboring," as used in Code Va. 1849, c. 196, § 16, providing that every free person found on a Sabbath day laboring at a trade or calling, excepting household duties or other work of necessity or charity, should forfeit a certain sum, implies something more than only mere physical effort. It imports a continuance of bodily exertion, put forth in a trade or calling—such an exercise of muscular sense as brings on fatigue. Where plaintiff and defendant talked over business matters on Sunday, and came to a conclusion, which another then and there reduced to writing, which was read over and explained to defendant, who then and there signed, sealed, and delivered it—the whole matter taking place within an hour's time on the Sabbath day—there was no laboring, within the meaning of the statute. The laboring done, if any, in and about the transaction, was performed by the party who reduced the agreement to writing and not by the parties to the covenant, unless the talking which they did is

considered labor. Neither of the parties was found laboring, in any usual sense of the word. *Raines v. Watson*, 2 W. Va. 371-402.

The making of a contract does not come within the meaning of the term "labor." *Bloom v. Richards*, 2 Ohio St. 387, 400.

While the words "all labor," as used in a Sunday law, are equivalent to the words "labor, business, or work," yet the making of a contract on Sunday is not prohibited by the statute; the intention being to prohibit such work as disturbs the religious observances in the quiet of the Sabbath. *Holden v. O'Brien*, 90 N. W. 531, 86 Minn. 297.

Execution of note or will.

"Labor," as used in Gould, Dig. c. 51, art. 5, § 1, prohibiting labor on Sunday, should be construed to include the execution by the maker, and the receipt by the payee, of a promissory note. *Tucker v. West*, 29 Ark. 386, 400.

The execution and delivery of a note on Sunday is not labor, within the meaning of the Illinois statute which declares that "whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted) or by any amusement or diversion on Sunday shall be fined." *More v. Clymer*, 12 Mo. App. 11, 14.

The making and delivery on a secular day of a promissory note dated to take effect on a subsequent Lord's Day is not work or labor prohibited by the statutes for the observance of the Lord's Day. *Stacy v. Kemp*, 97 Mass. 166, 168.

"Labor," as used in a New Hampshire statute prohibiting all secular work, business, or labor on Sunday, should not be construed to include the execution of a will. *George v. George*, 47 N. H. 27, 35.

"Labor, business, or work," within the meaning of the statute prohibiting any labor, business, or work, except works of necessity and charity, on the Lord's Day, includes the giving of a promissory note or Sunday in consideration of articles purchased on that day. *Towle v. Larrabee*, 26 Me. (13 Shep.) 464, 466.

Freight.

"Labor," as used in Act Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], providing that persons who contract with the United States to perform public work shall add to the usual penal bond an obligation to promptly pay all persons who supply labor and materials in the work, does not include a charge by a railroad for freight on materials which are loaded and unloaded by such contractor. *United States v. Hyatt* (U. S.) 92 Fed. 442, 445, 34 C. C. A. 445

so occupying and using the same, "knowingly permits" such use, within Rev. St. § 4275, providing that, if the owner of the building in which the money was lost knowingly permits this to be used for gambling purposes, such building and the real estate on which it stands shall be liable for the fines and costs and damages and costs recovered. *Thompson v. Ackerman*, 12 O. C. D. 456, 465.

Rev. St. § 3281 [U. S. Comp. St. 1901, p. 2127], forfeits personal property owned by a person who has "knowingly permitted" or suffered his premises to be used for purposes of ingress or egress to or from an illicit distillery. Held, that it is a prerequisite to such forfeiture that the person should have known that the ingress or egress over his premises was to or from a distillery. *Gregory v. United States* (U. S.) 10 Fed. Cas. 1195, 1198.

KNOWLEDGE.

See "Actual Knowledge"; "Best of His Knowledge and Belief"; "Carnal Knowledge"; "Constructive Knowledge"; "Full Knowledge"; "Means of Knowledge"; "No Knowledge or Information"; "Peculiar Knowledge"; "Personal Knowledge"; "To My Knowledge."

"Knowledge," as used in Const. art. 1, § 7, reciting that, religion, morality and knowledge being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction, should be construed in its generic or unlimited sense. "Knowledge" comprehends in itself all that is comprehended in the other two words, "religion" and "morality," and which can be the subject of human instruction. True religion includes true morality. All that is comprehended in the word "religion," or in the words "religion and morality," and that can be the subject of human instructions, must be included under the general term "knowledge." Nothing is enjoined, therefore, but the encouragement of means of instruction in general knowledge—the knowledge of truth. The fair interpretation seems to be that true religion and morality are aided and promoted by the increase and diffusion of knowledge, on the theory that knowledge is the handmaid of virtue, and that all three, religion, morality, and knowledge, are essential to good government. *Board of Education of City of Cincinnati v. Minor*, 23 Ohio St. 211, 241, 13 Am. Rep. 233.

The word "knowledge," as used in Rev. St. § 4283 [U. S. Comp. St. 1901, p. 2943] limiting the liability of owners of vessels for loss

occurring without their privity or knowledge, means some personal cognizance, or means of knowledge of which he is bound to avail himself, of a contemplated loss, or of a condition of things likely to produce or contribute to the loss, without appropriate means to prevent it. *Lord v. Goodall S. S. Co.* (U. S.) 15 Fed. Cas. 884, 887.

As ability.

In an instruction in a homicide case that if there have been circumstances proven tending to show that the defendant was connected with the homicide, and the knowledge to explain such circumstances is plainly shown to be in his possession, and he willfully declines or intentionally omits to explain such circumstances, such omission is a circumstance unfavorable to his innocence, the term "knowledge" is synonymous with "ability." *Adams v. State*, 10 South. 106, 114, 28 Fla. 511.

As actual knowledge.

The word "knowledge," as used in Code, § 2892, allowing supplementary pleadings alleging facts that have come to the party's knowledge since the filing, etc., means actual, and not constructive, knowledge. *Peoples v. Carrol*, 58 Tenn. (11 Heisk.) 417, 423.

The word "knowledge," as used in a contract by which a fidelity and casualty company bound itself to make good to a bank such pecuniary loss as the latter might sustain by reason of the fraud or dishonesty of a named employé in connection with his duties, providing that the contract would be void if the bank continued in its service an employé of whose untrustworthiness they had knowledge, means actual knowledge, and not constructive. *Fidelity & Casualty Co. v. Gate City Nat. Bank*, 25 S. E. 392, 394, 97 Ga. 634, 33 L. R. A. 821, 54 Am. St. Rep. 440.

"Knowledge," as used in a statement that the owner of property sought to be subjected to an easement by prescription must have knowledge of the claim and use of such easement, means not only knowledge on the part of the owner of the act of occupation and enjoyment, and of the party occupying and enjoying, but also knowledge that the party in fact claims the right of enjoyment adversely. *Woodruff v. North Bloomfield Gravel Min. Co.* (U. S.) 18 Fed. 753, 790.

Under the Constitution and statute, providing that the director or officer of a bank who shall receive any deposit when the bank is insolvent, if he shall have had knowledge of the fact that it is insolvent or in sinking circumstances when he assented to the receipt of the deposit, shall be punished, the word "knowledge," so employed, must be taken in its common acceptance; that is, in

the plain or ordinary meaning and usual sense of the word. It ought to be so construed that no man who is innocent can be punished or endangered. So treated, we may properly look to the source to which men generally apply for the meaning of the word "knowledge." Webster's Dictionary defines "knowledge" as: "(1) The certain perception of truth; belief which amounts to or results in moral certainty; indubitable apprehension; information, intelligence, as to have knowledge of a fact." The knowledge which the law requires that a director shall have had means a guilty knowledge, not an innocent, bona fide ignorance arising from negligence to keep posted or to inquire. It must be construed as to have been intended as a sword with which to punish the guilty, and a shield to protect the innocent. If this had not been the intention, the liability would have been made absolute and unqualified, instead of dependent upon knowledge. *Utley v. Hill*, 55 S. W. 1001, 1099, 1100, 155 Mo. 232, 49 L. R. A. 323, 78 Am. St. Rep. 569.

"Knowledge" and "actual knowledge" have been held to be synonymous. The better opinion is, we think, that they are not to be thus regarded. *Kirkham v. Moore*, 65 N. E. 1042, 1043, 30 Ind. App. 549 (citing 2 Pom. Eq. Jur. § 592).

As belief.

See, also, "Belief."

Sess. Acts 1845, p. 145, provides that if the prosecuting attorney has knowledge of the commission of an offense, or shall be informed thereof by complaint, etc., he shall file an information, etc. Held, that the word "knowledge" should be construed to mean "with settled belief and reasonable conviction," and that it was not in any case necessary for the prosecuting attorney to have "actual and personal knowledge" as distinguished from "knowledge gained by information." *State v. Ransberger*, 17 S. W. 290, 291, 106 Mo. 135.

"Knowledge" is nothing more than a man's firm belief, and is distinguished from "belief" in that the latter includes things which do not make a very deep impression on the memory. The difference is ordinarily merely in degree. *Hatch v. Carpenter*, 75 Mass. (9 Gray) 271, 274.

The meaning of the words "belief" and "knowledge," as defined by lexicographers, will show that there is a distinct and well-defined difference between them. "Believe" is defined by Webster to mean to exercise trust or confidence; and by the Century Dictionary, to exercise belief in; to be persuaded upon evidence, arguments, and deductions, or by other circumstances other than personal knowledge. "Knowledge," accord-

ing to Webster, is the act or state of knowing; clear perception of fact; that which is or may be known. According to the Century Dictionary it means acquaintance with things ascertained or ascertainable; specific information. The Supreme Court of the United States, in the case of *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 8 Sup. Ct. 598, 31 L. Ed. 466, said: "Between mere belief and knowledge there is a wide difference." This expression of Mr. Justice Field was used in criticising and holding erroneous an instruction of the United States Circuit Court for the District of Colorado, in which the words "belief" and "knowledge" were used interchangeably, as conveying the same meaning, and it was said: "The court could not make them synonymous by its charge." Hence an allegation in a complaint in an action for injuries to a servant caused by defective passageway leading to a building which had been repaired by the master, alleging that when such a passageway had been repaired the complainant believed that it was safe, is not equivalent to an averment of want of knowledge. *Ohio Valley Coffin Co. v. Goble*, 62 N. E. 1025, 1027, 28 Ind. App. 362.

Discovery distinguished.

See "Discovery."

Information distinguished.

The words "information" and "knowledge," as used in the statute requiring a denial on information and belief to allege that the pleader has no knowledge or information upon which to base a belief, are not synonymous, and therefore an allegation that the pleader had not sufficient information on which to base a belief was insufficient. *Downing North Denver Land Co. v. Burns*, 70 Pac. 413, 414, 30 Colo. 283.

As notice.

See, also, "Notice."

"Knowledge" is not synonymous with notice, but when a person is spoken of as having actual or constructive notice it means no more than that under the indicated circumstances the man is legally chargeable with knowledge. *Merrill v. Pacific Transfer Co.*, 63 Pac. 915, 917, 131 Cal. 582.

Knowledge is equivalent to notice in cases where it is not required to be in writing. *Jones v. Vanzandt* (U. S.) 13 Fed. Cas. 1047, 1049.

The terms "knowledge" and "notice" are not synonymous or interchangeable, and should not, therefore, be confounded the one with the other. That which clearly does not amount to positive knowledge may often, in a legal sense, constitute actual notice. Accordingly, in applying a statute which contemplates that only actual notice shall affect the rights of one acting in good faith, the

language used expressly or by necessary implication negating the idea that he is chargeable with constructive notice as well, the mere fact that he did not have precise and definite knowledge concerning the matter in question cannot be regarded as having any real importance whatever. On the contrary, the distinction to be drawn in a case calling for the application of such a statute is that "between actual and constructive notice, and not between actual knowledge and constructive notice. The difference in meaning between knowledge and notice must not be overlooked, for it is equally important with the distinction between the different kinds of notice. The fact to be established, when the case requires proof of actual notice, is that the party acquired his pretended rights with notice; and this may be true, although the purchase may have been made in actual ignorance of the facts of which knowledge is imputed to the purchaser." Wade, Notice (2d Ed.) § 36a. "Notice is actual when one either has knowledge of a fact, or is conscious of having the means of knowledge, although he may not use them. Actual notice may be divided into express and implied. Express notice embraces, not only what may fairly be called knowledge, from the fact that it is derived from the highest evidence to be communicated by the human senses, but also that which is communicated by direct and positive information, either written or oral, from persons who are personally cognizant of the fact communicated. The implication of notice arises when the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him by the exercise of due diligence to a knowledge of the principal fact." Clarke v. Ingram, 33 S. E. 802, 804, 107 Ga. 565.

"Knowledge" and "notice" are not synonymous, although the effects produced by notice are the same, in many cases, as result from actual knowledge. Levins v. W. O. Peoples Grocery Co. (Tenn.) 38 S. W. 733, 740.

"Knowledge" may be classified in a legal sense as positive and imputed; imputed when the means of knowledge exists, known and accessible to the party, and capable of communicating positive information. When there is knowledge, notice, as legally and technically understood, becomes immaterial. It is only material when, in the absence of knowledge, it produces the same results. However closely actual notice in many instances approximates knowledge, and constructive notice may be its equivalent in effect, there may be actual notice without knowledge; and when constructive notice is made the test to determine priorities of right, it may fall far short of knowledge and be sufficient. When the purpose is to subordinate to a prior existing equity or right in

another the subsequently acquired right of a party who has information of collateral facts sufficient to put him on inquiry, which, if pursued, would lead to the truth, such information is regarded as sufficient to charge him with notice of the ultimate fact, but is not tantamount to either knowledge or express notice, nor is either a necessary inference. Knowledge is not equivalent to and synonymous with notice. In reference to the rights of a purchaser from a fraudulent vendee for value and without notice of the fraud, there is a difference between the want of knowledge and the want of notice. Cleveland Woolen Mills v. Seibert, 1 South. 773, 776, 81 Ala. 140.

As property.

See "Property."

Science distinguished.

See "Science."

As suspicion.

"Knowledge" and "suspicion" are not synonymous terms. American Surety Co. v. Pauly (U. S.) 72 Fed. 470, 477, 18 O. C. A. 644.

KNOWLEDGE, INFORMATION, AND BELIEF.

The verification of a bill in chancery praying a discovery and the appointment of a receiver by the complainant as being true to the best of his knowledge, information, and belief, is insufficient, as the words "knowledge, information, and belief," upon the construction most favorable to the complainant, mean that the affiant has knowledge that some of the averments of the bill are true; that, while he does not know, he has been informed and believes that others of the averments are true; and that as to yet other averments he has neither knowledge or information, but, without knowing the facts or ever having been informed of their truth, he believes them to be true. Burgess v. Martin, 20 South. 506, 507, 111 Ala. 656.

The words "to the best of his knowledge, information, and belief," at the end of an affidavit of service, qualified and restricted the prior declarations contained therein; and therefore the affidavit was defective and insufficient. Harrison v. Beard, 30 Kan. 532, 2 Pac. 632.

KNOWLEDGE OF DANGER.

The "knowledge of danger" arising from walking upon a railroad track necessarily involves an appreciation of it. To say that one knows the danger of being run over by a railroad train, if upon the track, and yet does not appreciate the danger of being and

remaining upon the track, is contradictory, not only in its terms, but in the very substance of the proposition. That a person must have known the danger of being upon a railroad track is evident from the plain fact that standing upon a railroad track where trains pass necessarily involves danger. *St. Louis S. W. Ry. Co. v. Shiflet*, 58 S. W. 945, 947, 94 Tex. 131.

"Knowledge of danger" does not necessarily constitute contributory negligence. It is plain that one may exercise due care with full knowledge of the danger to which he is exposed, or to which he lawfully exposes himself. This certainly is not contributory negligence. When knowledge is fastened upon the plaintiff, it is presumptive evidence of contributory negligence, and may be rebutted by proper evidence of the exercise of ordinary care under the circumstances. *Holwerston v. St. Louis & S. Ry. Co.*, 57 S. W. 770, 777, 157 Mo. 216 (quoting *Beach*, *Contrib. Neg.* § 37).

KNOWLEDGE OF THE LAW.

"The knowledge of the law with which every man is charged includes a knowledge of the constituent facts which make the law. That the Legislature enacted a certain law is a fact, but a knowledge of the law imputed to every man comprises a knowledge of that fact. That a certain law is valid or void is another fact, but every man is presumed to know whether it is valid or void, else he could not know the law." *Evans v. Hughes County*, 52 N. W. 1062, 1065, 3 S. D. 244.

KNOWN.

See "Generally Known"; "Personally Known"; "Well Known Member."

In *St. 1825*, requiring the certificate of acknowledgment to a deed by a married woman to set forth that the "contents were made known and explained" to her, "made known" is equivalent to "made acquainted with" the contents, as used in the certificate stating that she was made acquainted with the contents of the deed. *Bohan v. Casey*, 5 Mo. App. 101, 108.

As used in *Gen. St. c. 151, § 13*, declaring that, in order for a materialman to save his lien on a vessel, he shall file a sworn statement giving a just and true account of the demands due him and the name of the owner of the vessel, "if known," includes a party who has been informed and believes that the vessel was owned by the person who in fact owned it. *Story v. Buffum*, 90 Mass. (8 Allen) 35, 38.

The owner of land is not "known," within the meaning of *Comp. St. art. 5, c. 77, § 4*, relating to foreclosure of tax certificates, when the holder of a tax certificate

is unable by reasonable diligence and inquiry in the neighborhood of the land in question to learn the whereabouts of the person or persons appearing to have estates therein, or when he is unable to ascertain who has such estates. *Leigh v. Green*, 90 N. W. 255, 258, 64 Neb. 533.

KNOWN APPLIANCES.

See "Best Known Appliances."

KNOWN AS.

These words, explained by the context in a deed, are a mere formula, to which no restricted effect can be given, so that a deed of a lot in a given plat, "known as lot 1," without further description, would convey the whole of the lot, though the same included a larger area than it was generally supposed to include. *Kneeland v. Van Valkenburgh*, 46 Wis. 434, 438, 1 N. W. 63, 32 Am. Rep. 719.

"Known as the government reservation," as used in *Act 1851*, commonly known as the "Water Lot Act," and providing for the disposition of state property, and exempting from its provisions that portion of the property "known as the government reservation," would include all property known by that name, except that part of such reservation the lease of which was confirmed by the act. It is immaterial to the validity of the exception whether the reservation had any legal existence or not. *People v. Dana*, 22 Cal. 11, 21.

KNOWN CHANNEL.

The word "known," as used in the legal proposition that subterranean waters can only be the subject of riparian rights when flowing in defined or known channels, means the knowledge by reasonable inference from existing and observed facts in the natural or pre-existing condition of the surface of the ground. "Known," in this rule of law, is not synonymous with "visible," nor is it restricted to knowledge derived from exposure of the channel by excavation. *Miller v. Black Rock Springs Imp. Co.*, 40 S. E. 27, 30, 99 Va. 747, 86 Am. St. Rep. 924; *City of Los Angeles v. Pomeroy*, 57 Pac. 585, 598, 124 Cal. 597.

Underground currents of water which flow in channels, the course of which can be distinctly traced, are known and defined, within the meaning of the law, and are governed by the same rules of law as streams flowing beneath the surface. *Medano Ditch Co. v. Adams*, 68 Pac. 431, 434, 29 Colo. 317.

The word "known," in an instruction as to the burden of showing that the course of a subterranean stream is known or no-

corious, is not synonymous with "visible," but refers to knowledge by reasonable inference. *Wyandot Club v. Sells*, 9 Ohio Dec. 106-111.

KNOWN CREDITORS.

Acts 1867, p. 19, providing that commissioners appointed to receive and act upon claims presented against the insolvent estates of deceased persons shall give notice of their meetings to all known creditors residing within the probate district, means the creditors known to the executor or the administrator, and not merely the creditors which are known by the commissioners. *Appeal of Davis*, 39 Conn. 395, 399.

KNOWN DEFECTS.

When it is said that a servant assumes the risk of danger from known defects in implements used in his employment, the obvious meaning is that he assumes the risk of such danger as is apparent to his observation, not such as, on account of his want of experience, he could not reasonably be expected to apprehend. *Demars v. Glen Mfg. Co.*, 40 Atl. 902, 904, 67 N. H. 404.

KNOWN EQUIVALENT.

"Known equivalent," in the patent law in reference to a pioneer machine, means devices which, in mechanics, were recognized as proper substitutes for the devices used by a certain patentee to effect the same results, even though the peculiar form of the work done by the device was unknown before. Otherwise a difference in the particular devices used to accomplish a particular result in a machine would always enable a person to escape the charge of infringement, provided such devices were new with such person in such a machine. *Morley Sewing Machine Co. v. Lancaster*, 9 Sup. Ct. 299, 309, 129 U. S. 263, 32 L. Ed. 715.

KNOWN INTEMPERATE HABITS.

"A man of known intemperate habits is one whose habit for intemperance is known in the community, just as a man is known in the community either as a good or bad citizen. *Zeigler v. Commonwealth* (Pa.) 14 Atl. 237, 238.

Act May 13, 1887, § 17, providing a punishment for the offense of selling intoxicating liquors to a "person of known intemperate habits," does not include a person of intemperate habits who conceals such habits. "It is only when his intemperance has become so conspicuous as to form a habit, and that habit is known, not merely to his family or to a night watchman, but to his friends and neighbors, and the com-

munity in which he lives, that the law forbids and punishes the sale of liquor to him. Every man has a reputation of sobriety or for intemperance in the community in which he resides, just as every man has a reputation for integrity and for truth, and such reputation is generally known." *Commonwealth v. Zeit*, 21 Atl. 7, 8, 138 Pa. 615, 11 L. R. A. 602.

"Known intemperate habits," within the meaning of a statute prohibiting the sale of intoxicating liquors to persons of known intemperate habits, does not import that it is necessary that the person selling liquor has seen the purchaser intoxicated. "To know of a man's intemperate habits, it is not necessary to see him drunk, and know to an absolute certainty, by personal knowledge, that such are his habits. Nor is it necessary that defendant should have had written notice, or even verbal notice, served upon him, telling him that this man was of intemperate habits. If that was his reputation in the neighborhood where he lived, and if defendant knew that such was his reputation, that would be sufficient." *Elkin v. Buschner* (Pa.) 16 Atl. 102, 104.

KNOWN LODE OR VEIN.

A vein or lode may be known to exist, within Rev. St. § 2333 [U. S. Comp. St. 1901, p. 1433], providing that a patent for a placer claim shall not include any vein or lode known to exist, so as to except it from the grant, though it has not been located according to law. *Sullivan v. Iron Silver Min. Co.*, 12 Sup. Ct. 555, 556, 143 U. S. 431, 36 L. Ed. 214 (reversing *Iron Silver Min. Co. v. Sullivan* [U. S.] 16 Fed. 829, 831).

Rev. St. § 2333 [U. S. Comp. St. 1901, p. 1433], provides that a patent for a placer claim shall not include any vein or lode known to exist within the boundaries of the grant, unless application is also made for such vein or lode, but, if its existence is not known, the title shall pass. Held, that a vein or lode may be known to exist, within the meaning of the statute, though it has not been located according to law. Our conclusions are, first, in respect to the matter of the known vein, that the reasons so clearly stated by Mr. Justice Field, speaking for the court, in the case of *Noyes v. Mantle*, 127 U. S. 348, 353, 8 Sup. Ct. 1132, 32 L. Ed. 168, are unanswerable, and forbid an adjudication that the term "known vein" is to be taken as synonymous with "located vein," and compel a reiteration of the declaration heretofore made that the term refers to a vein or lode whose existence is known, as contradistinguished from one which has been appropriated by location, and, as to the other matter, that the title to portions of this horizontal vein or deposit—"blanket vein," as it is generally called—may be ac-

quired under the sections concerning veins, lodes, etc. The fact that so many patents have been obtained under these sections, and that so many applications for patents are still pending, is a strong reason against a new and contrary ruling. *Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 12 Sup. Ct. 543, 549, 143 U. S. 394, 430, 36 L. Ed. 201.

"Known veins," mentioned in Rev. St. § 2333 [U. S. Comp. St. 1901, p. 1433], excepting from the operation of a placer patent veins known to exist at the time of the application. mean veins which have been clearly ascertained at the date of the patent, and are of such extent and value as to justify their exploitation. *Casey v. Thieviege*, 19 Mont. 341, 347, 48 Pac. 394, 398; *Brownfield v. Bler*, 39 Pac. 461, 463, 15 Mont. 403; *Davis v. Wlebbold*, 11 Sup. Ct. 628, 635, 139 U. S. 507, 35 L. Ed. 238.

The subsequent discovery of lodes upon the ground, and their successful working, do not affect the good faith of the application. That must be determined by what was known to exist at the time, and on a showing that no work was done on a claim because it was considered valueless and the location was abandoned, and that the only indication of the vein was that exposed by a ditch dug, and that it was not worth developing, it was insufficient to establish a claim for the lode or vein, within Rev. St. § 2333 [U. S. Comp. St. 1901, p. 1433], exempting such a vein from the grant of a placer patent. *Brownfield v. Bler*, 39 Pac. 461, 463, 15 Mont. 403.

To meet the designation of veins known to exist, it is not enough that there may have been some indications, by outcroppings on the surface, of the existence of lodes or veins of rock in place, bearing gold or silver, or other metals. The lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. *Butte & B. Min. Co. v. Sloan*, 16 Mont. 97, 40 Pac. 217; *Davis v. Wlebbold*, 11 Sup. Ct. 628, 635, 139 U. S. 507, 35 L. Ed. 238; *Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 12 Sup. Ct. 543, 549, 143 U. S. 394, 36 L. Ed. 201; *United States v. Iron Silver Mining Co.*, 128 U. S. 673, 683, 9 Sup. Ct. 195, 32 L. Ed. 571.

Rev. St. § 2333 [U. S. Comp. St. 1901, p. 1433], provides that a patent for a placer claim shall not include any vein or lode known to exist within the boundaries of the grant, unless application is also made for such vein or lode, but, if its existence is not known, the title shall pass. It is undoubtedly true that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may on subsequent exploration be found to

develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute. In the case of *Iron Silver Min. Co. v. Cheeseman*, 116 U. S. 529, 536, 6 Sup. Ct. 481, 29 L. Ed. 712, this court sustained an instruction as to what constitutes a lode or vein, given in these words: "To determine whether a lode or vein exists, it is necessary to define those terms; and, as in that, it is enough to say that a lode or vein is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountains. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and, if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a 'lode' or 'vein.'" *Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 12 Sup. Ct. 543, 549, 143 U. S. 394, 36 L. Ed. 201.

Within Rev. St. § 2333 [U. S. Comp. St. 1901, p. 1433], providing that, where a vein or lode is known to exist within the boundaries of a placer claim, the filing of an application for such placer claim which does not include an application for the vein or lode claim shall be construed as a declaration that the claimant of the placer claim has no right of possession to the vein or lode claim, means a vein of such extent as to render the land more valuable on that account, which is clearly ascertained and known. *United States v. Iron Silver Min. Co.*, 9 Sup. Ct. 195, 198, 128 U. S. 673, 32 L. Ed. 571.

The requisites of a known vein under Rev. St. § 2333 [U. S. Comp. St. 1901, p. 1433], excluding them from the operation of a patent, are different from those of a vein or lode which will justify a location under section 2320 [U. S. Comp. St. 1901, p. 1424]. Under the former, the ledge must be known to be so valuable for its mineral as to justify expenditures for their extraction, while under the latter comparatively slight indications of a defined and mineral-bearing ledge are sufficient. To meet the designation of a known ledge, the lodes or veins must be clearly ascertained, and the mineral that they contain must be in sufficient quantity to make them valuable as mineral lands. *Montana Cent. R. Co. v. Migeon* (U. S.) 68 Fed. 811, 813.

KNOWN PROPERTY.

The term "known property," as used in a statute providing that the statute of limitations shall not run against one who is absent from the state, excepting where he leaves within the state known property, means that the person's ownership of the property must be so notorious that a creditor would have found it by a reasonable search and inquiry. *Farnham v. Thomas*, 56 Vt. 33, 34.

The phrase "known property," in the statute relating to limitations, means property which by use of ordinary diligence might have been known. *Tucker v. Wells*, 12 Vt. 240, 243.

Actual knowledge by the plaintiff alone would be sufficient to make it known property, or it might be known property, in the sense of the statute, without knowledge by him, provided it was known by others, and the knowledge of it was so common that plaintiff, by the exercise of reasonable diligence, would have found it. *Moore v. Quint*, 44 Vt. 97, 104.

Personal property left in a state by a debtor, which fact was known to several persons, but was not generally known, and the creditor resided in another town, 20 miles distant, is not known property, within the statute. *Wheeler v. Brewer*, 20 Vt. 113, 117.

KNOWN VIOLATION OF LAW.

See "Die in Known Violation of Law."

KNUCKS—KNUCKLES.

The words "knucks" and "knuckles" mean the same thing, so that a bail bond is not insufficient because it recites that defendant is charged with the offense of having and carrying on and about his person "brass knucks," instead of "brass knuckles," on the ground that it sets out no offense against the Penal Code. *Mills v. State*, 35 S. W. 370, 371, 36 Tex. Cr. R. 71.

KUMSHAW.

The "kumshaw," in the general Canton trade, is a present made by the Hong merchant or broker to the captain or supercargo of a vessel on the completing of a sale. It is voluntary on the part of the Hong. It consists, not of money, but of shawls, fine teas, etc., and is always regarded as the perquisite and private profit of the person to whom it is made. But the kumshaw in the opium trade differs in some respects from that in the ordinary Chinese trade. It is a money fee fixed in amount, and obligatory on the purchaser. The kumshaw is paid only when the opium is delivered to a purchaser or smuggler, and not when it is transshipped. In the different opium ships at Canton, as between the owner and captain, the right to the kumshaw was usually, though not always, a matter of special agreement. In the British ships it was generally divided, while in the only American ship engaged in the opium store trade the captain received the whole kumshaw. *Wilcocks v. Phillips* (U. S.) 29 Fed. Cas. 1198, 1201.

L

L

An assessor, in making an assessment, used the abbreviations "h., l., and stable," and it was held that such assessment was intelligible, the phrase being properly used to mean "house, lot, and stable." *Alden v. City of Newark*, 86 N. J. Law (7 Vroom) 288.

L. S.

In copying a writ or summons, the facsimile of a seal cannot well be made, and to do it would require more skill than pertains to the profession generally. By long usage and the general understanding of legal writers, "L. S." is regarded as the true representation of a seal in a copy of all legal precepts. If the word "Seal" were written in the place of the seal on the writ or summons, it would not be a true copy, for no such writing is upon the writ or summons. Whether we might receive that as a sufficient representation, it is not necessary to say, but we have no hesitancy in deciding that the letters "L. S." are the proper designation and copy of the seal. *Smith v. Butler*, 25 N. H. (5 Fost.) 521, 524.

The letters "L. S.," printed between brackets, and following the signatures of the makers of a promissory note, which also contained the words, "given under the hand and seal of each party," were sufficient to make it a sealed instrument. *Barnes v. Walker*, 41 S. E. 243, 115 Ga. 108.

In *O'Cain v. O'Cain* (S. C.) 1 Stro. 405, Wardlaw, J., said: "For a seal, the letters 'L. S.' with a circumflex, are usually adopted; and where a party who signs does himself make these marks plainly after his name, or with his name before them, plainly made on the paper, they furnish of themselves evidence of his intention to do what they usually denote—to seal." *McLaughlin v. Braddy*, 41 S. E. 523, 524, 63 S. C. 433, 90 Am. St. Rep. 681.

LA.

The letters "La." will not be judicially recognized as an abbreviation for the state of Louisiana. *Russell v. Martin*, 15 Tex. 238.

LA FAVORITA.

The words "La Favorita," used to designate flour sold by a certain firm, did not indicate by whom the flour was manufactured, but indicated the origin of its selection and

classification, and were equivalent to the signature of the firm to a certificate that the flour was the genuine article, which had been determined by them to possess a certain degree of excellence. They did not, of course, in themselves, indicate quality, for it was merely a fancy name in a foreign language; but they evidenced that the skill, knowledge, and judgment of the firm had been exercised in ascertaining that the particular flour so marked was possessed of a merit rendered definite by their examination, and of a uniformity rendered certain by their selecting, and is entitled to be protected as a trade-mark. *Menendez v. Holt*, 9 Sup. Ct. 143, 144, 128 U. S. 514, 32 L. Ed. 526.

LABEL

A notice posted in a hotel room that packages of value should be properly labeled and deposited in an iron safe kept at the office for that purpose is satisfied by the written name of the owner upon a package deposited with the clerk. The most general idea of a label is not of a separate strip of paper or parchment, but a written description of the article upon which it is placed or made, as to its ownership, or character, or quality, or extent. The name of the owner was a label. It indicated the ownership. A similar indorsement of the word "money" or "valuables" would have been a label. *Wilkins v. Earle*, 44 N. Y. 172, 185, 4 Am. Rep. 655.

As a trade-mark.

A label is a slip of paper or any other material bearing a name, title, address, or the like, affixed to something to indicate its nature, contents, ownership, destination, or other particulars. That which constitutes the real and whole value of the label is, in connection with its general form and appearance, its statements concerning the origin of the goods to which it is to be attached, and the evidence it furnishes of the genuineness of the goods, as the product of the particular manufacturer whose work is certified to by the stamp of authenticity given by the label, and the change of an immaterial statement on a label will not make it a new label. *Perkins v. Heert*, 39 N. Y. Supp. 223, 226, 5 App. Div. 335.

"A label is not a trade-mark, as recognized at common law, though it may in fact contain no words, figures, etc., except those which constitute the trade-mark. A person may adopt a label of given material, size, color, etc., and may attach the same to his goods, or the wrappers, cases, etc., in which they are packed, although another person has

previously adopted labels of the same materials, dimensions, and color, and used them in the same manner; but labels, like trademarks, may be adopted and used by a manufacturer or seller of goods, to distinguish his goods from those of others; and, when another person uses the same label, or a colorable imitation thereof, it produces the same result as would a copy or colorable imitation of a trade-mark—that is to say, it is a false representation that the goods to which it is attached were manufactured or sold by the person whose label was copied or imitated, and purchasers are deceived and are liable to be defrauded." *Burke v. Cassin*, 45 Cal. 467, 481, 13 Am. Rep. 204.

A label is only intended to indicate the article contained in the bottle, package, or box to which it is affixed, and not to distinguish it from articles of the same general nature manufactured or sold by others, thus securing to the producer the benefits of any increased sale by reason of any peculiar excellence he may have given to it, as a trade-mark does. *Higgins v. Keuffel*, 11 Sup. Ct. 781, 732, 140 U. S. 428, 35 L. Ed. 470.

Neither a letter nor a horseshoe, nor any such simple device, can be claimed as a label. *Lorillard v. Drummond Tobacco Co.* (U. S.) 14 Fed. 111.

That a painting only 7 by 4½ inches in size, painted by an artist employed by a corporation from a design made by its president, may be used as an advertising label, does not affect the right of copyright. The subject is not to be considered a label simply because copies may be so used. *Schumacher v. Schwencke* (U. S.) 25 Fed. 466, 467.

The manufacturer of goods has no such property interest in the words of a label adopted by him, which merely indicate the quality of the goods, but do not indicate in any manner the manufacturer or place of manufacture, or the kind of goods, as will entitle him to an injunction to restrain another manufacturer from using the same or similar words. *Stokes v. Landgraff* (N. Y.) 17 Barb. 608, 611.

LABOR.

See "Common Labor"; "Incidental Labor"; "Manual Labor"; "Mechanical Labor"; "Personal Labor"; "Servile Labor"; "Wordly Labor."

See, also, "Sue, Labor, and Travel."

All labor, see "All."

As a commodity, see "Commodity."

As property, see "Property."

Engaged in labor, see "Engaged."

For instances of men whose services are held to be labor, see subtitle "Laborer."

"The word labor comes from the Latin verb, *labo*, which is thus rendered in one of the most approved lexicons; to totter, to be ready to fall, to be on the point of falling, to waiver, to be at a loss, to hesitate. *Riddle's Lex.* By the same authority the Latin noun *labor* is thus translated: labor, pains combined with physical efforts, or metonymically, activity, industry, hardship, misfortune, trouble, distress. The English word labor is thus defined by Walker: the act of doing what requires a painful exertion or strength, pains, toll, work to be done, work done, performance, exercise, motion with some degree of violence, child-birth, trouble. Webster's definitions are 1, exertion of muscular strength or bodily exertion which occasions weariness, particularly the exertion of the limbs; any occupation by which subsistence is obtained as in agriculture and manufactures in distinction of exertion of strength in play or amusements which are denominated exercise rather than labor. *Toll*—some work, pains, trouble, any bodily exercise which is attended with fatigue. After the labors of the day the farmer retires and rest is sweet. Moderate labor contributes to the health. What is obtained by labor will of right be the property of him by whose labor it is gained. *Rambler*. 2, Intellectual exertion, application of the mind which causes weariness, as the labor of compiling and writing a history. 3, exertion of mental powers united with bodily employment, as the labors of the apostles in propagating Christianity. 4, work done or to be done; that which requires wearisome exertion being a labor of so great difficulty the exact performance thereof we may rather wish than look for. *Hooker*. 5, heroic achievement, as the labor of Hercules, trouble, the pangs and efforts of child-birth, the evils of life, trial, prosecution, etc. They rest from their labors; *Rev. 14*." *Bloom v. Richards*, 2 Ohio St. 387, 400.

"Labor" is defined to be physical toil or bodily exertion; also to be hard muscular effort directed to some useful end, as agriculture, manufactures, and the like; also to be intellectual exertion and mental effort. *Dixon v. People*, 48 N. E. 108, 110, 168 Ill. 179, 39 L. R. A. 116.

"Labor," either as a noun or a verb, is a comprehensive word, and does not seem to carry to its derivative, 'laborer,' as ordinarily used, its full original meaning. The traveling salesman undoubtedly labors, but he is not a laboring man. But an allegation that a judgment is for labor is not equivalent to an allegation that it is for a laborer's wages." *Paddock v. Balgord*, 48 N. W. 840, 841, 2 S. D. 100.

Labor or service, within the meaning of Act Cong. Feb. 26, 1885, c. 164, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290], prohibiting

the importation of aliens for labor or service, is limited to cheap and unskilled labor and service, and does not include professional labor or service. *United States v. Laws*, 16 Sup. Ct. 998, 1000, 163 U. S. 258, 41 L. Ed. 151.

Buying goods.

Services of plaintiff, who expected to be manager of defendant's store, in going east with defendant and assisting him in buying goods, do not constitute labor, within How. Ann. St. § 8749m, authorizing persons having preferred claims for labor to join in chancery in cases of fraud or assignment for the benefit of creditors. *Lawton v. Richardson*, 77 N. W. 265, 266, 118 Mich. 609.

Contractor's services.

Within the meaning of the Florida statute of June 3, 1887, which gives a superior lien to any persons who shall perform any labor upon or for the benefit of any railroad, etc., the service of a contractor on a railroad is labor. *Couper v. Gaboury*, 69 Fed. 7, 8.

Execution of contract.

In Cr. Code, § 261, providing that whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted), or by amusement or diversion, on Sunday, shall be fined, etc., the term "labor" does not include mere business; and hence the entering into a contract with a certain person to sail a vessel during a certain season for the other party to the contract is not labor, within the meaning of the word as used in the statute. The word should be construed as having been used in its ordinary term, and not as synonymous with or including "business." *Richmond v. Moore*, 107 Ill. 429, 438, 47 Am. Rep. 445.

"Laboring," as used in Code Va. 1849, c. 196, § 16, providing that every free person found on a Sabbath day laboring at a trade or calling, excepting household duties or other work of necessity or charity, should forfeit a certain sum, implies something more than only mere physical effort. It imports a continuance of bodily exertion, put forth in a trade or calling—such an exercise of muscular sense as brings on fatigue. Where plaintiff and defendant talked over business matters on Sunday, and came to a conclusion, which another then and there reduced to writing, which was read over and explained to defendant, who then and there signed, sealed, and delivered it—the whole matter taking place within an hour's time on the Sabbath day—there was no laboring, within the meaning of the statute. The laboring done, if any, in and about the transaction, was performed by the party who reduced the agreement to writing and not by the parties to the covenant, unless the talking which they did is

considered labor. Neither of the parties was found laboring, in any usual sense of the word. *Raines v. Watson*, 2 W. Va. 371-402.

The making of a contract does not come within the meaning of the term "labor." *Bloom v. Richards*, 2 Ohio St. 387, 400.

While the words "all labor," as used in a Sunday law, are equivalent to the words "labor, business, or work," yet the making of a contract on Sunday is not prohibited by the statute; the intention being to prohibit such work as disturbs the religious observances in the quiet of the Sabbath. *Holden v. O'Brien*, 90 N. W. 531, 86 Minn. 297.

Execution of note or will.

"Labor," as used in Gould, Dig. c. 51, art. 5, § 1, prohibiting labor on Sunday, should be construed to include the execution by the maker, and the receipt by the payee, of a promissory note. *Tucker v. West*, 29 Ark. 386, 400.

The execution and delivery of a note on Sunday is not labor, within the meaning of the Illinois statute which declares that "whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted) or by any amusement or diversion on Sunday shall be fined." *More v. Clymer*, 12 Mo. App. 11, 14.

The making and delivery on a secular day of a promissory note dated to take effect on a subsequent Lord's Day is not work or labor prohibited by the statutes for the observance of the Lord's Day. *Stacy v. Kemp*, 97 Mass. 166, 168.

"Labor," as used in a New Hampshire statute prohibiting all secular work, business, or labor on Sunday, should not be construed to include the execution of a will. *George v. George*, 47 N. H. 27, 35.

"Labor, business, or work," within the meaning of the statute prohibiting any labor, business, or work, except works of necessity and charity, on the Lord's Day, includes the giving of a promissory note or Sunday in consideration of articles purchased on that day. *Towle v. Larrabee*, 26 Me. (13 Shep.) 464, 466.

Freight.

"Labor," as used in Act Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], providing that persons who contract with the United States to perform public work shall add to the usual penal bond an obligation to promptly pay all persons who supply labor and materials in the work, does not include a charge by a railroad for freight on materials which are loaded and unloaded by such contractor. *United States v. Hyatt* (U. S.) 92 Fed. 442, 445, 34 C. C. A. 445

Hiring a horse.

"Labor," as used in a statute prohibiting labor on Sunday, does not include a contract by a livery stable keeper to hire a horse on Sunday, if the hiring is for purposes of charity or necessity. If the contract is made for purposes of business or pleasure, it is labor intended to be prohibited by the statute. *Stewart v. Davis*, 31 Ark. 518, 520, 25 Am. Rep. 578.

Personal service distinguished.

It is said in *Weymouth v. Sanborn*, 43 N. H. 171, 80 Am. Dec. 144, that claims for labor would not ordinarily be understood to embrace the services of the clergyman, physician, lawyer, commission merchant, or salaried officer, agent, railroad or other contractor, but would be confined to claims arising out of services where physical toll was the main ingredient, though directed and made more valuable by mechanical skill. The term "labor," in a statute providing that no person summoned as trustee shall be charged as such on account of the personal services or earnings of the wife of the debtor at any time, or on account of any labor performed by the debtor or any of his family after the service of the process or within 15 days prior to such service, is of a more narrow meaning than the term "personal service" or "earnings," as used in the statute. *Hoyt v. White*, 46 N. H. 45, 48.

Keeping open barber shop.

The term "laboring on the Sabbath," in an indictment charging that defendant unlawfully labored on the Sabbath, is not satisfied by proof that defendant kept his barber shop open on that day, but did no work therein. *State v. Frederick*, 45 Ark. 347, 348, 55 Am. Rep. 555.

Manufacture of articles.

The provision of Rev. St. c. 208, § 9, exempting from the process of foreign attachment debts due for the labor of defendant performed 15 days before the service of the process and afterward, does not extend to those cases in which other things have been procured by the laborer upon his own responsibility, and blended with his labor, in accomplishing a work undertaken by himself. *Robbins v. Rice*, 18 N. H. 507, 510.

Mining claims.

Rev. St. 1872, §§ 2325, 2326 [U. S. Comp. St. 1901, pp. 1429, 1430], relative to the location of mining claims, and providing that there shall be annually expended on certain claims, labor or improvements amounting to \$100, mean labor or improvements on any part of property consisting of several consolidated claims. When the labor is performed or the improvements are made for the devel-

opment of the property as a whole—that is, to facilitate the extraction of the metals it may contain—though in fact such labor and improvements are made on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvements consist in the construction of a flume to carry off the debris or waste material. Such labor or improvement relates to each one of the claims consolidated, and is labor or improvement expended thereon, within the statute. *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636, 655, 26 L. Ed. 875; *De Noon v. Morrison*, 23 Pac. 374, 83 Cal. 163. Labor performed by the owner of the mine in constructing a wagon road thereto for the purpose of developing and operating the same may be treated as a compliance with the statute. *Doherty v. Morris*, 28 Pac. 85, 86, 17 Colo. 105.

The mining laws of the United States require that not less than \$100 worth of labor shall be performed upon every unpatented location. Labor and improvements, within the meaning of the statute, are deemed to be done upon the location when the labor is performed or improvements made for the express purpose of working, prospecting, or developing the ground embraced in the location. Work done outside of the limits of a mining claim, for the purpose of prospecting or developing it, is as available for holding the claim as if done within the boundaries of the location of the claim. *Book v. Justice Min. Co.* (U. S.) 58 Fed. 106, 117.

Rev. St. § 2334, providing that the holder of a mining claim, to maintain his right of possession, must see that \$100 worth of labor shall be performed on such claim, or in improvements made thereon, during each year, should be construed to include the time and labor of a watchman and custodian, expended on the property in taking care of it, though the mining works are idle. *Lockhart v. Rollins*, 21 Pac. 413, 415, 2 Idaho, 503.

Performance of official duty.

"Labor" is defined as to exert muscular strength; to exert one's strength with painful effort, particularly in servile occupations; to work; to toil. The term, as used in a criminal statute, does not apply to an officer engaged in the performance of his official duties, so that the filing of an application to purchase school lands in the General Land Office on Sunday does not render the application void; it not being labor, within Pen. Code 1895, art. 196, imposing a fine on any person who shall labor on Sunday. *Stephens v. Porter*, 69 S. W. 423, 424, 29 Tex. Civ. App. 556.

Printing.

"Labor," as used in Comp. Laws, § 607, as amended by Laws 1889, c. 49, § 104, providing for the making of contracts for labor by a county in a certain manner, will be construed to mean manual exertion of a toilsome nature, and hence will not include the printing of a tax list. *Dewell v. Hughes County Com'rs*, 66 N. W. 1079, 1080, 8 S. D. 452.

Selling goods or waiting on customers.

Mansf. Dig. § 1883, prohibiting laboring on Sunday, except in the performance of ordinary household duties of daily necessity, comfort, or charity, includes the selling of theater tickets for, and the superintending of, an entertainment by the manager of a public theater, that he has caused to be given therein on Sunday. *Quarles v. State*, 17 S. W. 269, 270, 55 Ark. 10, 14 L. R. A. 192.

A person who sells intoxicating liquors on Sunday is engaged in labor, within Laws 1887, c. 26, imposing a penalty on any one found on Sunday "engaged in any labor except works of necessity, charity or mercy." *Cortesy v. Territory*, 30 Pac. 947, 948, 6 N. M. 682, 19 L. R. A. 349.

Shaving by barber.

The shaving of a person by a barber, in his usual and ordinary business, is labor, within the meaning of a statute prohibiting labor on Sunday. *State v. Nesbit*, 8 Kan. App. 104, 109, 54 Pac. 326, 328.

Teams employed.

Laws 1887, Act 229 (3 How. St. § 8427a), giving any person who performs "any labor or service" in manufacturing lumber a lien therefor, includes the labor or services of teams furnished by the person who himself, as a laborer or contractor, performs the labor or services; but there can be no lien in favor of the owner of a team let to the laborer or contractor, where the one who makes use of the team is himself entitled to assert a lien for the services at a gross sum for his own work and that of the team. *Mable v. Sines*, 52 N. W. 1007, 92 Mich. 545.

Within the meaning of a statute giving a lien to "laborers and for persons furnishing materials to contractors or subcontractors," labor done by a man's team may be fairly regarded as labor done by him; no right arising to any one out of its services, except to him. *Chicago & N. E. R. Co. v. Sturgis*, 7 N. W. 213, 214, 44 Mich. 538.

"Labor and services," as used in Laws 1877, c. 95, giving a lien on logs for labor and services, should not be construed to mean merely the personal or manual labor and services of the claimant, but include those

performed by his teams and servants. *Hogan v. Cushing*, 5 N. W. 490, 491, 49 Wis. 169.

LABOR ORGANIZATION.

As conspiracy, see "Conspiracy."

LABOR PERFORMED.

"Labor performed," as used in St. 1855, c. 231, § 1, giving a lien on a vessel for labor performed, material used, or labor and materials used in the construction, launching, or repairs of, or for constructing the launching ways for, or for provisions, stores, or other articles furnished for or on account of, the vessel, means merely labor performed for the construction of a vessel; and hence no lien can be claimed for labor or materials which were not actually used in the construction of the vessel, or fitted and prepared for that purpose. The words "or labor and materials furnished" were inserted to make it clear that the statute covered the case of a person who did not himself perform the labor or own the materials, etc., but does not allow labor and materials, as it does stores and provisions, to be merely furnished on account of the ship. *Young v. The Orpheus*, 119 Mass. 179, 184.

LABOR ON ANY LAND.

Rev. St. 1858, c. 153, § 12, providing that any person performing manual "labor upon any land," etc., shall be entitled to a lien thereon, includes the making of fences on the land. The words include all labor done directly upon the land for the purpose of preparing it for use as such. *Bailey v. Hull*, 11 Wis. 289, 291, 78 Am. Dec. 706.

LABOR SERVICE.

The janitor of the hall of a town of less than 12,000 inhabitants is not an employé of the town, who can invoke St. 1896, c. 517—providing that, in any towns in which the civil service act has not been applied to the labor service, the selectmen of the towns shall take such action as may be necessary to secure the employment of veterans in the labor service of their respective towns in preference to all other persons except women—in his behalf by mandamus, as a veteran of the late Civil War, as the Legislature intended the words "labor service" to mean such service as defined by the rules of the civil service commissioners, and their rules do not include such an employé. *Johnson v. Kimball*, 48 N. E. 1020, 1022, 170 Mass. 58.

Within the civil service provisions of the charter of the city of Tacoma, by which the classification of the civil service was made as "official service" and "labor service,"

official service comprised those positions of a permanent character, and labor service that of temporary employment. The duty of the flume tender was the custody and care of the flume of the waterworks system, which belonged to, and was operated by, the city. Such duties were permanent, and were designated by the city, rather than by contract, and the compensation was properly designated as official service. *State v. Smith*, 19 Wash. 644, 54 Pac. 33.

LABORER.

See, also, "Mechanic."

See "Agricultural Laborer"; "Chinese Laborer"; "Co-laborer"; "Day Laborer"; "Emigrant Laborers"; "Hand Laborers."

All laborers, see "All."

Every laborer, see "Every."

Other laborer, see "Other."

A laborer, as defined by Webster, is one who works at a toilsome occupation; a man who does work requiring little skill, as distinguished from an artisan; sometimes called a "laboring man." Clerks, agents, cashiers of banks, and all that class of employes whose employment is associated with mental labor and skill, are not considered laborers. Every human being who follows any legitimate employment or discharges the duties of any office is, in a broad sense, a laborer. The President of the United States, a Governor of a state, and the Justices of the Supreme Court are all laboring men, in the sense that they do a good deal of hard work, much of which is, indeed, attended with physical and muscular exertion; but at the same time they cannot properly be termed manual laborers, either in the popular sense in which these words are understood and used, or in the sense in which the term "laborers" was employed in the statute giving a laborer a lien on the property of his employer. In determining whether a particular clerk or other employe is really a laborer, the character of the work he does must be taken into consideration, and he must be classified, not according to the arbitrary designation given to his calling, but with reference to the character of his services. *Oliver v. Macon Hardware Co.*, 25 S. E. 403, 405, 98 Ga. 249, 58 Am. St. Rep. 300; *McPherson v. Stroup*, 28 S. E. 157, 159, 100 Ga. 228.

The term "laborer" is no more comprehensive than the term "employe." *Frick Co. v. Norfolk & O. V. R. Co.* (U. S.) 86 Fed. 725, 728, 32 C. C. A. 31.

Code, § 1241, which provides that the homestead is subject to execution or forced sale in satisfaction of judgments obtained on debts secured by "mechanics", laborers, and vendors' liens" on the premises, does not include a materialman's lien. *Richards v. Shear*, 11 Pac. 607, 608, 70 Cal. 187.

A laborer is one who labors with physical power, and under the direction of another, at fixed wages. *Kansas City v. McDonald*, 80 Mo. App. 444, 448.

The word "laborer," as used in the act relating to mechanics' liens, shall be construed to include any mechanic, workman, artisan, or laborer employed in or about any such work for which a lien may be had. *Comp. Laws Mich.* 1897, § 10,738.

In the statute giving laborers having claims against insolvent corporations priority, it is provided that the word "laborers" shall be construed to include all persons doing labor or services of whatever character for or as workmen or employes in the regular employ of such corporations. *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 33 N. J. Eq. (6 Stew.) 192, 194; *Lehigh Coal & Navigation Co. v. Central R. Co. of New Jersey*, 29 N. J. Eq. (2 Stew.) 252, 253.

The Century Dictionary defines a "laborer" as "one who labors or works with mind or body, or both, but specifically one who is engaged in some toilsome physical occupation, or, in a more restricted sense, one who performs work requiring little skill or special training, as distinguished from a skilled workman or one engaged especially in husbandry." *Cochran v. A. S. Baker Co.*, 61 N. Y. Supp. 724, 30 Misc. Rep. 48.

A laborer is one who labors with his physical powers in the service of and under the direction of, another, for fixed wages. *Blanchard v. Portland & R. F. Ry.*, 32 Atl. 890, 891, 87 Me. 241; *Meands v. Park*, 50 Atl. 706, 707, 95 Me. 527.

A laborer is one who performs manual labor. *In re Ho King* (U. S.) 14 Fed. 724, 725; *Wildner v. Ferguson*, 43 N. W. 794, 42 Minn. 112, 6 L. R. A. 338, 18 Am. St. Rep. 495; *Milligan v. San Antonio & G. S. Ry. Co.* (Tex.) 46 S. W. 918, 919; *McPherson v. Stroup* (Ga.) 28 S. E. 157, 159; *Weatherby v. Saxony Woolen Co.* (N. J.) 29 Atl. 326; *Coffin v. Reynolds*, 37 N. Y. 640, 646; *Hovey v. Ten Broeck*, 26 N. Y. Super. Ct. (3 Rob.) 316; 320; *Whitaker v. Smith*, 81 N. C. 340, 342, 31 Am. Rep. 503; *Weymouth v. Sanborn*, 43 N. H. 171, 173, 80 Am. Dec. 144; *Schwacke v. Langton* (Pa.) 12 Phila. 402; *Rogers v. Dexter & P. R. Co.* (Me.) 27 Atl. 257, 21 L. R. A. 528; *Appeal of Wentworth*, 82 Pa. 469, 471; *Boyle v. Mountain Key Min. Co.* (N. M.) 50 Pac. 347, 350; *Williams v. Link* (Miss.) 1 South. 907; *Stuart v. Poole*, 38 S. E. 41, 112 Ga. 818, 81 Am. St. Rep. 81; *King v. Kelly* 25 Minn. 522, 524; *Meands v. Park* (Me.) 50 Atl. 706, 707; *Wakefield v. Fargo*, 90 N. Y. 213, 217; *Farinholt v. Luckhard* (Va.) 21 S. E. 817, 90 Va. 936, 44 Am. St. Rep. 953; *St. Louis S. W. Ry. Co. v. Lyle* (Tex.) 26 S. W. 264, 265; *St. Louis, A. & T. Ry. Co. v. Matthews*, 12 S. W. 976, 75 Tex. 92; *Johnston v.*

Barrilla, 41 Pac. 656, 658, 27 Or. 251, 50 Am. St. Rep. 717; Missouri, K. & T. Ry. Co. v. Baker, 14 Kan. 563, 566; Epps v. Epps, 17 Ill. App. (17 Bradw.) 196, 201.

The word "laborer," as used in the title to Laws 1889, c. 204, entitled "An act to fix the amount of wages of laborers exempt from process of attachment, garnishment, or execution," being used in connection with "wages" may, in a general sense, be applied to employes other than workmen engaged in manual labor, consistently with the provisions of the act. Hence the law will not be in conflict with the constitutional provision which requires the subject of a law to be expressed in its title. *Boyle v. Vanderhoof*, 47 N. W. 396, 397, 45 Minn. 81.

A laborer, within the statutes exempting from garnishment the wages of a "laborer," is one whose work depends on mere physical power to perform ordinary manual labor, and not one engaged in services consisting mainly of work requiring mental skill or business capacity, and involving the exercise of intellectual faculties. *Kline v. Russell*, 39 S. E. 477, 113 Ga. 1085 (citing *Oliver v. Macon Hardware Co.*, 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300).

The term "laborer," as used in a Constitution relating to the exemption of wages of laborers, was intended to apply to manual laborers, whose claims are usually small, and, owing to the necessity of the laborer, promptly enforced. *Butler v. Clark*, 46 Ga. 466-468.

The statement in an application for a life insurance policy, in answer to the question as to what the applicant's occupation was, that he was laborer, when in fact he had suspended labor for several years prior to the making of the application, either on account of old age or through continuous disability, was misleading, and the policy issued in pursuance of such application is avoided. *United Brethren Mut. Aid Soc. v. White*, 100 Pa. 12, 17.

A person may be properly referred to as a laborer, or as belonging to the laboring class, although at the particular time to which such reference is made he may, by reason of inability to obtain work, sickness, or other cause, not be actually employed as a laborer. *United States v. Chung Ki Foon* (U. S.) 83 Fed. 143, 144.

"Laborers," as used in Laws 1892, c. 688, § 54, making stockholders of corporations personally liable for all debts due any of their laborers, servants, or employes, other than contractors, for services performed by them, are those who toil in a menial capacity. *Bristor v. Kretz*, 49 N. Y. Supp. 404, 405, 22 Misc. Rep. 55.

Mode of payment.

The term "laborer" includes one employed to puddle iron, though he is paid by the job, and not by the day. *Adcock v. Smith*, 37 S. W. 91, 92, 97 Tenn. (13 Pickle) 873, 56 Am. St. Rep. 810.

Chief Justice Horton, speaking for the supreme court in *State v. Martindale*, 47 Kan. 147, 150, 27 Pac. 582, says: "The words 'laborers, workmen, mechanics, and other persons,' in Laws 1891, c. 104, § 1, relating to the employment of such persons by public corporations for more than eight hours per day, evidently do not embrace any officer or employe for whom an annual salary has been specifically named and appropriated by the Legislature. Thus a person contracting to do a certain amount of work for a certain sum of money cannot recover a greater sum for the reason that he has worked over eight hours a day in performing such work." *Billingsley v. Marshall County Com'rs*, 49 Pac. 329, 5 Kan. App. 435.

Skill used.

"A laborer is defined by Webster to be one who labors in a toilsome occupation; a man who does work that requires little skill, as distinguished from an artisan." *Bloom v. Richards*, 2 Ohio St. 387, 401.

"Laborers," as used in Act July 23, 1868, giving laborers a lien, is employed to mean one who labors in some toilsome occupation—one who does work that requires little skill. *Dano v. Mississippi, O. & R. R. Co.*, 27 Ark. 564, 567.

Within a statute giving a laborer a lien, a laborer is one who labors in a toilsome occupation; a man who does work that requires little skill, as distinguished from an artisan. *Savannah & C. R. Co. v. Callahan*, 49 Ga. 506, 511.

In the laborer's lien act of July 23, 1868 (*Gantt's Dig.* p. 740), the word "laborer" must be understood in its ordinary sense, and is distinguished from "mechanic" or "artisan," as used in other lien acts. *Taylor v. Hathaway*, 29 Ark. 597, 601.

"Laborer," as used in Act July 3, 1868, providing that laborers who perform work and labor for any person under a written or verbal contract shall have an absolute lien on the product of their labor for such work and labor, should be construed according to its common acceptance, and to mean men who do work that requires little skill, as distinguished from an artisan. It is not to be construed literally, as giving to every laborer a lien for his labor. *Guise v. Oliver*, 11 S. W. 515, 51 Ark. 356.

Actor or performer.

A laborer is one who is hired to do manual labor, but does not include every per-

son who performs labor for compensation. One who furnishes a performance consisting of music, dancing, and feats of contortion is not a laborer. *Wirth v. Calhoun*, 89 N. W. 785, 786, 64 Neb. 316.

Agent.

Gen. St. 1878, c. 66, § 310, subd. 11, exempting from garnishment the wages of a laboring man, to a certain amount, means a person whose work is manual; those who are responsible for no independent action, but who do a day's work or stated job under the direction of a superior; those who work for wages, etc. The term does not include an agent who sells goods by sample. *Wildner v. Ferguson*, 43 N. W. 794, 795, 42 Minn. 112, 6 L. R. A. 338, 18 Am. St. Rep. 495.

A traveling agent is not a laborer, within the meaning of Acts 1848, § 18, making the stockholders of manufacturing corporations individually liable for debts due their "laborers" and servants. *Williamson v. Wadsworth* (N. Y.) 49 Barb. 294, 298.

A traveling agent of a machine company is not a laborer, within the meaning of Acts 1887, No. 94, giving laborers preferences for salary due from the master, even though such agent occasionally does some manual work in adjusting machines sold and operating new ones, and in making them work properly, and in instructing others in such matters. *Appeal of Clark*, 59 N. W. 150, 151, 100 Mich. 448.

Apprentice or servant distinguished.

"Laborer" is more distinctive than "servant," and embraces a smaller class, comprehending only such as perform labor with their hands. *Hoovey v. Ten Broeck*, 26 N. Y. Super. Ct. (3 Rob.) 316, 320.

As used in a statute conferring a preference on claims for services performed by a "laborer, servant, or apprentice," the word "servant" is limited by the more specified words "laborer" and "apprentice," with which it is associated, and comprehends only persons performing the same kind of service that was due from laborers and apprentices. *Vane v. Newcombe*, 10 Sup. Ct. 60, 64, 132 U. S. 220, 33 L. Ed. 310 (citing *Wakefield v. Fargo*, 90 N. Y. 213).

Architect or draftsman.

An architect is not entitled to a lien for drawing plans and specifications for a building, under Pub. St. c. 391, § 1, giving a lien to any person to whom a debt is due for "labor performed or furnished" and actually used in the erection of a building. *Mitchell v. Packard*, 47 N. E. 113, 114, 168 Mass. 467, 60 Am. St. Rep. 404.

Laws 1862, c. 478, authorizes a lien to be created in favor of any person who shall

perform any labor or furnish any material in building any house, etc. Held, that the words "any person who shall perform any labor" mean not only manual labor, but any work done toward the erection of the building, and hence an architect is entitled to a lien. *Stryker v. Cassidy*, 76 N. Y. 50, 52, 32 Am. Rep. 262 (reversing 10 Hun, 18).

In Laws Ohio 1894, par. 185, giving a lien to a person who performs labor for erecting, altering, repairing, or removing a house by virtue of a contract, etc., "labor" includes not merely manual or unskilled labor, but extends to the labor of an architect in preparing plans and specifications and in superintending construction, where it appears that such plans and specifications were prepared with a view to the particular location where the building was actually erected, and in pursuance of a contract having a substantial financial basis. *Phoenix Furniture Co. v. Put-in-Bay Hotel Co.* (U. S.) 66 Fed. 683, 685.

Gen. St. p. 589, c. 90, § 1, which provides that whoever performs labor or furnishes materials and machinery for erecting, etc., any house or other building by virtue of a contract or agreement with the owner or agent thereof, shall have a lien, etc., includes the services of one who prepares plans and specifications and superintends the erection of a building. *Knight v. Norris*, 13 Minn. 473, 475 (Gil. 438, 439).

Under Code, § 318, providing that a person who has done work or labor on a building or improved land may have a lien on the building and the lot of land on which it is erected, the services of an architect in preparation of drawings, plans, and specifications for a building, and in superintending the erection thereof, should be included. *Hughes v. Torgerson*, 11 South. 209, 96 Ala. 346, 16 L. R. A. 600, 38 Am. St. Rep. 105.

An architect is not a mechanic or laborer, so as to entitle him to a mechanic's lien on a building for which he made drawings and specifications. *Price v. Kirk* (Pa.) 13 Phila. 497, 498.

A laborer, within the meaning of a statute giving a mechanic's lien to any person for labor performed or materials furnished for the erection and construction of a building, includes one who draws the plans and superintends and directs its construction. *Mutual Ben. Life Ins. Co. v. Rowand*, 26 N. J. Eq. (11 C. E. Green) 389, 397.

The terms "mechanic or laborer," within the meaning of the statute preferring the claims of mechanics or laborers, do not include a draftsman. *Leinau v. Albright*, 10 Pa. Co. Ct. R. 171, 173.

Bartender.

A bartender, whose duties are mainly manual, and who is also required to keep

books, as a part of his duties, is a laborer, within the meaning of the law creating a lien in favor of laborers for their labor upon the property of their employers. *Lowenstein v. Meyer*, 40 S. E. 728, 727, 114 Ga. 709.

Bookkeeper or auditor.

The term "laborer," as used in Rev. St. 1895, § 3312, providing that all mechanics, laborers, and operatives who have performed labor in the construction or operation of a railroad shall have a lien thereon, apparently includes only those who have performed manual labor, and a bookkeeper and auditor in the employ of a construction company which built a railroad is not entitled to a lien for the amount due him for his services. *Milligan v. San Antonio & G. S. R. Co. (Tex.)* 46 S. W. 918, 919.

Act 1892, providing that laborers and workmen and all persons doing labor or service, of whatever character, in the regular employ of an insolvent corporation, shall have a first and prior lien, includes a bookkeeper, for his services involve "labor," in the strict sense of that word. *Consolidated Coal Co. v. Keystone Chemical Co.*, 35 Atl. 157, 54 N. J. Eq. 309.

A bookkeeper is included in the term "laborer," as used in 2 Rev. St. (5th Ed.) p. 658, § 18, rendering stockholders of a mining company liable for all debts due and owing to their laborers. *Hovey v. Ten Broeck*, 26 N. Y. Super. Ct. (3 Rob.) 316, 320.

A bookkeeper of a mining company is not a laborer, within the title of 22 St. at Large, p. 502, entitled "An act to provide for laborers' liens." *Malcomson v. Wappoo Mills (U. S.)* 86 Fed. 192, 198.

A bookkeeper is neither a laborer nor a servant, in view of an act to protect employes and laborers in their claims for wages (3 Starr & C. Ann. St. 828), and the act concerning voluntary assignments, relating to preferred claims for wages (1 Starr & C. Ann. St. 1305). *Signor v. Webb*, 44 Ill. App. 338, 339.

A bookkeeper is not a laborer, within Laws 1891, c. 415, § 8, preferring the wages of laborers of insolvent corporations. *Cochran v. A. S. Baker Co.*, 61 N. Y. Supp. 724, 30 Misc. Rep. 48.

A printer's bookkeeper, employed at a weekly salary, is a laborer, and entitled to a prior lien on an insolvent employer's assets, under Laws 1895, p. 242, amending Act June 15, 1887, giving laborers such a lien. *Heckman v. Tammen*, 56 N. E. 361, 363, 184 Ill. 144.

Clergyman.

Act Cong. Feb. 28, 1885, c. 164, 23 Stat. 832 [U. S. Comp. St. 1901, p. 1290], prohibits

the importation and migration of foreigners and aliens under contract to perform labor or service of any kind in the United States. The act provides that the prohibitions of the act shall not apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants. Held, that the words "labor or service" include the services of an alien clergyman residing in England. The words "labor or service" should not be taken in any restricted sense. Every kind of industry and every employment, manual or intellectual, are embraced within the language used, subject to the specific exceptions. *United States v. Church of the Holy Trinity (U. S.)* 36 Fed. 303, 305 (reversed in *Holy Trinity Church v. United States*, 12 Sup. Ct. 511, 513, 143 U. S. 457, 36 L. Ed. 226).

Clerk.

The term "laborer," in a statute exempting the wages of a laborer from garnishment, includes a clerk and bookkeeper. *Lamar v. Chisholm*, 77 Ga. 306.

The term "laborers," in the clause of the Constitution of 1868 giving mechanics and laborers a lien upon the property of their employers for labor performed or material furnished, does not include clerks or persons doing general service, although they may labor. *Richardson v. Langston*, 68 Ga. 658, 659.

The services of the clerk of a canal company are not labor performed in the construction of the canal, within the meaning of a statute requiring the company to deposit a certain sum as security for labor performed or furnished in the construction of the canal. *Crowell v. Cape Cod Ship Canal Co.*, 46 N. E. 424, 168 Mass. 157.

The work performed by a mailing clerk of a newspaper corporation, whose duty it is to get out, address, and otherwise deliver papers to the patrons, being mechanical and manual, is embraced within the terms of a statute providing that all debts which shall be owing for labor by any corporation at the time it shall become insolvent shall be preferred. *Michigan Trust Co. v. Grand Rapids Democrat*, 71 N. W. 1102, 1103, 113 Mich. 615, 67 Am. St. Rep. 486.

A railway clerk, whose services under his contract consisted mainly of work requiring mental skill or business capacity, and involving the exercise of his intellectual faculties, rather than work, the doing of which properly would depend upon a mere physical power to perform ordinary manual labor, is not a laborer, within the statutes relating to the exemption from garnishment of a laborer's wages. *Boynton v. Pelham*, 33 S. E. 876, 108 Ga. 794; *Hunter v. Morgan*, 33 S. E. 986, 987, 108 Ga. 409 (citing *Oliver v. Macon Hardware Co.*, 25 S. E. 403, 98 Ga. 249, 58

Am. St. Rep. 300; *McPherson v. Stroup*, 28 S. E. 157, 100 Ga. 228).

Within the meaning of Code, § 3554, declaring that "all journeymen, mechanics, and day laborers shall be exempt from the process and liability of garnishment of their wages," a man in the employ of a railroad banking company as a forwarding clerk, for which he receives monthly wages, and whose duty is to report daily when the drays commence work, and to attend to the forwarding of goods consigned to said company so long as the drays continue to work, and at the close of his day's work to report at the office of the company to assist in checking up and correcting any mistakes in the shipments or receipts during the day—he being paid monthly, and the company having the right to discharge him at any time that his services are not needed, usually giving a month's notice—is a laborer, and his wages are not subject to garnishment. *Claghorn v. Saussy*, 51 Ga. 576, 577.

Clerk in store.

The term "laborer," as used in Code, § 1244, providing that the wages of every laborer or mechanic, to a certain amount, shall be exempt from garnishment or other legal process, means one who subsists by physical toil, in distinction from one who subsists by professional skill, and physical toil being the main ingredient of services rendered. A clerk in a store is a laborer, and his wages are exempt. *Williams v. Link*, 1 South. 907, 64 Miss. 641.

As used in Code, § 1974, giving a lien to a laborer on the property of his employer, the word "laborer" does not include a clerk in a store. *Hinton v. Goode*, 73 Ga. 233, 234.

A person employed as a clerk, bartender, and boy of all work, to labor in and about a retail grocery and liquor store, is a laborer, within the meaning of a statute entitling a laborer to a general lien on the property of his employer. *Oliver v. Boehm*, 63 Ga. 172.

A statute giving laborers a lien for work done for their employers does not include clerks in stores or other establishments, unless they perform manual labor. *Ricks v. Redwine*, 73 Ga. 273, 275.

A general salesman in a clothing establishment is not a laborer, within the Code, exempting from the process of garnishment the wages of a laborer. *Ensel v. Adler*, 35 S. E. 334, 110 Ga. 326.

Conductor of street railway.

Civ. Code, § 4732, exempting from the process of garnishment "the wages of a laborer," means one whose work requires mere physical power to perform ordinary manual labor, not requiring mental skill or business capacity, or involving the exercise of his in-

tellectual faculties; and a street railway conductor, whose duties are to keep the car in general order, to couple and uncouple trail cars when used, to keep lights dusted off and in proper condition, to keep the guard rails of the car in proper position, to attend to the trolley and keep it in place, to keep the seats of the car turned, to help passengers on and off the car, to help to put the car back on the track if it gets off, and to help remove all obstructions from the track, is a laborer, within the meaning of the statute. *Stuart v. Poole*, 38 S. E. 41, 112 Ga. 818, 81 Am. St. Rep. 81 (citing *Oliver v. Macon Hardware Co.*, 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300).

A conductor of a street car, engaged in performing his ordinary duties on Sunday, while the cars were being operated as they are usually run on secular days for the purpose of accommodating the public generally, and earning money from any one who might see fit to travel upon it, is "laboring," within the statute which prohibits any labor on Sunday, except of necessity or charity; and if injured, while so engaged in violating the law, by collision with another car, he cannot recover for such injury. *Day v. Highland St. R. Co.*, 135 Mass. 113, 114, 46 Am. Rep. 447.

Contractor.

"Laborers," within the meaning of the act of 1872 giving a preference to laborers for claims for wages, includes farm laborers, if the employment be continuous in character, but does not include persons who hire a hay press and threshing machine, which they operate during the season wherever they find employment. They are not farm laborers, but are contractors. *Wilson v. Gibson*, 10 Pa. Co. Ct. R. 191, 193.

A person who contracts to excavate and grade a street at a certain rate per cubic yard, and uses two carts and two or three horses in the prosecution of work, with a number of men sufficient, with himself, to keep the carts and horses going, is not a laborer, within the meaning of the act of April 15, 1845, exempting the wages of any laborer from attachment in execution. *Heebner v. Chave*, 5 Pa. (5 Barr) 115, 117.

An employee who so far retains the control of the work in his hands that he is not subject to the direction of his employer while engaged thereat is an independent contractor, and not within the exception of Civ. Code, § 531, relative to clerks', laborers', and mechanics' wages. *Fox v. McClay*, 67 N. W. 888, 889, 48 Neb. 820.

An independent contractor to mine phosphate rock at a certain price per ton, employing others to do the work, is not a laborer or employé, within Act S. G. March 5, 1897,

providing for laborers' liens. *Malcomson v. Wappoo Mills* (U. S.) 85 Fed. 912, 913.

Gen. St. 1878, c. 32, §§ 63-77, giving a lien to laborers for labor upon logs or timber, and providing that the act is intended for the protection of laborers for hire, means those performing manual labor only, and does not include a person interested in contracting, cutting, hauling, banking, or driving logs by the thousand. *King v. Kelly*, 25 Minn. 522, 524.

Act April 9, 1872, giving a preference to claims of laborers against decedents' estates, does not include one who performs a contract to deliver lumber by hiring teams and drivers, but who does no hauling himself. In the contemplation of the act, laborers are those who perform with their own hands the contract they make with the employer. *Appeal of Wentroth*, 82 Pa. 469, 471.

Rev. St. c. 91, § 38, as amended by Pub. St. 1889, c. 183, giving a statutory lien to whoever labors on logs, was designed for the protection of the laborer only; and the word "laborer," as used in such statute, is one who performs manual labor for wages, under the direction of his employer, and does not include persons who had taken out a contract to cut and haul logs on a tract, and were independent in their methods of doing it, and were carrying out the contract largely through the labor of others, though they performed some physical labor and used their own teams. They were not mere laborers working for fixed wages, the rate of which would not be varied by circumstances. When they labored themselves, it was not for wages, but to increase the profits by saving wages. *Littlefield v. Morrill*, 54 Atl. 1109, 1110, 97 Me. 505, 94 Am. St. Rep. 513.

The term "laborer," as used in Code, § 531 providing that nothing shall be exempt from execution or attachment for the wages of clerk, laborer, or mechanic, is one who is hired to do the manual or menial labor of another, but it does not include every person who performs labor for compensation. The statute was designed to furnish relief to persons specifically enumerated in the collection of debts due them for their personal services, and not to those who contract and furnish the labor and services of others. So a contractor is not a laborer. Thus a person who contracts to furnish all help and make and burn brick for a certain price per thousand, and also agrees to keep the machinery furnished by the other party in good repair, to supply oil for the same, and fuel and cars for the team furnished by the other party, is not entitled to the benefit of such statute. *Henderson v. Nott*, 54 N. W. 87, 88, 86 Neb. 154, 88 Am. St. Rep. 720.

One who built a house under a contract to build it for a certain sum, doing some of

the work himself, and employing assistants who worked under him, is not a laborer, within the meaning of Code 1892, § 1963, exempting the wages of every laborer or person working for wages from attachment or garnishment. *Heard v. Crum*, 18 South. 934, 935, 73 Miss. 157, 55 Am. St. Rep. 520.

The term "laborer," in Laws 1883, c. 349, § 1, providing that all assignments hereafter made for the benefit of creditors which shall contain or give any preference to one creditor over other creditors, except for wages of laborers, servants, or employes earned within six months prior thereto, shall be void, does not include the owner of a steam wood factory, who, under contract with another who furnishes rough planks, manufactures such planks for the latter. Contractors who have entire control of the work to be done, and are in no way subject to the control or direction of the person with whom they contracted, while performing the work they contracted to do for them, are not laborers, in the sense that they were earning wages of some person for the work to be done by them. To constitute a laborer or employe, who can be said to be earning wages of an employer, they must be holding such a relation to the employer that he can direct and control them in and about the work which they are doing for him. *Lang v. Simmons*, 25 N. W. 650, 652, 64 Wis. 525.

In *Balch v. New York & O. M. R. Co.*, 46 N. Y. 521, it was held that the words "employer" and "laborer," as used in the general railroad act of 1850, which gives the laborer a claim against the company for the indebtedness of a contractor, are used in their ordinary and usual sense, and imply the personal service and work of the individual designed to be protected. The former does not include one who contracts for and furnishes the labor and services of others, or who contracts for and furnishes a team or teams for work, with or without his own services. *Fidelity & Deposit Co. v. Parkinson* (Neb.) 94 N. W. 120, 122.

Contractor on railroad.

Sand. & H. Dig. § 6251, providing a lien for every laborer or other person who shall do or perform any work or labor on a railroad, includes only those who actually labor, and does not apply to a contractor who does not perform any work or labor personally. *Little Rock, H. S. & T. Ry. Co. v. Spencer*, 47 S. W. 196, 197, 65 Ark. 183, 42 L. R. A. 334 (citing *Gurney v. Atlantic & G. W. R. Co.*, 58 N. Y. 358; *Aikin v. Wasson*, 24 N. Y. 482; *Lehigh Coal & Navigation Co. v. Central R. Co.*, 29 N. J. Eq. [2 Stew.] 252).

The term "laborer," as used in 1 & 2 Wm. IV, c. 37, relating to claims by any artificer, workman, or laborer, would not include a person who takes the contract to execute

a certain cutting on a railway at a certain sum per cubic yard, employing several men under him to assist in doing the work. *Riley v. Warden*, 2 Exch. 59, 67.

Within the meaning of Const. art. 15, § 7, which provides that the stockholders of all corporations and joint-stock associations shall be individually liable for all labor performed for such corporations or associations, the term "laborer" does not include a contractor who contracts to complete a certain section of railroad. *Peck v. Miller*, 39 Mich. 594, 599.

The term "laborer" is no more comprehensive than the term "employé." As used in Code 1887, § 2485, giving a prior lien to certain laborers, does not include one who lays the track, constructs the overhead line, and strings feeder wires for an electric company at an agreed price per foot or mile. Such a person is a contractor. *Frick Company v. Norfolk & O. V. R. Co.* (U. S.) 86 Fed. 725, 738, 32 C. C. A. 31.

Act Ky. March 20, 1876, giving a lien in favor of laborers, employés, etc., for work done and materials furnished in keeping a railroad a going concern, etc., should be construed not to include contractors supplying laborers and teams for the construction and repairs of a railroad, being paid for the same by the day, and either party having the right to stop work at the end of any day. *Tod v. Kentucky Union Ry. Co.* (U. S.) 52 Fed. 241, 243.

Cook.

A hotel cook is not a laborer, within the meaning of Act April 9, 1872, securing a lien for money due for labor and services by any laborer, miner, mechanic, or clerk, etc. Appeal of Sullivan, 77 Pa. (27 P. F. Smith) 107, 108.

Cropper on land.

Acts 1890, c. 56, making it unlawful to induce a laborer who has contracted to work for another for a specified time to leave his employer before his contract has expired, without the consent of the employer, includes a cropper who has hired to work land for a part of the crop. *Ward v. State*, 12 South. 249, 250, 70 Miss. 245.

Where a person rented a farm to keep till he had gathered and marketed the crop, one-half of which he was to pay as rent—the owner of the land to furnish team, tools, and feed, but to pay nothing for making the crop—the contract was one of rental and the tenant was not a laborer within Mansf. Dig. § 4451, providing that contracts for labor for a longer period than one year shall be void unless in writing. *Mondschein v. State*, 55 Ark. 389, 18 S. W. 383.

Domestic distinguished.

"Laborer," as defined by Bouvier, is "a servant in husbandry or manufacture, not living intra mœnia"; and, no doubt, that was the original technical meaning of the word. It was usually applied to those employed in toilsome outdoor labor, as distinguished from domestic servants. *Farinholt v. Luckhard*, 21 S. E. 817, 90 Va. 936, 44 Am. St. Rep. 953.

Editor and reporter.

Act Feb. 17, 1848, § 18, providing that the stockholders of any company organized under the provisions of the act of which the section forms a part shall be jointly and severally individually liable for all debts that may be due and owing to all their laborers or servants and apprentices for services performed for such corporation, "is not confined to manual laborers, nor those needing protection by reason of presumable ignorance," but, in the case of a newspaper, includes a reporter and an editor, when they are not officers of the corporation. *Harris v. Norvell* (N. Y.) 1 Abb. N. C. 127, 129.

Employés of a newspaper corporation, whose work consists of writing editorials, the preparation of copy for the printers, the direction of the make-up of the paper, proof-reading, reporting, and gathering news, being engaged in intellectual rather than manual labor, are not entitled to claim the benefits of a statute which provides "that all debts which shall be owing for labor by any corporation at the time it shall become insolvent shall be preferred claims, against the estate of such insolvent debtor." *Michigan Trust Co. v. Grand Rapids Democrat*, 71 N. W. 1102, 1103, 113 Mich. 615, 67 Am. St. Rep. 486.

Employé distinguished.

See "Employé."

Engineer.

Const. art. 15, § 7, and Comp. Laws, § 2308, making corporation stockholders liable for labor performed for the corporation, does not include the services of an assistant chief engineer of a railroad company. The term "labor," in some extended senses, will include every possible human exertion, mental and physical; and, in that broad signification, it would be hard to find any case which would not come within the law. The precise line between what is commonly called "labor" and other employment cannot be drawn with absolute precision, but the position of an assistant chief engineer would never have been classed as that of a laborer, nor his work as labor, in the popular sense. It is mostly direction and scientific work, involving much more superintendence than personal exertion in manual labor. He is chosen for his knowledge, and not for his muscu-

lar capacity, in which latter quality he may or may not be eminent. *Brockway v. Innes*, 39 Mich. 47, 48, 33 Am. Rep. 348.

Members of the engineers' corps are not included in the term "laborers," as used in Laws 1882, c. 10, requiring railroad companies to pay to the Governor a certain sum, to be expended by him in paying the claims of laborers. *State v. Rusk*, 13 N. W. 452, 55 Wis. 465.

The term "laborer," in Act April 11, 1849, § 10, incorporating a steamship company, and providing that the stockholders shall be individually liable for all debts due and owing to their laborers and operators, does not include the consulting engineer. "If we should attempt to define the plaintiff, in reference to the services he rendered, we should scarcely describe him as a laborer or an operator. Such words we should ordinarily apply to an entirely different class of men—to a class who obtain their living by coarse manual labor, as distinct from professional men; men who work with their hands, rather than their heads. 'Operative' though very nearly the same signification, is somewhat more comprehensive than 'laborer.' The services of plaintiff were very like those rendered by the lawyer. Each may involve some manual labor, but that is the incident rather than the principal of the services. The plaintiff, in my opinion, correctly described his services as professional, as distinguished from those of a laborer or operative." *Ericsson v. Brown* (N. Y.) 38 Barb. 390-392.

A laborer is one who works at a toll-some occupation—a man who does work requiring little skill, as distinguished from an artisan. Thus a civil engineer is not a laborer. *Pennsylvania & D. R. Co. v. Leuffer*, 84 Pa. 168, 24 Am. Rep. 189. Mechanical engineers, electrical engineers, clerks, agents, cashiers of banks, bookkeepers, and all that class of employes whose employment is associated with mental skill and labor, are not considered laborers. Hence a locomotive engineer is not a laborer, so as to exempt his wages as laborer's wages. *State ex rel. I X L Grocery Co. v. Land*, 32 South. 433, 108 La. 512, 58 L. R. A. 407.

Same—Civil engineer.

Laws 1850, p. 214, § 10, providing that all stockholders of every railroad company shall be jointly and severally liable for all the debts due or owing to any of its laborers and servants for services performed for such corporation, means persons employed in the service of the company who have not a different, proper, and distinctive appellation, such as officers and agents of the company. The engineer, the master mechanic, and the conductor are as fully entitled to its benefits as is the man who shovels gravel. The latter

is, in law, no more and no less a servant of the company than either one of the former; and hence a civil engineer, and a rodman in his employ, and all others performing services not as officers and agents, are laborers and servants of the company. *Conant v. Van Schaick* (N. Y.) 22 Barb. 87, 99.

A civil engineer engaged in the construction of a building, though he may have performed some work with his hands—some work attended with physical and muscular exertion—but whose services, in the main, were not such as depended for their proper performance on mere physical power to do ordinary manual labor, but consisted principally of work requiring mental skill or business capacity, and involving the exercise of his intellectual faculties, is not a laborer, whose wages are exempt from garnishment. *McPherson v. Stroup*, 28 S. E. 157, 159, 100 Ga. 228.

Acts 1848, § 18, authorizing the organization of manufacturing companies, makes the stockholders of such companies individually liable for debts due their laborers and servants. Held, that the words "laborers and servants" meant those acting in subordination to others, under the direction and control of the others, and hence a civil engineer and traveling agent was not a servant, within the meaning of the statute. *Williamson v. Wadsworth* (N. Y.) 49 Barb. 294, 298 (citing *Richardson v. Abendroth*, 43 Barb. 162).

Act Jan. 21, 1843, as supplemented by Act April 4, 1862, giving a lien to contractors, laborers, and workmen upon the railroads, etc., only means persons engaged in manual labor, and does not include a civil engineer. *Pennsylvania & D. R. Co. v. Leuffer*, 84 Pa. 168, 171, 24 Am. Rep. 189.

"Labor," as used in Ky. Laws 1838, giving a lien to all persons "furnishing or performing labor" for the construction of railroads or other public improvements, means all persons furnishing services, and is not limited to manual labor. A civil engineer who supervises the construction of bridges and the roadbed of a railroad is within the act. *Central Trust Co. v. Richmond, N., I. & B. R. Co.* (U. S.) 54 Fed. 723, 724.

The term "laborers," as used in Rev. St. art. 3312, providing that laborers in the construction or repair of a railroad shall have a lien for wages due, is used in its ordinary sense. Ordinarily this word cannot be used as embracing persons engaged in learned professions, but, rather, such as gain their livelihood by manual toll. When we speak of laboring or working classes, we do not intend to include therein persons like civil engineers, the value of whose services rests rather in their scientific than in their physical ability. In one sense the engineer is a laborer; but so is the lawyer and the doctor and the bank-

er, yet no statistician has ever been known to include these among the laboring classes. *Gulf & B. V. R. Co. v. Berry*, 72 S. W. 1049, 1050, 31 Tex. Civ. App. 408 (citing *Pennsylvania & D. R. Co. v. Leuffer*, 84 Pa. 168, 24 Am. Rep. 189).

Expert.

The term "labor," in some extended senses, would include every possible human exertion, mental and physical. As used in Pub. Acts 1887, No. 94, which provides that all debts which shall be owing for labor by any corporation at the time it shall become insolvent shall be preferred claims against the estate of such insolvent debtor, it includes services performed for a corporation engaged in the manufacturing of mill machinery and fitting out mills by an experienced miller in adjusting and starting machinery in the mills supplied by the corporation. *Appeal of Black*, 47 N. W. 342, 343, 83 Mich. 513.

"Labor," within the meaning of the mechanics' lien law, providing that a mechanic's lien may be acquired by any mechanic or other person who shall do any labor on, or furnish any materials, machinery, fixtures, for, any building, erection, or other improvement, includes the labor of a man remodeling a gas plant for a period of 30 days in order to test the machinery and cause it to meet the requirements of the guaranty given, but does not include service rendered in instructing the superintendent of the owner as to how to run the plant. *Peatman v. Centerville Light, Heat & Power Co.*, 74 N. W. 689, 691, 105 Iowa, 1, 67 Am. St. Rep. 276.

Fireman and stoker.

A contract employing a fireman or stoker on board a steamer for a trip from London to Havana is a memorandum or agreement for the hire of a laborer, within St. 55 Geo. III, c. 184, exempting from a stamp tax memoranda or agreements for the hire of any laborer. *Wilson v. De Zulueta*, 14 Q. B. 405, 414.

Foreman.

The term "laborer," as used in Elliott's *supp.* § 1606, which provides that debts owing to laborers or employes, which shall have accrued by reason of their labor or employment, to an amount not exceeding \$50 to each employe, shall be a preferred debt, includes a man employed by a gas company to have the sole superintendence of the digging of trenches and laying of pipes, with authority to hire and discharge employes at his pleasure. *Pendergast v. Yandes*, 24 N. E. 724, 124 Ind. 159, 8 L. R. A. 849.

The term "labor," in a statute giving a lien to those who labor at cutting or hauling logs, was undoubtedly employed by the Leg-

islature in its limited and popular sense—to designate that class of workmen who labor with physical force in the service and under the direction of another for fixed wages—and does not include a foreman or superintendent of the entire logging operation, having charge of the men engaged in cutting and hauling the logs, but who performed no person manual labor on the logs. *Meands v. Park*, 50 Atl. 706, 707, 95 Me. 527 (citing *Rogers v. Dexter & P. R. Co.*, 85 Me. 372, 27 Atl. 257, 21 L. R. A. 528).

The term "labor or work," in a statute giving a lien for labor and work in mines, includes the services of a foreman of a mine, who is employed to boss the men at work in the mine, keep their time, and give them orders for their pay. *Capron v. Strout*, 11 Nev. 304, 310.

The term "laborer," in a statute providing that all mechanics, laborers and operators who may have performed labor in the construction or repair of any railroad, locomotive, or equipment, or in the operating of a railroad, shall have a prior lien for wages, includes one who performs services under contract with a subcontractor of a railroad as foreman or superintendent of laborers engaged in the construction of the road, and furnishes certain tools and teams to carry on the work of construction, and sometimes uses the tools himself, and at other times directs their use by the laborers. "It has been held that a timekeeper and superintendent in the employ of a contractor is not a laborer. *Missouri, K. & T. Ry. Co. v. Baker*, 14 Kan. 563. But we are not disposed so to hold. We think the foreman or superintendent of a company of laborers, who remains with them, directing their work, and sometimes working himself, is within the meaning and intent of the word 'laborer' as used in the statute. While he may not actually work with the shovel, scraper, plow, or other implement, he performs a laborious and necessary part of that work, by overlooking and directing it, and is as indispensable to the construction of the road as the man who actually uses the tools." *Texas & St. L. R. Co. v. Allen* (Tex.) 1 White & W. Civ. Cas. Ct. App. §§ 568, 570.

A "laborer," within the meaning of *Comp. Laws Utah*, giving a lien for wages to any person or persons who shall perform any work or labor upon any mine, or furnish any material, etc., includes a person hired by the owner to oversee the miners, and generally to control and direct its workings and developments, who in the performance of his duties does some manual labor. *Flagstaff Silver Min. Co. v. Cullins*, 104 U. S. 176, 177, 26 L. Ed. 704.

One who has procured a loan for a corporation, and gone to work for such cor-

poration at an annual salary, payable monthly or as he wanted it, acted as foreman, took part in the menial labor required to manufacture the stone made by the corporation, kept the time of the men, solicited orders, collected bills, and did whatever was required of him by the secretary of the company, who acted as its general superintendent, is a "laborer or servant," within the meaning of Laws 1848, c. 40, § 18, making the stockholders of a corporation organized thereunder personally liable for the wages of its laborers or servants. *Short v. Medberry* (N. Y.) 29 Hun, 39, 40.

General manager.

The term "mechanics or laborers," in Burns' Rev. St. 1894, § 7255, entitling mechanics and laborers employed in a shop to a lien for their services, does not include a general manager of the shop.—*Raynes v. Kokomo Ladder & Furniture Co.*, 54 N. E. 1061, 153 Ind. 315.

"Laborer," as used in Laws 1882, c. 10, requiring a railroad company to pay to the Governor of the state a certain sum of money, to be by him expended in paying the claims of laborers, etc., in the construction of a road, only designates those who have performed labor in and about said work, and not members of the engineer's corp or an assistant general manager. *State v. Rush*, 13 N. W. 452, 55 Wis. 465.

Acts 1863, c. 63, § 2, providing that stockholders of a corporation shall be liable for all debts that may be due and owing to their laborers, servants, and apprentices for services performed for such corporation, cannot be construed to include a general manager of a corporation. Laborers mean those who perform menial or manual services for the corporation, and who usually look to the reward of a day's labor for immediate or present support, from whom the company does not expect credit, and to whom its future liability to pay is of no consequence. A laborer is one who is responsible for no independent action, but who does a day's work or a stated job under the direction of a superior. "Laborers" is a word of limited meaning, and refers to a particular class of persons, employed for a defined and low grade of service, performed without responsibility for the acts of others, themselves directed to the accomplishment of the task under the supervision of another. A general manager is not ejusdem generis with a laborer. *Wakefield v. Fargo*, 90 N. Y. 213, 217.

House painter.

House painters are within the provisions and protection of the statutes which give a lien upon buildings to those who furnish labor or materials for the erecting or

repairing thereof. *Martine v. Nelson*, 51 Ill. 422, 423.

Inspector of lumber.

In Laws 1887, Act 94, making all debts for labor by a corporation or person at the time of insolvency preferred claims against the estate, "labor" is not employed in its largest sense, as meaning any one who renders services, and hence does not include the labor of lumber inspectors in measuring and ascertaining the quantity and quality of logs. In re *Sayles*, 52 N. W. 637, 638, 92 Mich. 354.

Intellectual laborer.

The term "laborer" is not limited to those engaged in manual labor, but extends to intellectual labor as well. *Phoenix Furniture Co. v. Put-in-Bay Hotel Co.* (U. S.) 66 Fed. 683, 685; *Brockway v. Innes*, 39 Mich. 47, 48, 33 Am. Rep. 348.

Keeper of stallion.

One whose only occupation was in having the entire care of a stallion moved from stand to stand for breeding purposes was a laborer, within Code, § 4008, exempting from execution certain property to the head of a family, if a laborer. *Krebs v. Nicholson*, 91 N. W. 923, 118 Iowa, 134, 96 Am. St. Rep. 370.

Lawyer.

A lawyer employed by a railroad company on a yearly salary, payable monthly, is not a laborer, within the meaning of Sand. & H. Dig. Ark. § 1425, providing that no preference shall be allowed among the creditors of insolvent corporations, except for the wages and salaries of laborers and employes. *Latta v. Lonsdale* (U. S.) 107 Fed. 535.

Legal service rendered by counsel is not labor, within the meaning of Barb. & C. Ky. St. 1894, § 2492, relative to mechanics' liens upon railroads, providing that all persons who perform labor, or furnish labor, materials, etc., shall have a lien on such railroad for such labor, materials, etc.—*Richmond & I. Const. Co. v. Richmond*, N. I. & B. B. Co. (U. S.) 68 Fed. 105, 113, 15 C. C. A. 289, 34 L. R. A. 625.

Liveryman.

The term "laborer," in the statute exempting from execution the horses, etc., by the use of which the debtor, if a physician, public officer, farmer, teamster, or other laborer, habitually earns his living, may include one who is engaged in the livery business. *Root v. Gay*, 20 N. W. 489, 490, 64 Iowa, 399.

Mail carrier.

Const. art. 11, § 1, providing that homestead exemptions shall not extend to pro-

cess issued on a demand "for services rendered by a laboring person," carries with it the idea of actual physical and manual exertion or toil, and is used to denote that class of persons who literally earn their bread by the sweat of their brows, and who perform with their own hands, at the cost of physical labor, the contracts made with their employers; and one engaged in carrying the United States mail, using his own horse and vehicle therefor, is a "laboring person," within the Constitution. *Farinholt v. Luckhard*, 21 S. E. 817, 90 Va. 936, 44 Am. St. Rep. 953.

Maker of articles for sale.

"Laborer," as used in *Sayles' Civ. St. art. 3179a*, giving a lien to laborers who have performed labor on any railroad, means one who performs manual services in the construction, repair, or operation contemplated by the statute, and does not embrace one who may work in repairing something of his own to sell to a railroad company after it has been rendered suitable, through his toil, to be used in the construction or repair of a railway. *St. Louis S. W. Ry. Co. v. Lyle (Tex.)* 28 S. W. 264, 265; *St. Louis, A. & T. Ry. Co. v. Matthews*, 12 S. W. 976, 75 Tex. 92.

Mechanic.

A mechanic is unquestionably a laborer. *Missouri, K. & T. Ry. Co. v. Baker*, 14 Kan. 563, 567.

In defining who may be included within the term "laborer," as used in a statute giving a lien to laborers, the court said: "Although the plaintiff was a mechanic, he was a laborer, within the true intent and meaning of the statute. A contractor may be a mechanic, but, if he does not perform manual labor, he is not entitled to a laborer's lien on the property of his employer. So a laborer may be a mechanic, and, if he performs manual labor as such mechanic, he is entitled to a laborer's lien on the property of his employer; and a laboring mechanic who performs actual manual labor for his employer is as much entitled to a laborer's lien on his property for the value of the labor performed by him as any other class of laborers." *Adams v. Goodrich*, 55 Ga. 233, 234.

Officer.

Sess. Laws 1891, c. 114, making it unlawful for laborers, workmen, mechanics, or other persons employed by the state of Kansas to work more than eight hours per day, does not include an officer or employé for whom an annual salary has been specifically named and appropriated by the Legislature. *State v. Martindale*, 27 Pac. 852, 853, 47 Kan. 147.

"Labor," as used in *Rev. St. c. 208, § 9*, which provides that no person summoned as trustee shall be charged as such on account of any labor performed by the debtor after the service of the process, etc., includes the official services of the mayor of a city; hence the city cannot be charged as trustee on account of such services. *Robinson v. Aiken*, 39 N. H. 211, 212.

Rev. St. § 63, providing that, in case of the insolvency of any corporation, the laborers in the employ thereof shall have a lien upon the trustees thereof for the amount of wages due to them, etc., and that the word "laborers" shall be construed to include all persons doing labor or service, of whatever character, for, or as workmen or employes in the regulation and employ of, such corporation, should be construed not to include the president of a corporation. The statute does not intend to authorize the directors or officers to employ themselves, and then in case of insolvency to give them the statutory lien, and to prefer them to all the general creditors. The word "laborers" is used in the sense of employes, and does not include the employer. *England v. Beatty Organ Co.*, 4 Atl. 307, 41 N. J. Eq. 470.

Corporation Act, § 63, providing that where a corporation is insolvent the "laborers" and employes shall have a preferred lien for their wages, cannot be construed to include officers. The first legislation upon this subject only provided a preference for laborers. By universal consent, this had reference only to those who performed manual labor, of whatever nature. *Weatherby v. Saxony Woolen Co. (N. J.)* 29 Atl. 326.

Acts 1848, § 18, authorizing the formation of corporations for manufacturing and mechanical purposes, enacts that the stockholders of any company organized under this act shall be jointly and severally liable for all debts due to their laborers and servants for services performed for the corporation. Held, that the words "laborers and servants" meant those generally designated by such names as performing manual labor, etc., and did not include officers and agents, and hence the secretary of the corporation was not within the statute. *Coffin v. Reynolds*, 37 N. Y. 640, 646.

In construing the eighteenth section of the general manufacturing corporation act, which imposes liability upon stockholders in corporations for debts owing to laborers, servants, or apprentices, the courts have confined its application to persons occupying subordinate positions, and have excluded from its protection the officers and managers of corporations, on the ground that they were not laborers or servants, within the meaning of the act. *Palmer v. Van Santvoord*, 47 N. E. 915, 916, 153 N. Y. 612, 38 L. R. A. 402 (quoting *Dean v. De Wolf*, 82

N. Y. 626; *Hill v. Spencer*, 61 N. Y. 274; *Wakefield v. Fargo*, 90 N. Y. 213).

The services of the president of a canal company were not labor performed in the construction of the canal, within the meaning of a statute requiring the company to deposit a certain sum as security for claims for labor performed and furnished in the construction of the canal. *Crowell v. Cape Cod Ship Canal Co.*, 46 N. E. 424, 168 Mass. 157.

Operative distinguished.

See "Operative."

Overseer.

"Laborers," within the meaning of a statute preferring the claims of laborers, does not include overseers on plantations, unless they work as common day laborers. *Rust v. Billingslea*, 44 Ga. 306-318.

The term, within the meaning of the act giving laborers a lien on crops and also within the meaning of the homestead act, which exempts the products of laborers from levy and sale, does not include an overseer. *Isbell v. Dunlap*, 17 S. C. 581, 583.

"Laborers," as used in 2 Rev. St. (5th Ed.) p. 658, § 18, rendering stockholders of a mining company liable for all debts due and owing to their laborers, servants, and apprentices, must probably be restricted to those engaging in manual work. The term includes a bookkeeper and overseer. *Hovey v. Ten Broeck*, 28 N. Y. Super. Ct. (3 Rob.) 316, 320.

Gantt's Dig. §§ 4079-4097, giving a lien to laborers for their wages, cannot be construed to include a farm overseer. The claimant must perform manual labor, and there must be some product of his labor to which the lien must attach. *Flournoy v. Shelton*, 43 Ark. 168, 170.

Acts 1870, c. 206, giving a lien to mechanics and other laborers, cannot be construed to include an overseer. In the common use of the word, we mean one who toils—one who labors with his hands. But an overseer is an agent, a superintendent, a sort of alter ego. His business is not to labor, but to oversee those who do work in subjection to his authority. He might in special cases unite both capacities, and be both laborer and overseer; but, where he does not perform any labor except to supervise and superintend a farm and laborers, he is not a laborer. *Whitaker v. Smith*, 81 N. C. 340, 342, 31 Am. Rep. 503.

"The term 'laborer' is not applicable to any one who does not earn his living by the work of his hands, as by plowing, mowing, hoeing, ditching, carrying a hod, feeding the fire of an engine, etc., but includes

an overseer, who, though hired by the year, receives his pay weekly." *Caraker v. Matthews*, 25 Ga. 571, 576.

An overseer of men employed under a railroad contract is included in the term "laborers," as used in the charter of the Hudson River Railroad Company, making such corporation directly liable for all sums due laborers. *Warner v. Hudson R. Co.* (N. Y.) 5 How. Prac. 454, 455.

Physician.

"Labor," as used in Homestead Act, § 5, providing that the exemption shall not extend to any claim for labor less than \$100, cannot be construed to include a claim for the services of a physician. The common and ordinary signification of the term "labor" agrees with the definition given by the best lexicographers, and is understood to be physical toil. Claim for labor is confined to claims arising out of services where physical toil is the main ingredient, although directed and made more valuable by mechanical skill. *Weymouth v. Sanborn*, 43 N. H. 171, 173, 80 Am. Dec. 144.

Plasterer.

A plasterer is a laborer, within the law providing that exemptions of homestead shall not extend to laborers' and mechanics' liens. *Merrigan v. English*, 22 Pac. 454, 457, 9 Mont. 113, 5 L. R. A. 837.

The term "labor," within the meaning of St. 1855, c. 431, § 1, providing that any person who shall actually perform labor in erecting, altering, or repairing any building, etc., shall have a lien thereon, includes a plasterer; and he is entitled to a lien for his own labor and that of his apprentices, but not for that of journeymen and laborers employed and paid by him. *Parker v. Bell*, 73 Mass. (7 Gray) 429, 430.

Printer.

Under a statute providing that debts for labor against a person whose business shall be suspended by creditors shall be preferred claims, and first paid, persons who perform physical labor, as typesetters, cylinder feeders, pressmen, and one also who kept the books at stipulated wages of so much per week, are entitled to a preference. That in their employment they had acquired and used skill would not render the designation of "laborer" inapplicable. They labored with their hands for their employer for wages, and were clearly laborers, within the meaning of the statute. To so construe the statute as to limit its benefits to mere menial servants performing the lowest forms of labor, requiring no skill, would do violence to the meaning of the act, and leave the evil intended to be cured to remain in existence, only slightly mitigated. While the statute

must be confined to those who perform manual services, still it cannot be confined to such services only as require no skill in the performance of them. *Heckman v. Tammien*, 184 Ill. 144, 56 N. E. 361, 363.

Private secretary.

A private secretary, whose duties, combined, include those of an amanuensis, stenographer, etc., who received dictation and transcribed letters for the president of a corporation, and performed other duties of a similar nature, is held to be a laborer, within the statute exempting laborers' wages from garnishment. Calling him a private secretary, instead of clerk, does not, says the court, change the principle upon which persons performing similar duties have been held to be laborers. *Abrahams v. Anderson*, 5 S. E. 778, 779, 80 Ga. 570, 12 Am. St. Rep. 274.

Retailer of oil from wagon.

"Laborer," as used in a statute exempting the horse or team and the wagon or other vehicle by the use of which the debtor, if a laborer, etc., habitually earns his living, includes a person retailing oil from a tank wagon, as he is one who labors in a toilsome occupation. *Consolidated Tank Line Co. v. Hunt*, 48 N. W. 1057, 1058, 83 Iowa, 6, 12 L. R. A. 476, 32 Am. St. Rep. 285.

School teacher.

Act April 15, 1845, creating exemptions in favor of laborers, cannot be construed to include the wages of a school-teacher, as the wages exempted by the act are such as are earned by the personal, manual labor of the debtor. *Schwacke v. Langton* (Pa.) 12 Phila. 402.

The term "laborer," within the meaning of the statute exempting the wages of laborers from garnishment, includes a school-teacher; but the wages of such teacher are exempted also for the further and better reason that it would be contrary to public policy, as tending to prevent the teacher from being able to support himself, and thus tending to stop the schools. *Hightower v. Slaton*, 54 Ga. 108, 109, 21 Am. Rep. 273.

A school-teacher is neither a laborer, clerk, servant, nurse, nor other person, within the meaning of the statute providing that in all cases within the jurisdiction of a justice of the peace, where any action is brought by any laborer, clerk, servant, nurse, or other person for compensation claimed due for personal services performed, the plaintiff, if successful, shall be entitled to recover, as part of the costs, a judgment against the defendant for an attorney's fee. *School Dist. No. 94 v. Gautier*, 73 Pac. 954, 957, 13 Okl. 194.

Stockholders employed.

Rev. St. § 1697, relating to assignments in insolvency, provides that the wages of "laborers, servants, and employes" shall be given preference. Held, that the words "laborers, servants, and employes" would include every one that was employed by the assignor—even the stockholders of a corporation who were employed by the corporation on a salary. *Conlee Lumber Co. v. Ripon Lumber & Mfg. Co.*, 29 N. W. 285, 288, 66 Wis. 481.

Stream cleaner.

Within the meaning of Laws 1898, c. 186, providing that "laborers and day workmen" employed by the city of New York shall not be subject to competitive examination, includes a stream cleaner, whose duty requires him to keep clean the water running in streams, removing rubbish and other injurious materials therefrom, and to prevent pollution thereof. *People v. Dalton*, 63 N. Y. Supp. 258, 259, 49 App. Div. 71.

Subcontractor.

Laborer as subcontractor, see "Subcontractor."

Rev. St. c. 51, § 141, imposing a liability on railroad corporations to pay for the work of laborers employed in constructing their roads, cannot be construed to include a subcontractor who personally expends labor, with that of the crew employed by him, upon a section of the railroad which he has contracted to build. Etymologically the word "laborer" may include any person who performs physical or mental labor under any circumstances, but its popular meaning is much more limited. The farmer toiling on his own farm, or the blacksmith working in his own shop, the tailor making clothes for his own customers, is not a laborer. One who performs physical labor, however severe, in his own service or business, is not a laborer, in the common business sense. A contractor who takes the chance of profit or loss is not a laborer in that sense. In the language of the business world, a laborer is one who labors with his physical powers in the service and under the direction of another for fixed wages. This is the common meaning of the statute. *Rogers v. Dexter & P. R. Co.*, 27 Atl. 257, 85 Me. 372, 21 L. R. A. 528.

The term "laborer," as used in Wag. St. 302, providing that a laborer in the employ of a railroad contractor, to whom the contractor is indebted for 30 or less number of days' labor performed in constructing said road, may render the company liable to pay therefor by giving notice, should be construed to mean the ordinary day laborer who performs labor on a railroad for a contractor of the railroad company for the construction of some part of the road. The ordinary con-

struction of the language could not be made to include those who furnish teams and wagons and drivers hired by them to haul and deliver stone or other material in the construction of the road. *Groves v. Kansas City, St. J. & C. B. R. Co.*, 57 Mo. 304, 307.

The term "laborer," as used in Laws 1850, c. 140, § 12, giving a laborer employed in the construction of a railroad a claim against the company for a debt due him from a contractor, on filing a claim therefor with the company, is used in its ordinary and usual sense, and is intended to designate a common laborer, who earns his daily bread by his toil. "The term necessarily implies personal services and work of the individual designed to be protected. The term 'laborer' cannot be construed as designating one who contracts for and furnishes the labor and services of others, or one who contracts for and furnishes one or more teams for work, whether with or without his own services or the services of others to take charge of the teams while engaged in the service." *Balch v. New York & O. M. R. Co.*, 46 N. Y. 521, 524.

A subcontractor of work in constructing a railroad is not a laborer, within the provisions of the statute providing that a contract for construction shall contain a covenant on the part of the contractor to pay for the work and labor of all laborers and teamsters, teams and wagons, employed on the job, and for all materials used thereon, and performance of such contract shall be guaranteed by two or more sureties signing the contract. *Kansas City v. McDonald*, 80 Mo. App. 444, 448.

Rev. Civ. St. art. 317a, giving a lien to "mechanics, laborers, and operatives" performing labor or working with tools or teams in the construction of a railroad, does not include one who has undertaken and performed a subcontract for the construction of several miles at a specified sum per mile. *Krakauer v. Locke*, 25 S. W. 700, 701, 6 Tex. Civ. App. 446; *Parks v. Locke* (Tex.) 25 S. W. 702, 703.

"Laborers," as used in the charter of the Hudson River Railroad Company, making such corporation directly liable for all sums due laborers, meant not only those who personally performed labor, but all who did so by their servants and teams. *Warner v. Hudson River R. Co.* (N. Y.) 5 How. Prac. 454, 455.

"Laborer," as used in Laws 1850, p. 211, § 2, providing that railroad companies shall be liable to any laborer on their construction, as often as the contractor by whom he is employed is indebted to him for 30 days, or any less number of days, of labor, in a large sense, may include a very extensive class of persons; but in this statute it means

laborers, in the strict and primary sense; those supposed to be poor and dependent on their wages. It means one engaged in personal labor with implements used by him, for which no extra charge is ordinarily made. A laborer employing his own teams and an assistant, under an agreement therefor with the contractors, cannot recover against the company for the services of the teams or the assistant; nor can he recover even for his own personal services, unless, perhaps, where his agreement for his own services was separate. A day's labor of a laborer does not include, also, the team which he drives. In a large sense, a person whose teams are employed for another performs labor with them, whether he works himself or not; but, in a stricter sense, and within the meaning of the statute, a day's labor of a man is that which he performs himself. This may include any implement of toil without which labor cannot be performed, but not the use of horse any more than of steam power. *Atcherson v. Troy & B. R. Co.* (N. Y.) 6 Abb. Prac. (N. S.) 329, 337.

Superintendent.

A timekeeper and superintendent in the employ of a railroad contractor is not a laborer, within Laws 1872, p. 286, § 1, requiring railroad companies to take bonds from contractors that they shall pay all laborers. *Missouri, K. & T. Ry. Co. v. Baker*, 14 Kan. 563, 566.

The superintendent of a mine is not a laborer, servant, clerk, or operative of a company, within the meaning of a provision of its charter making the stockholders individually liable for the wages of such persons in case the company becomes insolvent. *Cocking v. Ward* (Tenn.) 48 S. W. 287, 289.

A laborer is defined as one who labors in a toilsome occupation; a man who does work that requires little skill, as distinguished from an artisan; sometimes called a "laboring man"; and "labor," as used in Comp. Laws, § 1520, providing that every person performing labor in any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road, or aqueduct, or any other structure, will have a lien, etc., will be held to include more than mere manual labor, since some of the subjects are such that no manual labor could be performed upon them, and the work or labor must be ejusdem generis as to all the structures, and will include the manager or superintendent of a mine. *Boyle v. Mountain Key Min. Co.*, 50 Pac. 347, 350, 9 N. M. 237.

"Laborers," as used in the title of 22 Rev. St. S. C. p. 502, entitled "An act to provide for laborers' liens," which word does not appear in the body of the act, giving to employes of factories, mines, etc., a

lien for their wages or salaries, does not include the superintendent of a mining company. *Malcomson v. Wappoo Mills (U. S.)* 86 Fed. 192, 198.

The primary or specific lexical meaning uniformly assigned to the word "laborer" is a workman who labors with physical force in the service and under the direction of another for fixed wages. The foreman or superintendent of an entire logging operation, having charge of the men engaged in cutting and hauling the logs, but who performs no personal manual labor on the logs, is not a laborer. *Meands v. Park*, 50 Atl. 706, 707, 95 Me. 527 (citing *Rogers v. Dexter & P. R. Co.*, 85 Me. 372, 374, 27 Atl. 257, 21 L. R. A. 528; 12 Am. & Eng. Enc. Law, p. 532; 23 Am. & Eng. Enc. Law, p. 872).

As used in Rev. St. c. 51, § 141, making railroads liable for the wages of laborers employed by contractors, for labor actually performed on the road, the term "laborer" cannot be construed to include one who, at an agreed compensation of \$7 a day, superintends the building of bridges, keeps an account of the men's time, and makes out the pay rolls. In the language of the business world, says Mr. Chief Justice Peters, a laborer is one who labors with his physical powers, in the service and under the direction of another, for fixed wages; this is the common meaning of the word, and hence its meaning in the statute; and while etymologically the word "laborer" may include any person who performs physical or mental labor under any circumstances, its popular meaning is much more limited. *Blanchard v. Portland & R. F. Ry.*, 32 Atl. 890, 891, 87 Me. 241.

One who was employed as a woodsman, and whose duties as such included overlooking and superintending a large number of ordinary hands engaged in turpentine operations, who had authority to employ and discharge those hands, who also worked in the commissary in the capacity of a clerk, and who was employed for his skill in rendering services which obviously required mental and business capacity rather than the mere power to do manual toil, which services consisted much more largely of headwork than of handwork, was not a laborer entitled, under Code, § 1974, to foreclose a lien as such, though in the performance of his duties he did a considerable amount of manual labor, and often became physically fatigued. *Cole v. McNeill*, 25 S. E. 402, 405, 99 Ga. 250.

Acts 1848, c. 40, making the stockholders of a corporation liable for debts due and owing to laborers, servants, and operatives for services performed for the company, does not include within its meaning a superintendent of a mining corporation, who has power to hire and pay workmen, and to make

contracts for supplies, ores, etc., under the direction of the company. *Krauser v. Ruckel (N. Y.)* 17 Hun, 463, 465; *Dean v. De Wolf (N. Y.)* 16 Hun, 186, 187.

Sess. Laws 1872, p. 147, § 4, which declares that all miners, laborers, and others who work or labor to the amount of \$25 or more in or upon any mine, lode, or deposit shall have a lien, etc., includes the work of the superintendent in planning and superintending development work upon the mines, and in planning and supervising the erection of the mills and machinery, but it would not include the work of such superintendent in keeping the books and disbursing the funds of the mining company. *Rara Avis G. & S. M. Co. v. Bouscher*, 12 Pac. 433, 434, 9 Colo. 385.

"Laborers," as used in Sess. Laws 1850, p. 14, declaring that, whenever any contractor employing laborers on the defendant's work is indebted to such laborers, the latter, by pursuing the course prescribed, may make the defendant liable for their debt, means such persons as, upon the employment of contractors, actually engage in the construction of the work; also those who labor by their servants or agents, and superintendents over others engaged in actual labor on the road. *Warner v. Hudson River R. Co. (N. Y.)* 5 How. Prac. 454, 456.

Teamster.

"Laborer," as used in Laws 1872, c. 136, providing that, where a railroad company falls to take a bond from the contractor constructing a portion of its road, the company shall be held liable to laborers for services rendered in the construction thereof, includes a teamster employed by a contractor whose work consists in driving the team, handling a plow, and loading and unloading scrapers and wagons. *Mann v. Burt*, 10 Pac. 95, 97, 35 Kan. 10.

The hauling of lumber and timber on the ground for the construction of buildings upon an oil leasehold is not such labor for or about the construction or erection of any engine, engine house, derrick, etc., as to entitle a party to file a lien as a laborer against such leasehold, under the provisions of the act of June 28, 1879 (Pamph. Laws, 182). *Wilson v. Whitcomb*, 100 Pa. 547, 550.

The term "mechanics, workmen, and laborers employed by the company," in an act incorporating a slate company, which provides that the stockholders shall be individually liable for debts due mechanics, workmen, and laborers employed by the company, does not include a teamster using his own team and contributing his own time in hauling slate for the company for certain compensation, nor of a wagonmaker repairing wagons for the company, as the lia-

bility cast on the stockholders was with a view to an additional security to the operatives of the establishment, who were the producers—the life of it. It is generally only to such that liens are extended in the mining districts. *Moyer v. Pennsylvania Slate Co.*, 71 Pa. (21 P. F. Smith) 293, 298.

The term "laborers," within the meaning of Act March 9, 1889, § 1, giving laborers a lien on any structure for work performed by them thereon, includes a teamster. The spirit and intention of the statute is to prefer laborers as a class, and not to prefer one class of laborers over another, nor one kind of manual or mechanical toil over another, if all come within the general scope of its provisions and comply with its terms. *McElwaine v. Hosey*, 35 N. E. 272, 275, 135 Ind. 481.

Telegraph operator.

A telegraph operator will be included in the term "laborer," within the title of an act (Laws 1889, c. 204) entitled "An act to fix the amount of wages of laborers exempt from attachment, garnishment, or execution." *Boyle v. Vanderhoof*, 47 N. W. 396, 397, 45 Minn. 31.

Threshing machine operator.

"Laborer," as used in the laborer's lien act, is one who performs by his own hand the contracts he makes with his employer. *Appeal of Seiders*, 46 Pa. (10 Wright) 57. The acts are intended to favor those who earn their money by the sweat of their own brows, not those who are mere contractors to have the work done, and whose compensation was the profit they would realize on the transaction. *Appeal of Wentroth*, 82 Pa. 469. And hence the runners of a threshing machine are not entitled to wages under such laborer's lien act. *Johnston v. Barrills*, 41 Pac. 656, 658, 27 Or. 251, 50 Am. St. Rep. 717.

Code, § 1975, providing that any "laborer" who shall do labor in sowing or harvesting, or in securing or assisting to secure or house, any crop, shall have a lien therefor on such crop, should not be construed to give a lien on grain for the labor of other persons than the person, asserting the lien, employed by him in threshing the grain, though he was present directing their work; but he may have a lien for his own labor, including the use of his threshing machine and teams. It cannot be said that as a laborer with his sickle is allowed a lien, so the contractor or employer of a large body of men doing the harvesting for him is to be substituted for the single harvester, from the needs of a larger and more extensive system of farming. The purpose of the lien was for the mechanics or laborers dependent on their daily earnings, etc. *Mohr v. Clark*, 19 Pac. 28, 29, 3 Wash. T. 440.

The term "laborer," within the meaning of Act May 12, 1891, giving priority to wages due laborers, including farm laborers or any other kind of laborers, does not include one threshing grain for another with a steam separator for a compensation of so much per bushel for the grain threshed. A limited sense has been given to the word "laborer," for the very specific reason that in all statutes of this kind the intent has been to protect the class of persons who wholly depend on their manual toil for subsistence, and who cannot protect themselves. *Henry v. Sheaffer*, 14 Pa. Co. Ct. R. 237.

Timekeeper.

The term "laborer," in laws making railroads liable for wages of laborers employed by contractors for labor actually performed on the road, cannot be construed to include one who keeps account of the men's time and makes out the pay rolls. *Blanchard v. Portland & R. F. Ry.*, 32 Atl. 890, 891, 87 Me. 241.

"Laborer," as used in Laws 1872, p. 286, § 1, providing that a railroad company shall take a bond from a contractor that the latter shall pay all "laborers," mechanics, etc., all just debts due to such persons, etc., and that in case of a failure to take such bond the company should be liable for such debts, etc., does not include a person in the employ of a contractor with a railroad company simply as timekeeper and superintendent. The word "laborer" is here used in its more common acceptation, and means one who labors in a toilsome occupation; that is, a man who does work that requires little skill, as distinguished from an artisan. *Missouri, K. & T. R. Co. v. Baker*, 14 Kan. 563, 566.

Traveling salesman.

Within the meaning of Const. art. 15, § 7, which makes the stockholder of a corporation liable for labor debts, the term "laborer" would not include a traveling salesman who solicits orders for the sale of goods. *Jones v. Avery*, 15 N. W. 494, 50 Mich. 326.

As used in General Incorporation Act 1875, § 11, providing that the stockholders of mining, quarrying, and manufacturing companies are jointly and severally liable individually for all moneys due and owing to the "laborers," servants, clerks, and operatives of the company in case it becomes insolvent, the term "laborer" cannot be construed to include a traveling salesman on a salary of \$100 per month. *Hand v. Cole*, 7 L. R. A. 96, 97, 12 S. W. 922, 88 Tenn. 400.

The term "clerk, laborer, or tradesman," in a statute giving a preference out of a fund raised by execution against his employer to a clerk, laborer, or tradesman, does not include a traveling salesman who sells on commission for a furniture manufacturer. *Witner v. Miller*, 12 Pa. Co. Ct. R. 363.

A traveling salesman is not a "laborer, servant, or employé," within the meaning of the statutes allowing a preferential payment out of the assets of an insolvent employer's estate. *Eppstein v. Webb*, 44 Ill. App. 341, 342.

"A 'laborer' is popularly understood to be a person who performs manual labor not requiring special knowledge or skill. There is doubtless a sense in which the word 'laborer' may be applied to a person who performs any labor of any character, either physical or mental, but this is not the signification popularly attached to the word." As used in a statute creating exemptions in favor of "laborers," the word does not include a traveling salesman. *Epps v. Epps*, 17 Ill. App. (17 Bradw.) 196, 201.

The words "laborers, mechanics, and clerks," as used in a statute exempting from execution or garnishment the wages of "laborers, mechanics, and clerks who are the heads of families," etc., are not words of limitation merely, but were intended by the Legislature to designate all such persons as earn their living by wages, and whose compensation is measured by the day, week, month, or year; of course, not including the employés of the government, state, county, or city. Such words would therefore include a traveling salesman working for a fixed sum per month. *Wm. Deering Co. v. Ruffner*, 49 N. W. 771, 773, 32 Neb. 845, 29 Am. St. Rep. 473.

Workman synonymous.

In Act Jan. 21, 1843, forbidding any corporation empowered to construct any railroad from making any general assignment or transfer of its property while it is indebted to any laborers and workmen, the word "laborer" is employed synonymously with "workman." *Leuffer v. Pennsylvania & D. R. Co. (Pa.)* 11 Phila. 548.

Workman with helpers.

A miner who by his own labor mines coal at a certain price per ton, and employs a common laborer to assist him at so much per day, is a "laborer," within the meaning of Act April 15, 1845, exempting the wages of laborers from attachment. *Pennsylvania Coal Co. v. Costello*, 33 Pa. (9 Casey) 241, 244.

"Laborers," as used in Act April 2, 1849, entitling laborers to certain preferences, means "those who perform with their own hands the contract they make with the employer; and where a work contracted for is of a nature to require helpers of the chief workman, and he employs his helpers, he is to be considered as authorized to do so by the proprietor, and the wages of such helpers are as much within the protection of the statute as the wages of the chief himself. The statute does indeed limit itself

to persons employed by the proprietor, but proprietors may employ hands through an agent, and where the owner of a rolling mill lets a job to a roller, puddler, heater, or other master workman at so much per ton, he impliedly authorizes him to employ all necessary helpers. All laborers employed by the persons or companies referred to in the act are entitled to its benefits, whether the wages agreed to be paid them are measured by time, or by the ton, or by the piece, or any other standard. *Appeal of Seidler*, 46 Pa. 57, 61.

LACE.

"Webster describes 'lace' as a fabric of fine thread, of linen, silk, or cotton, interwoven with figures; a delicate tissue of thread, worn as an ornament by ladies. Thus, it will be seen that 'lace' derives its name, not from the material which entered into its manufacture, but the term is designated to describe a certain peculiar and delicate texture into which may be woven indifferently any one or more of several materials. Nor do such materials, however costly, give to lace any but an inconsiderable value. It is the delicacy, intricacy, and beauty of its tissue, woven at the expense of immeasurable toil, patience, and skill, that gives to this fabric its chief intrinsic value." *Ocean Steamship Co. v. Way*, 17 S. E. 57, 60, 90 Ga. 747, 20 L. R. A. 123.

Schedule 1, Tariff Act March 3, 1883, provides that cotton laces shall be subject to a duty of 40 per cent. ad valorem. The word "lace" is thus defined in the dictionaries: "A fabric of fine threads of linen, silk, or cotton, interwoven in a net, and often ornamented with figures." Cotton lace, made-up articles, such as collars, cuffs, tidies, parasol covers, etc., are within the meaning of the term "lace," unless the term has in trade a special restricted meaning which would exclude such articles. *Sidenburg v. Robertson (U. S.)* 41 Fed. 763, 765. So, also, Hamburg net, Nottingham curtain net, taped and not taped, Nottingham pillow shams, Nottingham tidies, and Nottingham bedspreads, unless the goods were at the time of the passage of the act known in trade and commerce by various trade names, and that the term "lace" had in the parlance of trade and commerce a restricted meaning, which excluded the goods in question. *Clafin v. Robertson (U. S.)* 38 Fed. 92, 93.

Silk spot nets and dotted nets are "laces," within section 8 of Tariff Act June 30, 1864, imposing a duty of 60 per cent. ad valorem on silk laces, "lace" being defined by Webster as a fabric of fine threads of linen, silk, or cotton interwoven in a net, and often ornamented with figures or a delicate tissue of thread. *Morrison v. Miller (U. S.)* 37 Fed. 82, 83.

LACHES.

Laches is negligence or omission to assert a right. *Ring v. Lawless*, 60 N. E. 881, 883, 190 Ill. 520; *United States v. Winona & St. P. R. Co.* (U. S.) 67 Fed. 969, 971, 15 C. C. A. 117.

Laches is such neglect or omission to do what one should do as warrants the presumption that he has abandoned his claim and declines to assert his right. *Wissler v. Craig's Adm'r*, 80 Va. 22, 30.

"Laches" has been defined to be such negligence or omission to assert a right as, taken in conjunction with lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, will be a bar in a court of equity. *Morse v. Selbold*, 35 N. E. 369, 371, 147 Ill. 318; *Treadwell v. Clark*, 77 N. Y. Supp. 350, 356, 73 App. Div. 473.

What would be laches in one case might not constitute such in another. The question is one addressed to the sound discretion of the court, depending upon all the facts of the particular case. *The Queen of the Pacific* (U. S.) 61 Fed. 213, 216.

As a definition of "laches," it is sufficiently correct to say that it is the neglecting or the omitting to do what in law should have been done, and this for an unreasonable and unexplained length of time, and in circumstances which afforded opportunity for diligence. This definition will be found adequate as a test to be applied in the vast majority of cases. *Babb v. Sullivan*, 21 S. E. 277, 279, 43 S. C. 436.

"Laches" is defined as inexcusable delay in asserting a right. One who acts as soon as possible after learning of his right, or that his right has been invaded, cannot be charged with delay. *Byrne v. Schuyler Electric Mfg. Co.*, 31 Atl. 833, 837, 65 Conn. 336, 28 L. R. A. 304.

Under the Code of Procedure it is held that "laches" is an equitable defense, which, unless disclosed by the complaint, must be proved by the answer, and the mere appearance of the lapse of time is not sufficient to raise the issue. *Gay v. Havermale*, 67 Pac. 804, 806, 27 Wash. 390.

The absence of diligence in compelling specific performance of a contract has long since become crystallized in the legal term "laches," which is incapable of an exact definition, and dependent upon neither the lapse of time nor the force of those statutes which in actions at law determine generally the plaintiff's rights. The defense of laches is in no sense dependent on the statute of limitation. The lapse of time and the staleness of the claim are undoubtedly the governing considerations, but the parties are always held

bound to proceed with reasonable diligence in the enforcement of their rights. *Hagerman v. Bates*, 38 Pac. 1100, 1104, 5 Colo. App. 391.

The term "laches," in its broad legal sense as interpreted by courts of equity, signifies such unreasonable delay in the assertion of and attempted securing of equitable rights as to constitute in equity and good conscience a bar to recovery. The doctrine is founded upon the universally conceded justice and paramount importance of the proposition that the repose of titles and the security of property are manifestly promoted by acting upon the maxim, "*Vigilantibus, non dormientibus, jura subveniunt.*" A learned judge has aptly and beautifully said that this bar as exercised by courts of equity is well symbolized by the emblem of Time, who is depicted as carrying a scythe and an hourglass; that while with one he cuts down the evidence which might protect innocence, with the other he metes out the period when innocence can be no longer assailed. *Graff v. Portland Town & Mineral Co.*, 54 Pac. 854, 856, 12 Colo. App. 106.

Abandonment distinguished.

See "Abandon—Abandonment."

Acquiescence distinguished.

While the words "laches" and "acquiescence" are often used as similar in meaning, the distinction in their import is both great and important. Laches imports a merely passive nonaction, while acquiescence implies active assent, and, when there is no statutory limitation applicable to the case, the courts of equity would discourage laches and refuse relief after great and unexplained delay; yet when there is such statutory limitation they will not anticipate it, as they may where acquiescence has existed. Laches, in fact, amounts only to that inferior species of acquiescence described in the following terms by Lord Kindersley in *Rochdale Canal Co. v. King*, 2 Sim. (N. S.) 89: "Mere acquiescence, if by 'acquiescence' is to be understood only abstaining from legal proceedings, is unimportant. Where one party invades the right of another, the other does not in general deprive himself of the right of seeking redress, merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the statute of limitations." *Wood on Limitations*, § 62; *Lux v. Haggin* (Cal.) 10 Pac. 674, 678; *Kenyon v. National Life Ass'n*, 57 N. Y. Supp. 60, 74, 39 App. Div. 276.

Change in status of parties or property.

Laches is not, like limitation, a mere matter of time, but principally a question of the inequity in permitting the claim to be enforced; an inequity founded upon some change in the conditions, or the relations of

the property or the parties. *Coosaw Min. Co. v. Carolina Min. Co.* (U. S.) 75 Fed. 860, 868; *Nantahala Marble & Talc Co. v. Thomas* (U. S.) 76 Fed. 59, 64; *Wheeling Bridge & Terminal Ry. Co. v. Reymann Brewing Co.* (U. S.) 90 Fed. 189, 195, 32 C. C. A. 571.

"Laches" is a term of flexible import, and whether it exists in a given case depends upon facts and circumstances peculiar to that case. It means something more than mere delay; some other element must be connected with the delay to constitute laches, and hence in some cases a party has been concluded by a delay of months, or even weeks, while in other cases his rights have been held unaffected by a delay of years. The question ordinarily is whether, during the period of delay, such changes have taken place in the position of the parties relative to the subject-matter in litigation as to render it inequitable to permit the enforcement of rights concerning which otherwise there might be no difficulty. *DuBois v. Clark*, 55 Pac. 750, 753, 12 Colo. App. 220.

Delay alone, unaccompanied by other circumstances, will not necessarily preclude relief. In every instance where the defense is founded on mere delay—that delay, of course, not amounting to a bar of any statute of limitations—the validity of the defense must be tested on principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay, and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy. The doctrine of laches, as understood in courts of equity, implies injury to the party pleading it as a defense. Where the situation of the parties has not been altered, and one has not been put in a worse condition by the delay of the other, the defense of laches does not generally apply. *Parker v. Bethel Hotel Co.*, 34 S. W. 209, 217, 96 Tenn. 252, 31 L. R. A. 706.

"Laches," in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within the limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has in good faith become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes, but when a court sees negligence on one side, and injury therefrom on the other, it is a ground for denial of relief. *Chase v. Chase*, 20 R. I.

202, 87 Atl. 804 (cited and approved in *Gorham v. Sayles*, 50 Atl. 848, 850, 23 R. I. 449).

The doctrine of laches in courts of equity is not an arbitrary one. When it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might be regarded as equivalent to a waiver, or by his neglect has, though perhaps not waiving that remedy, put the other party in a situation in which it would be unreasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. Two circumstances, always important to be considered, are the length of the delay, and the nature of the acts done during the interval, which might affect either party. *Hall v. Otterson*, 23 Atl. 907, 912, 52 N. J. Eq. (7 Dick.) 522.

Delay alone insufficient.

The question of laches turns not simply upon the number of years which have elapsed between the accruing of the right and the assertion of it, but also upon the nature and evidence of the right, the changes of value, and of circumstances occurring during that lapse of years. *Galliber v. Cadwell*, 12 Sup. Ct. 873, 874, 145 U. S. 368, 36 L. Ed. 738.

Mere delay does not constitute laches, and if a relator shows that his delay in moving has been founded on sufficient reason and good faith, it is impossible to say he has been guilty of laches. In short, every case must rest upon its own special facts and circumstances. *People v. Scannell*, 59 N. Y. Supp. 679, 680, 27 Misc. Rep. 662.

"Laches" is such neglect or omission to assert a right as, taken in conjunction with lapse of time more or less great, and other circumstances, causes prejudice to the adverse party, and operates as a bar in a court of equity. Something more than mere lapse of time is implied in the term "laches." Ordinarily, there must be other circumstances, causing prejudice to the adverse party, which would make it inequitable to grant the relief prayed for. Thus, where the delay of plaintiff to enforce an obligation was due mainly to the defendant's repeated and urgent appeals for time and to his inability to meet his obligations, plaintiff will not be held guilty of laches because he yielded to the request for delay. *Hellams v. Prior*, 42 S. E. 106, 107, 64 S. C. 296.

The determination of whether a party is guilty of laches in a particular case is attended with much difficulty. Laches is neglect to do something which a party ought to do, and mere lapse of time, unaccompanied by some circumstances affording evidence of a presumption that the right has been abandoned, is not considered laches.

Claims are considered stale only where gross laches is shown, with unexplained acquiescence in the operation of an adverse right. It is unquestionably true that a court of equity will refuse its aid to enforce stale demands where the party has slept upon his rights or acquiesced for an unreasonable length of time, but whether the lapse of time is sufficient to bar a recovery must of necessity depend upon the particular circumstances of each case. *Bell v. Wood*, 27 S. E. 504, 506, 94 Va. 677.

Laches is such negligence as results in the omission to do what one is by law required to do to save a right, and which warrants a presumption that the claimant of it has abandoned it and declines to assert it. When the assertion of the right is neglected or omitted for a period of time more or less great, and under such circumstances as to cause prejudice to an adverse party, it may operate as a bar in equity. Although a proper ingredient in the law of laches, the instances seem to be rare where courts have declared that mere lapse of time might effect a positive bar, even in cases of purely equitable jurisdiction; while, on the other hand, relief has frequently been granted, notwithstanding great delay, when substantial justice could yet be done between the parties. Therefore mere lapse of time, where the parties remain in the same relative position, the delay working no serious wrong to the adverse party, and justice being possible, will not operate as a bar in equity. *Hamilton v. Dooly*, 49 Pac. 769, 772, 15 Utah, 280.

Laches, as has been well said, does not, like limitation, grow out of the mere passage of time, but is founded on the inequity of permitting the claim to be enforced—an inequity founded on some change in the condition or relation of the property or the parties. Whenever such a manifest inequity does not appear, the case does not fall within the operation of the rule if the suit is for the recovery of property, real or personal, unless it is apparent on the face of the bill that, for the period prescribed as a bar to the corresponding legal remedies, there has been a possession hostile to the title the complainants assert. *First Nat. Bank v. Nelson*, 18 South. 154, 155, 106 Ala. 535.

In determining whether a party has been guilty of laches so as to bar his right to be relieved from a judgment on the ground of mistake, inadvertence, etc., a proper regard must be had to the just claim of other business, to the terms of the court, and any other material facts. A delay of a month after the entry of the judgment will not necessarily constitute such laches as to bar the relief, nor will the failure to renew the application at the first term of court

after the cause was removed from the Supreme Court, where the merits of the application were already settled by the Supreme Court, and where the application was renewed the next month at the succeeding term of court. *Butler v. Mitchell*, 17 Wis. 52, 60.

Laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced, an inequity founded on some change in the condition or relation of the property or the parties; and, where the question of laches is in issue, plaintiff is chargeable with such knowledge as he might obtain on inquiry, providing facts already shown by him were such as to put a man of ordinary intelligence on inquiry. *Johnson v. Atlantic, G. & W. I. Transit Co.*, 15 Sup. Ct. 520, 531, 156 U. S. 618, 39 L. Ed. 556.

Knowledge of rights implied.

Laches is inexcusable delay in ascertaining a right, and is an equitable defense determinable by the particular facts. *Anderson's Law Dictionary*, 593. But the term implies knowledge of one's rights, and therefore it cannot be imputed to one who is non compos mentis. *Trowbridge v. Stone's Adm'r*, 26 S. E. 363, 365, 42 W. Va. 454.

As a presumption.

The defense of laches is in equity only permitted to defeat an acknowledged right on the ground that it affords evidence that the right has been abandoned. *Cottrell v. Watkins*, 17 S. E. 328, 331, 80 Va. 801, 19 L. R. A. 754, 37 Am. St. Rep. 897.

Laches is the neglect or omission to do something which the party ought to do, and mere lapse of time, unaccompanied by any circumstances to make it to the interest of a creditor to call in the investment, and during all of which time the debtor is scrupulously fulfilling all of his obligations, can never amount to such laches or neglect on the part of the creditor as to defeat his rights. Such lapse is only permitted in equity to defeat an acknowledged right, on the ground of affording evidence of a presumption that that right has been abandoned, and it therefore never prevails when that presumption is outweighed by opposing facts and circumstances. So the failure of the obligee in a bond for the payment of money, executed in 1844, to institute a suit thereon until 1877, was not laches, where the obligor in the bond regularly and promptly paid semiannual interest thereon up to the year 1872. *Cole's Adm'r v. Ballard*, 78 Va. 139, 147.

As neglect of legal duty.

Lapse of time alone is not sufficient to bar equitable relief. The term "laches" in-

volves the idea of negligence, a neglect or failure to do what ought to be done under the circumstances to protect the rights of the parties to whom it is imputed, or involving injury to the opposite party through such neglect to assert rights within a reasonable time. *Ripley v. Selligman*, 50 N. W. 143, 147, 88 Mich. 177.

Delay is not the sole factor that constitutes laches. If it were so, some period fixed by statute or by the common law of the courts would afford a safe and unvarying rule. Laches denotes not only undue lapse of time, but also negligence, and opportunity to have acted sooner, and all three factors must be satisfactorily shown before the bar in equity is complete. *Babb v. Sullivan*, 21 S. E. 277, 279, 43 S. C. 436 (cited in *Wagner v. Sanders*, 39 S. E. 950, 955, 62 S. C. 73).

Strictly speaking, and using the term as it is understood in the law, "laches" is such neglect or omission to assert a right as, taken in conjunction with lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. Lord Ellenborough, in the case of *Selbag v. Abitbol*, 4 Maule & S. 462, said: "Laches is a neglect to do something which by law a man is obliged to do. Whether any neglect to call at a house, where a man informs me that I may get the money due on a bill of exchange, amounts to laches, depends on whether I am obliged to call there." Obviously, then, there must be a legal duty to do some act, a failure to do that duty, and attendant circumstances which cause prejudice to an adverse party, before the doctrine can be successfully invoked. Mere lapse of time, without more, unless of sufficient duration to amount to and constitute the bar of the statute of limitations, will not be sufficient. *De Muth v. Old Town Bank*, 37 Atl. 266, 268, 85 Md. 315, 60 Am. St. Rep. 322.

LACK OF JURISDICTION.

The expression "lack of jurisdiction," in special assessment proceedings, does not necessarily mean that there was no authority of law to levy the assessment under any circumstances; it covers as well a case where there was legal authority to make the assessment, but when there has occurred some material defect or omission in the proceedings at any stage. *Schlntgen v. City of La Crosse*, 94 N. W. 84, 87, 117 Wis. 158.

LADEN.

Within the meaning of Ohio Act 1831, and Pennsylvania Act 1831, relating to the

control of the Cumberland road, and exempting from toll any wagon or carriage laden with the property of the United States, etc., "laden" does not mean fully laden. Hence a carriage which contained the United States mail would be "laden" with property of the United States within the meaning of the acts above referred to, and hence exempt from toll. *Searight v. Stokes*, 44 U. S. (3 How.) 151, 169, 11 L. Ed. 537.

LADIES' NOTIONS.

A mortgage describing mortgaged property as a general stock of millinery stock of "ladies' notions," consisting of hats, etc., now on hand or to be purchased or used in the business of a general millinery store, covers only such property as is specifically described, immediately following said expression or term. *Chapin v. Garretson*, 52 N. W. 104, 105, 85 Iowa, 377.

LADING.

See "Bill of Lading."

LAGER BEER.

"Lager beer is a beer which is used in Germany, where it is kept in casks on a frame, 'lager' (signifying bed), placed in a cellar for that purpose." And it is the name of a similar beverage now largely manufactured in the United States. It is obviously called "lager beer" here to indicate that it is like the German beer. The fact that the word "lager" is prefixed to the term "beer" does not convey the idea that it is a fermented liquor made of malt, this idea being involved in its being called "beer," since that is a fermented liquor chiefly made from malt. *United States v. Ducournau* (U. S.) 54 Fed. 138, 139; *Johnson v. State* (Tex.) 66 S. W. 552, 553.

Lager beer is beer called "lager beer" because it is contemplated that it has been stored some time after being made. *United States v. Ellis* (U. S.) 51 Fed. 808, 812.

Lager beer is and has been for many years a familiar beverage in this country. Its constituents are enumerated not only in books of science, but in popular encyclopedias. It is a malt liquor of the lighter sort, and differs from ordinary beers and ales, not so much in its ingredients, as in its process of fermentation. *Seaman v. Burnham*, 16 N. W. 38, 41, 57 Wis. 568 (citing *State v. Goyette*, 11 R. I. 592).

Lager beer is beer with less per cent. of alcohol than contained in ordinary beer—that is, it is the second brew or draw of that manufactured—and, under a statute prohibiting the introduction into any Indian

reservation of any "ardent spirits, ale, beer, wine, or intoxicating liquors of whatsoever kind," lager beer cannot be concealed or hidden under the name of "Rochester Tonic," "Vegetable Bitters," "Malt Nutrients," and numberless other pretended health restoratives; and such alleged restoratives which contain a less per cent. of alcohol than contained in beer, but composed of the same ingredients, could not be sold or introduced in such reservations. *United States v. Cohn*, 52 S. W. 38, 46, 2 Ind. T. 474.

As ardent spirits.

See "Ardent Spirits."

As an intoxicating liquor.

The term "lager beer," of itself, imports an intoxicating liquor made from malt and hops. *State v. Church*, 60 N. W. 143, 144, 6 S. D. 89.

Lager beer, being a malt liquor, is to be regarded as an intoxicating liquor, within the meaning of a statute regulating the sale of intoxicating liquors. *State v. Rush*, 13 R. I. 198, 199.

Lager beer is, by the express provisions of St. 1869, c. 415, § 30, an intoxicating liquor. *Commonwealth v. Chappel*, 116 Mass. 7.

The term "intoxicating liquors" does not include liquors containing alcohol in so slight a quantity as not to unduly excite the human system. Lager beer falls within the term "intoxicating liquors" if the use of it is ordinarily attended with entire or partial intoxication, and whether such is the fact is to be decided by the jury. *People v. Zeiger* (N. Y.) 6 Parker, Cr. R. 355, 359.

Under a statute prohibiting the sale of intoxicating liquors, and declaring that lager beer shall be deemed intoxicating, lager beer may be described in the indictment as an intoxicating liquor, and cannot be proved to be otherwise. *Commonwealth v. Anthes*, 78 Mass. (12 Gray) 29, 32.

"We agree with Wells, J., when he says, in *Commissioners of Excise of Tompkins County v. Taylor*, 21 N. Y. 173, 178, 'that but one safe and sensible line of distinction can be drawn between the different kinds of liquor containing alcohol, in order to determine upon which of them the statute was intended to operate, and that is between those which are capable of causing intoxication, and those containing so small a percentage of alcohol that the human stomach cannot contain sufficient of the liquor to produce that effect.' Of course, we are not unmindful of the fact that different liquors and different quantities will produce different effects upon different persons, and that the effect upon persons may depend upon their habits, their health, their age and constitu-

tions. In *Rau v. People*, 63 N. Y. 277, 279, the Court of Appeals said: 'Hitherto the courts have not been willing to take notice that lager beer is intoxicating, but have submitted the question, when controverted, to the jury, to be determined upon the evidence. Where the liquors are not such as are known to the courts to be intoxicating, their character as intoxicating or not must be determined upon competent evidence as a question of fact.' *People v. Schewe* (N. Y.) 29 Hun, 122.

Judicial knowledge of character.

The courts will take judicial notice of the fact that lager beer is a malt liquor. *Netso v. State*, 5 South. 8, 9, 24 Fla. 363, 1 L. R. A. 825; *Pedigo v. Commonwealth* (Ky.) 70 S. W. 659.

The court will take judicial cognizance, without evidence, that lager beer is a malt liquor, it being said in the course of the opinion: "Lager beer is, and has been for many years, a familiar beverage in this country. Its constituents are enumerated not only in books of science, but in popular encyclopedias. It is a malt liquor of the lighter sort, and differs from ordinary beers and ales, not so much in its ingredients, as in its process of fermentation. The government might almost as well be required to prove that gin or whisky or brandy is a strong liquor as to prove that lager beer is a malt liquor." *State v. Goyette*, 11 R. I. 592.

Under an indictment for selling lager beer, it is not necessary to prove that it was a malt and fermented liquor, as the court properly treated it as a matter of common knowledge. *Waller v. State*, 38 Ark. 658, 660; *Watson v. State*, 55 Ala. 158, 160; *Tinker v. State*, 8 South. 855, 856, 90 Ala. 647.

The court cannot take judicial notice that lager beer is within the statute forbidding the sale of wine, beer, or strong liquors. *People v. Hart* (N. Y.) 24 How. Prac. 289.

In an action in which defendant was convicted of selling intoxicating liquors upon evidence that he sold lager beer, the court said: "We have no more hesitation in holding that the liquor known as 'lager beer' is intoxicating than we should have in holding that spruce beer is not; and we should put both rulings upon the same ground, to wit, that such is the common understanding resulting from common observation." *State v. Church*, 60 N. W. 143, 144, 6 S. D. 89.

As strong or spirituous liquor.

Lager beer is a malt liquor, of which fact the court will take judicial notice; and a prohibition of the sale of spirituous liquor, as, for instance, in Rev. St. U. S. § 2139, prohibiting the introduction of spirituous liquor into the Indian country, will not be con-

strued to include beer. *Sarils v. United States*, 14 Sup. Ct. 720, 721, 152 U. S. 570, 38 L. Ed. 556.

Lager beer, if proved to be intoxicating, comes within the prohibition against the sale of strong and spirituous liquors. *Dillman v. People*, 4 N. Y. Wkly. Dig. 251, 252.

Lager beer is a malt liquor made by fermentation. It is not included in the prohibition of Rev. St. U. S. § 2139, prohibiting the introduction of spirituous liquor or wine into the Indian country. *Sarils v. United States*, 14 Sup. Ct. 720, 722, 152 U. S. 570, 38 L. Ed. 556.

As wine.

See "Wine."

LAIID.

See "Lay—Laid."

LAIID UP FOR REPAIRS.

A yacht is "laid up for repairs," within the meaning of that phrase in a charter party, where it is at rest, having some damage made good which to a material degree impaired its ability to sail as a yacht, though the charterer may continue to eat and sleep and entertain friends on board. *Dahlgren v. Whitaker* (U. S.) 124 Fed. 695, 696.

LAKE.

A "lake" occupies a basin of greater or less depth, and may or may not have a single prevailing direction. A "river" is characterized by its confining channel banks, which give it a substantially single course throughout. *Jones v. Lee*, 43 N. W. 855, 856, 77 Mich. 35.

It is said that the controlling distinction between a stream and a lake or pond is that in one case the water has a natural motion, while in the other the water in its natural state is substantially at rest, and this entirely irrespective of the size of the one or the other. But not every sheet of water which has a current from head to its outlet is a stream. It is said that even the large lakes have such a current; and a small stream which spreads into a body of water some 50 rods wide and 3 miles long, and then reappears as a stream filled with rushes, and navigable only by small skiffs, is not a water course, but a lake. *Ne-pee-nauk Club v. Wilson*, 71 N. W. 661, 662, 96 Wis. 290.

As a boundary.

Where a lake is made a boundary of land in a grant thereof, the grant only extends to the water's edge, and not to the center, as is the case when a grant extends to a river. *State v. Town of Gilmanton*, 9 N. H.

461, 463; *State of Indiana v. Milk* (U. S.) 11 Fed. 389, 395.

The term "lake," when used in reference to a navigable body of fresh water in a conveyance describing one boundary of the land as being on the lake, is to be construed as fixing the boundary at the line at which the water usually stands when free from disturbing causes. *Seaman v. Smith*, 24 Ill. (14 Peck) 521, 524; *Fletcher v. Phelps*, 28 Vt. 257, 261.

The term "lake," when used to designate a boundary of land on a natural non-navigable lake, operates to fix the boundary at the natural shore of the lake, and the owner does not acquire the bed of the lake which is made dry by drainage and the natural action of a river in filling it up. *Noyes v. Collins*, 61 N. W. 250, 92 Iowa, 566, 26 L. R. A. 609, 54 Am. St. Rep. 571.

The term "lake," when used in a conveyance to designate a boundary of land which fronts on a nonnavigable lake, is to be construed as fixing the boundary at the center of the lake. *Ledyard v. Ten Eyck* (N. Y.) 36 Barb. 102, 124.

As a coloring matter.

The term "lake" is a compound of mineral or vegetable coloring matter and a metallic oxide. The term in a tariff act fixing a duty on colors and paints, including "lakes," is to be given such a meaning, in the absence of evidence showing the term to have a peculiar meaning in trade and commerce. *Sykes v. Magone* (U. S.) 38 Fed. 494, 497.

LAKE ERIE.

In one sense, the name "Lake Erie" embraces only the main water, excluding land, locked bays, and harbors; in another sense, all of its bays and harbors are part of the lake. In a grant of land bounded on the north by the shore of Lake Erie, the name would include the harbors. *Hogg v. Beerman*, 41 Ohio St. 81, 98, 52 Am. Rep. 71.

LAME—LAMINA.

The Century Dictionary defines "lame" and "lamina" as follows: "A plate; a blade; a thin plate. See 'lamina,' which is defined in the same dictionary as 'a thin plate or scale; a thin plate of wood, metal, etc.; a leaf, layer, etc.'" As used in Tariff Act July 24, 1897, c. 11, Schedule C, par. 179, cl. 1, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1644], fixing a duty on laces, embroideries, braids, galloons, trimmings, or other articles made of lame, the term includes metallics produced by cutting lame into very minute scales of definite size. *Marsching v. United States* (U. S.) 113 Fed. 1006, 1007.

LAMP.

"The word 'lamp,' considered with reference to the general idea conveyed, is as definite as any word in the language; but with regard to the particular form, material, and method of operation of the instrument itself, and the substance used as a light producer, it is as vague as the name of any concrete article in daily use can well be." Hence its meaning must depend largely on the context, and on the time, place, and habits of the people with reference to which it is used; and as used in a contract under which a gas company agreed to furnish natural gas to a village, free of charge, for all street lamps, it is held to mean open lights, such as had been in use previous to the time of making the contract. *Saltsburg Gas Co. v. Borough of Saltsburg*, 20 Atl. 844, 845, 138 Pa. 250, 10 L. R. A. 193.

LAND.

See "Back Land"; "Cherokee Lands"; "Cultivated Lands"; "Farming Land"; "Fenced Land"; "Improved Land"; "Inclosed Land"; "Indemnity Lands"; "Made Land"; "Mineral Land"; "Ministerial Land"; "Overflowed Lands"; "Parsonage Lands"; "Place Lands"; "Public Land"; "Seated Lands"; "State Lands"; "Swamp and Overflowed Lands"; "Tide Lands"; "Unseated Lands"; "Vacant Land."

All lands, see "All."

All my land, see "All."

All other land, see "All Other."

Any lands, see "Any."

His land, see "His."

Other lands, see "Other."

Uncultivated land, see "Uncultivated."

Unimproved land, see "Unimproved."

Blackstone defines "land" as comprehending all things of a permanent, substantial nature, it being a word of very extensive signification, and while distinct from, it includes, tenements. In a legal sense it signifies everything that may be holden, provided it be of a permanent nature, whether it be of a substantial, or of an unsubstantial, ideal kind. *Nessler v. Neher*, 26 N. W. 471, 472, 18 Neb. 649.

"It is elementary that 'land' itself, in legal contemplation, extends from the sky to the depths. Coke says, 'The term "land" includes, not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings; and it has an indefinite extent upwards as well as downwards, so as to include everything terrestrial under or over it.' Co. Litt. 4a. Blackstone says: 'Land comprehends all things of a

5 Wds. & P.—4

permanent and substantial nature, being a word of very extensive signification; also, if a man grants all his "lands," he grants all his mines of metals, and his fossils, his woods, his waters, and his houses, as well as his fields and meadows.' 2 Bl. Comm. 16-18. Washburn says: 'Land is always regarded as real property, and, ordinarily, whatever is erected or growing upon it, as well as whatever is contained within it or beneath its surface, such as minerals and the like, upon the principle that "cujus est solum, ejus est usque ad cælum" in one direction, and "usque ad orcum" in the other.' 1 Washb. Real Prop. 3. Land is the surface of the earth, whatever is attached to it by nature or by the hand of man, and all that is contained within or below it.' *Higgins Oil & Fuel Co. v. Snow* (U. S.) 113 Fed. 433, 438, 51 C. C. A. 267.

"Land," in its full legal signification, comprehends not only the soil, but any building on it, and includes not only the face of the earth, but everything under it or over it. *Lightfoot v. Grove*, 52 Tenn. (5 Heisk.) 473, 477.

The term "land," at common law, has a twofold meaning. In its more general sense it is held to comprehend any ground, soil, or earth whatsoever, as meadows, pastures, woods, marshes, furze, etc. 2 Bl. Comm. 18. In its more limited sense the term denotes the quantity and character of the interest or estate which the tenant may own in lands. *Johnson v. Richardson*, 33 Miss. 462, 464.

"Land," in its legal signification, comprehends any grounds, soil, or earth whatever. *Mitchell v. Warner*, 5 Conn. 497, 517 (citing 1 Inst. 4a); *Lux v. Hagglin* (Cal.) 4 Pac. 919, 920; *Taylor v. Robinson* (U. S.) 84 Fed. 678, 681.

The word "land" includes not only the conveyance of the earth, but everything under it or over it. He who owns a piece of land, therefore, is the owner of everything underneath in a direct line in the center of the earth, and everything above the surface. *Winton v. Cornish*, 5 Ohio (5 Ham.) 477, 478.

"Land" has, "in its legal significance, an indefinite extent, upwards as well as downwards. Whatever is in a direct line between the surface of any land and the center of the earth belongs to the owner of the surface. So that the word 'land' includes not only the face of the earth, but everything under it or over it." *Smith v. City of Atlanta*, 17 S. E. 981, 92 Ga. 119; *United States Pipe-Line Co. v. Delaware, L. & W. R. Co.*, 41 Atl. 759, 767, 62 N. J. Law, 254, 42 L. R. A. 572; *Weems v. Mayfield*, 22 South. 892, 75 Miss. 286; *Hilton & Dodge Lumber Co. v. Murray*, 62 N. Y. Supp. 35, 37, 47 App. Div. 289 (quoting and adopting *Mott v. Pal-*

mer, 1 N. Y. [1 Comst.] 564); *Seager v. McCabe*, 52 N. W. 299, 301, 92 Mich. 186, 16 L. R. A. 247.

"Land," in the English colonies, was considered as partaking much more than in England of the nature of mere commercial property. *Coombs v. Jordan* (Md.) 3 Bland, 284, 22 Am. Dec. 236.

The word "land" is comprehensive in its import, and includes many things besides the earth we tread on, as water, grass, buildings, fences, trees, and the like, for all these may be conveyed by the general designation of "land." *Harder v. Plass*, 11 N. Y. Supp. 226, 227, 57 Hun, 540; *Warren v. Leland* (N. Y.) 2 Barb. 613, 618.

"Land" is that species of property which, by its fixed situation and qualities, has engrossed the term "real" as its peculiar descriptive. *Myers v. League*, 62 Fed. 654, 659, 10 C. C. A. 571.

The word "land," when used in a deed, includes not only the naked earth, but everything within it, and the buildings, trees, fences, and fixtures upon it. A deed to land passes all the incidents to the land as well as the land itself, and as well when they are not expressed as when they are. *Mott v. Palmer*, 1 N. Y. (1 Comst.) 564, 569.

"Land" signifies any ground forming part of the earth's surface which can be held as individual property, whether soil or rock, or water-covered, and everything annexed to it, whether by nature, as trees, water, etc., or by the hand of man, as buildings, fences, etc. *Connecticut Mut. Life Ins. Co. v. Wood*, 74 N. W. 656, 657, 115 Mich. 444.

"Lands," as used in statutes providing for taking lands for a proposed street, should be construed in its broadest signification, and includes all things affixed to lands. *Paul v. Newark*, 6 Am. Law Rev. 576.

Certain words usually employed in a lease, as "house," "farm," "land," and the like, have, if necessary, a very wide meaning, and, where such general and comprehensive terms are employed, all things usually comprehended within the meaning thereof will pass, unless the circumstances of the case show very clearly that the intention of the parties was otherwise. *Riddle v. Littlefield*, 53 N. H. 503, 508, 16 Am. Rep. 388.

"Land," as used in *Hutchinson's Dig.* § 917, providing that every head of a family shall be entitled to hold, own, and possess, free from sale under execution, 160 acres of land, was employed in its general and popular sense to describe the particular subject of property which was designed to be brought within the exemption, and not to define the nature and quality of the interest or estate which was intended to be protected. The term "land," at common law, has a twofold

meaning. In its more general sense it is held to comprehend any ground, soil, or earth whatsoever, as meadows, pastures, woods, marshes, furze, etc. In its more limited sense the term denotes the quantity and character of the interest or estate which the tenant may own in lands. When used to describe the quantity of the estate, it is understood to denote a freehold estate at the least. *Johnson v. Richardson*, 33 Miss. 462, 464 (citing 2 Bl. Comm. 18).

Statutory definitions.

By statute in Arkansas (*Sandels & H. Dig.* § 6401) it is provided that the terms "real property" and "lands," as used in the act relating to taxation, include not only the land itself, with all things thereon contained, but also all buildings, structures, and improvements and other fixtures of whatever kind thereon, and all rights and privileges belonging or in any wise pertaining thereto. *Union Compress Co. v. State*, 41 S. W. 52, 64 Ark. 136.

The term "land," in the chapter of the New York statute in reference to taxation, is expressly defined "to include the land itself, all buildings and other articles erected upon or adverse to the same, all trees and underwood growing thereon, and all mines, minerals, quarries, and fossils in and under the same, except mines belonging to the state." *People v. Board of Assessors of City of Brooklyn*, 39 N. Y. 81, 87.

By statute in Oregon it is provided that "property," "real property," and "land" shall be held to mean and include not only the land itself, whether laid out in town lots or otherwise, but also, unless otherwise specified, buildings, structures, and fixtures of whatever kind, and all rights and privileges belonging or in any wise appertaining thereto. *Chapman v. First Nat. Bank*, 47 N. E. 54, 56, 56 Ohio St. 310.

By statute in Utah the terms "lands," "real estate," and "real property" include land, tenements, hereditaments, water rights, possessory rights, and claims. *Conant v. Deep Creek & Curlew Val. Irr. Co.*, 66 Pac. 188, 189, 23 Utah, 627, 90 Am. St. Rep. 721.

The words "land," "real estate," and "premises," when used in the chapter relating to conveyances of real estate, or in any instrument relating to real property, are synonyms, and shall be deemed to mean the same thing, and, unless otherwise qualified, to include lands, tenements, and hereditaments. *Rev. St. Okl.* 1903, § 887.

Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance. *Civ. Code Cal.* 1903, § 659; *Rev. St. Okl.* 1903, § 4022; *Duggan v. Davey*, 26 N. W. 887, 890, 4 Dak. 110; *Rev. Codes N.*

D. 1899, § 3271; Civ. Code S. D. 1903, § 187; Civ. Code Mont. 1895, § 1075.

For the purpose of assessment, the soil shall be known as "land." Ky. St. 1903, § 2984.

The words "land," "lands," and "real estate" shall include lands, tenements, and hereditaments, and all rights thereto and interests therein; and pews or slips in places of public worship shall be treated as real estate. V. S. 1894, 9.

The term "land," when used in any statute, shall include all corporeal hereditaments whatever, and any interest therein, whether an estate for years or a different estate. Code Miss. 1892, § 1507.

The terms "real property," "real estate," "land," or "lot," whenever used in the chapter relating to the assessment and collection of the revenue, shall be held to mean and include not only the land itself, whether laid out in town or city lots or otherwise, with all things pertaining therein, but also all buildings, structures, and improvements and other permanent fixtures, of whatsoever kind, thereon, all shot towers and all machinery therewith connected, all smelting furnaces and all machinery therewith connected, all gristmills, sawmills (except portable mills of every description), oilmills, tobacco, hemp, and cotton factories, tobacco stemmeries, ropewalks, manufactories of iron, nails, glass, clocks, and all other property belonging to manufactories of whatever kind, all wool-carding machines, all distilleries, breweries, all tanneries, all iron, copper, brass, and other foundries, and all rights and privileges belonging or in any wise pertaining thereto, except where the same may be otherwise denominated by the chapter. Rev. St. Mo. 1899, § 9123.

The terms "real property," "real estate," and "land," when used in the article relating to cities of the second class, shall include not only the land itself, but all buildings, fixtures, improvements, rights, and privileges appertaining thereto. Rev. St. Mo. 1899, § 5647.

The word "land" or "lands," and the words "real estate" or "real property," include lands, tenements, and hereditaments, and all rights thereto and interests therein, except chattel interests. Code W. Va. 1899, p. 134, c. 13, § 17.

The word "land," when used in the revenue act, shall be construed to include not only the land itself, whether laid out in town or city lots or otherwise, with all things contained therein, but also all buildings, structures, and improvements, and other permanent fixtures, effects of every kind thereon, and all rights and privileges belonging or in any wise pertaining thereto, except where

the same may be otherwise denominated by this act. Hurd's Rev. St. Ill. 1901, p. 1494, c. 120, § 292, subd. 12.

The terms "land," "real estate," and "real property" include lands, tenements, hereditaments, water rights, possessory rights, and claims. Rev. St. Utah, 1898, § 2498.

In the title relating to taxation the term "land" shall be held to mean and include not only land itself, whether laid out in town lots or otherwise, with all things contained therein, but also, unless otherwise specified, all buildings, structures, and improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging or in any wise appertaining thereto. Bates' Ann. St. Ohio 1904, § 2730.

The word "land" includes rights and easements of an incorporeal nature. Bates' Ann. St. Ohio 1904, §§ 1538-907.

The term "lands," as used in the act concerning conveyances, shall be construed as coextensive in meaning with "lands, tenements, and hereditaments," and shall include in its meaning all possessory right to the soil for mining and other purposes. Comp. Laws Nev. 1900, § 2713.

The terms "land," and "real estate," as used in the chapter relating to conveyances, shall be construed as coextensive in meaning with the terms "lands, tenements, and hereditaments," and as embracing all mining claims and other chattels real. Mills' Ann. St. Colo. 1891, § 456.

The word "lands," as used in the chapter relating to special taxes in cities, shall mean any unsubdivided real estate. Rev. St. Utah 1898, § 261.

The terms "real property," "real estate," and "lands," when used in the revenue act, except as otherwise provided, shall include city and village lots, and all other land and buildings, fixtures, improvements, mines, minerals, quarries, mineral springs and wells, oil and gas rights, and privileges pertaining thereto. Cobbey's Ann. St. Neb. 1903, § 10-400.

By Gen. St. 1901, § 7503, it is declared that the terms "real property," "real estate," and "land" usually, except as otherwise provided, include not only the land itself, but the buildings, fixtures, improvements, etc. Missouri, K. & T. R. Co. v. Miami County Com'rs, 73 Pac. 103, 105, 67 Kan. 434.

The term "land" as used in the chapter relating to frauds shall be construed as coextensive in meaning with "lands, tenements and hereditaments." Cobbey's Ann. St. Neb. 1903, § 5971; Rev. St. Wis. 1898, § 2325; Horner's Rev. St. Ind. 1901, § 1285; Rev. St. Mo. 1899, § 4160; Hyatt v. Vincennes Nat. Bank, 5 Sup. Ct. 573, 576, 113 U. S. 408, 28 L.

Ed. 1009; *Nellis v. Munson*, 15 N. E. 739, 108 N. Y. 453; *In re Ehrsam*, 55 N. Y. Supp. 942-944, 37 App. Div. 272; *Rev. St. Wis.* 1898, § 4971; *Edwards & McCulloch Lumber Co. v. Mosher*, 60 N. W. 264, 265, 88 Wis. 672; *Pub. St. R. I.* 1882, p. 77, c. 24, § 9; *Comp. Laws Mich.* 1897, § 50, subd. 9; *Pub. St. N. H.* 1901, p. 64, c. 2, § 21; *Mills' Ann. St. Colo.* 1891, § 4185, cl. 5; *McKee v. Howe*, 17 Colo. 538, 541, 31 Pac. 115, 116 (citing *Gen. St. § 3141*, 2 *Mills' Ann. St. § 4158*). In the construction of statutes the word "land" or "lands" and the words "real estate" shall include lands, tenements, hereditaments, and all rights thereto and interest therein. *Gen. St. Minn.* 1894, § 255, subd. 8; *Rev. Laws Mass.* 1902, p. 88, c. 8, § 5, subd. 8; *Rev. St. Me.* 1883, p. 59, c. 1, § 6, subd. 10; *Ky. St.* 1903, § 458; *Alexander v. Miller's Heirs*, 54 Tenn. (7 Heisk.) 65, 82.

In the construction of statutes the word "land," and the phrases "real estate" and "real property," include lands, tenements, and hereditaments, and all rights thereto and interest therein, equitable as well as legal. *Gen. St. Kan.* 1901, § 7342, subd. 8; *Code Iowa* 1897, § 48, subd. 8; *Shannon's Code Tenn.* 1896, § 63; *Strong v. Garrett*, 57 N. W. 715, 716, 90 Iowa, 100.

As agricultural land.

"Land," as used in 6 Geo. IV, c. 77, § 36, providing that, in the collection of rates for the purpose of lighting the town of C. with gas, no person shall be rated for or on account of any land whatsoever, refers to land used only for agricultural purposes, and for purposes ancillary thereto. *Regina v. Midland Ry. Co.*, 30 Eng. Law & Eq. R. 399, 400.

The word "land," in a local act for rating a borough, providing that no person should be rated for or on account of any land whatsoever, means land occupied for cultivation, and uses ancillary thereto, so that a line of railway through such borough was properly rated. *Regina v. Midland Ry. Co.*, 4 El. & Bl. 958, 962.

"The word 'land' in the Dutch language, it is well known, conveyed the same sense with its present technical acceptance, where it is used simply. It meant arable land, and no other was considered as arable but the rich lowlands or flats." *Van Gordon v. Jackson* (N. Y.) 5 Johns. 440, 454.

"Land," as used in *Code*, c. 94, § 1, providing that, "if there be a tenancy for life or other uncertain interest in land which is let to another, the lessee may hold the land to the end of the current year of the tenancy, paying rent therefor," denotes only agricultural land rented for an annual rental, and not town lots used for building purposes alone. *Shufflin v. House*, 31 S. E. 974, 45 W. Va. 731, 72 Am. St. Rep. 851.

As estate in fee.

Under the general railroad act, § 12, empowering any railroad company incorporated thereunder to take by condemnation "lands" or materials required for the use of such company in the construction of its road, a company taking property for its roadbed by condemnation must take for its possession and use such an estate or interest therein as in a legal sense is comprehended in the term "land," whereof the unqualified use and possession for the legitimate purposes of the company will be transferred by the condemnation proceedings. Where the petition for the appointment of commissioners, describing the lands desired, states that it is not intended to acquire any right or easement of support for the track or roadbed of the railroad by the ores lying beneath, and that the owner shall be at liberty after reasonable notice to remove the ores, notwithstanding the removal may weaken or destroy the roadbed, and that, if the support of the roadbed be destroyed or materially weakened by the removal of ores, then the company shall have the right to support said roadbed by timbers placed across the tunnel or by other means, the right in the lands as so qualified would not give the company the lands, and such qualified right it cannot acquire by condemnation under the statute. *De Camp v. Hibernia Underground R. Co.*, 47 N. J. Law (18 Vroom) 43, 53.

As an estate in the soil.

The term "land" embraces "all titles, legal or equitable, perfect or imperfect, including such rights as lie in contract, those which are executory as well as those which are executed." *Fish v. Fowle*, 58 Cal. 373, 375.

In *St. 38 Geo. III*, c. 5, § 4, providing that all bodies corporate, having or holding any lands or hereditaments, shall be charged to the land tax, the word "land" means a legal interest in the soil, though it may, in a statute passed to throw a charge upon the occupier, mean the ground on which a chattel is deposited in the exercise of an easement. The term as used in the statute does not include land occupied by the pipes of a waterworks company. *Chelsea Waterworks Co. v. Bowley*, 17 Q. B. 358, 360.

The term "land," at common law, has a twofold meaning. In its more general sense it is held to comprehend any ground, soil, or earth whatsoever, as meadows, pastures, woods, marshes, etc. In its more limited sense the term "land" denotes the quantity and character of the estate or interest which the tenant may own in lands. "The land is one thing," says *Plowden*, "and the estate in the land is another thing; for an estate in the land is a time in the land or land for a time." When used to describe the quantity of the estate, "land" is understood to denote a freehold estate at the

lowest. Hence it is held that the term "lands," as used in Hutch. Dig. 917, providing that every head of a family shall be entitled to hold, own, and possess, free from sale under execution, 160 acres of land, etc., includes an interest in lands for years for life, or any greater estate of freehold. *Johnson v. Richardson*, 33 Miss. 462, 464.

"Land," as used in Act 3 & 4 Wm. IV, c. 27, § 2, providing that no person shall make an entry or distress or bring an action to recover any land or rent but within 20 years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued, means the inheritance of land, the freehold of land, and the act does not deal with land in any other sense than in that where a person has a right to the land itself. *The Dean of Ely v. Bliss*, 19 Eng. Law & Eq. 190, 197.

The undivided half of a fee is "land." *Coombs v. Anderson*, 138 Mass. 376, 378.

Where an execution directs the officer to cause it to be satisfied of the goods, chattels, or lands of the judgment debtor, the word "lands" embraces any interest authorized in law to be taken. *Holmes v. Jordan*, 39 N. E. 1005, 1006, 163 Mass. 147.

A statute providing for compensation to owner of "lands" taken is broad enough for any interest which a person may have in lands affected by an improvement, whether a fee or an estate less than a fee. *Schoff v. Upper Connecticut River & Lake Imp. Co.*, 57 N. H. 110, 112.

The term "lands," when not restricted in meaning by related provisions in statutes, includes all interest therein. *Zumstein v. Consolidated Coal & Mining Co.*, 43 N. E. 329, 330, 54 Ohio St. 264.

"Lands," as used in P. L. 1835, p. 25, providing that a railroad company may take, have, and hold lands, and may condemn the same, and when the proceedings are consummated as provided by the act, and the price paid, the company shall be deemed to be seised and possessed in fee simple of all such lands, means "land" in its legal signification; that is, a corporeal hereditament. *United States Pipe-Line Co. v. Delaware, L. & W. R. Co.*, 41 Atl. 759, 762, 62 N. J. Law, 254, 42 L. R. A. 572.

As used in Act Jan. 26, 1828, § 27, providing that the power of a canal company to take land shall be so construed as not to authorize the company to take or appropriate to the use of their canal, or under color or pretense that the same are necessary therefor, any lands, etc., except such as are actually necessary for its necessary towing-paths and works, is equivalent to "right" or "estate." *New Jersey Zinc &*

Iron Co. v. Morris Canal & Banking Co., 15 Atl. 227, 231, 44 N. J. Eq. (17 Stew.) 398, 1 L. R. A. 133.

As land and improvements.

The term "land," in 12 Stat. U. S. 127, § 3, subd. 6, admitting Kansas as a state, and providing that government land should never be taxed by the state, includes improvements on homesteads, and hence such improvements are not taxable before final proof of settlement and cultivation is made. *Chase County Com'rs v. Shipman*, 14 Kan. 532, 537.

In a statute relating to mechanics' liens, providing that where a mortgagee has the prior lien the mortgagee shall retain his priority and be preferred to the extent of the value of the land at the time the contract is made with the mechanic or materialman, "land" means the land with such improvements as there were upon it at the time of the execution of the mortgage. If, for example, the owner of unincumbered real estate with a building upon it executes a mortgage thereon, and afterwards has repairs made on the building for which a mechanic's lien is enforced, such lien would take priority over the mortgage only to the extent of the additional value given to the property by the improvements. *Croskey v. The Western Mfg. Co.*, 48 Ill. 481, 483.

As property.

See "Personal Property"; "Property."

Award.

An award is not land, and is only treated as land in equity when necessary to adjust the rights of the parties. It is a claim or right presented to the owner of the land; it is personal property, that passes at death to the personal representative, and not to the heir. *In re Seventh Ave.*, 59 App. Div. 175, 177, 69 N. Y. Supp. 63, 64.

Bridge.

Where a charter of a turnpike company authorizes it to construct a road on a route which includes a public county bridge, and requires it to pay to the owners of land over which the road should pass all damages sustained, the compensation clause applies to the bridge, which is included in the term "land," and of which the county is the owner. *Freeholders of Monmouth County v. Red Bank & H. Turnpike Co.*, 18 N. J. Eq. (3 C. E. Green) 91, 94.

Building.

At common law, "land" includes all buildings of a permanent nature standing thereon. *Union Cent. Life Ins. Co. v. Tillery*, 54 S. W. 220, 221, 152 Mo. 421, 75 Am. St. Rep. 480.

The word "land," in its legal significance, comprehends any ground, soil, or earth whatever, and also has an indefinite extent upward as well as downwards, and therefore includes all castles, houses, and other buildings standing thereon. *Stevenson v. Bachrach*, 48 N. E. 327, 328, 170 Ill. 253.

The word "land," in a conveyance of land, includes the buildings situated thereon. *Gibson v. Brockway*, 8 N. H. 465, 470, 81 Am. Dec. 200.

Within the meaning of the statute which makes it the duty of the auditor to transfer for taxation, in the name of the owner of lands, town lots and parts thereof which have been conveyed, a building, whenever it is a permanent improvement, is "land," for the purpose of taxation. *Cincinnati College v. Yeatman*, 30 Ohio St. 276, 282.

Where authority is given to a railroad company to appropriate land, the term "land" is sufficiently broad to include buildings of a permanent and fixed character. *Chicago, I. & K. R. Co. v. Knuffke*, 13 Pac. 582, 583, 36 Kan. 367.

A fine of "land" will pass houses thereon, unless a particular intent to the contrary is manifested. *Bulkley v. Wilford*, 8 Dowl. & R. 549.

The term "land," in its general and legal meaning, embraces the structure of a tenant for a term of years, which would be part of the realty if the tenants owned the fee, though the lease stipulates that the lessee may remove the buildings at the end of the term, and on proceedings to condemn such land for a public park the lessee is entitled to damages in the value of the buildings. *Mills, Em. Dom.* § 223, says: "When land is condemned, the condemnation carries with the land all the erections upon it, including buildings, fences, gravel, stone, or wood-paving planks, flagstones, bridges, culverts, guard or lamp posts." In re *Appointment of Park Com'rs*, 1 N. Y. Supp. 763, 765.

"Land," as used in a New York statute providing that all land within the state, owned by individuals or by corporations, shall be liable to taxation, should be construed to include the land itself, and all buildings and structures erected upon or affixed to the same. *People v. Barker*, 47 N. E. 46, 47, 153 N. Y. 98.

The word "land" includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings and fences. *Crawford v. Hathaway* (Neb.) 93 N. W. 781, 788 (citing *McGee Irrigating Ditch Co. v. Hudson* [Tex.] 22 S. W. 967).

A conveyance of land likewise conveys the buildings thereon. *Isham v. Morgan*, 9 Conn. 374, 377, 23 Am. Dec. 361.

Chattels real.

"Land," as used in Const. art 15, § 9, providing that a homestead to the extent of 160 acres of farming land shall be exempt, etc., includes a leasehold estate in land. *Hogan v. Manners*, 23 Kan. 551, 558, 33 Am. Rep. 199.

Under the provision of a statute providing that the word "land" or "lands" may be construed to include lands, tenements, and hereditaments, and rights thereto and interest therein, a leasehold comes within the term "lands, tenements, and hereditaments," as used in the statute of frauds. *Potter v. Arnold*, 5 Atl. 379, 381, 15 R. I. 350.

The term "lands" does not comprehend chattel interests nor incorporeal hereditaments. Therefore a statute declaring that no bargain sale, etc., of "houses or lands," shall be good unless the deed be properly acknowledged, did not extend to a lease for years and a right of way. *Stone v. Stone*, 1 R. I. 425, 428.

Blackstone says that "land" comprehends all things of a permanent, substantial nature, and that all corporeal hereditaments may be included under the general denomination of "land." By the name "land," which is nomen generalissimum, everything terrestrial will pass. The term "land" is not descriptive of a particular estate or class of estates, but merely as the terraqueous subject-matter of real estates. In other words, land is the physical thing out of which all terrene estates are formed, from a freehold of inheritance down to a tenancy at will, but is not in itself descriptive of any given estate or estates. The term, in a statute relative to the recording of mortgages on lands and tenements, includes chattels real. *Ex parte Leland* (S. C.) 1 Nott & McC. 460, 462.

When the term "lands" is used in statutes protecting the property of married women, or giving mechanics' liens, or providing for the descent of the property, leaseholds are embraced, as Code, § 51, provides that the term, when used in the Code, shall include lands, tenements, and hereditaments, and all rights thereto and interest therein, equitable as well as legal. *Lewis v. Glass*, 20 S. W. 571, 572, 92 Tenn. (8 Pickle) 147.

Crops.

In an action for injury caused by overflowing "land," an instruction stated the measure of plaintiff's damages for each year was the difference, between the fair market value of the land immediately before the injury each year and its fair market value immediately after such injury. Held, that the "land" as used in the instruction included growing crops. *Sullens v. Chicago, R. I. & P. Ry. Co.*, 38 N. W. 545, 548, 74 Iowa, 659, 7 Am. St. Rep. 501 (citing *Drake v. Chicago*).

R. I. & P. Ry. Co., 19 N. W. 215, 63 Iowa, 302, 50 Am. Rep. 746).

Growing crops, before maturity, and severed from the soil, are, as a general rule, part of the "land." *Bagley v. Columbus Southern Ry. Co.*, 98 Ga. 626, 642, 25 S. E. 638, 34 L. R. A. 286, 58 Am. St. Rep. 325.

Easements and incorporeal hereditaments.

"Land," as subject to the *lex loci rei sitæ*, includes servitudes, easements, rents, and other incorporeal hereditaments and interests in and appurtenant to land. *Butler v. Green*, 19 N. Y. Supp. 890, 894, 65 Hun, 99.

The term "land" includes such real property only as has corporeal existence, and excludes incorporeal hereditaments. In re *Metropolitan Electric R. Co.*, 2 N. Y. Supp. 278, 281.

Within Gen. St. c. 3, § 7, cl. 10, declaring that "land" shall include tenements, hereditaments, and all rights thereto and interests therein, the term "land" includes an easement. *Googins v. Boston & A. R. Co.*, 30 N. E. 71, 155 Mass. 505.

The term "lands" does not comprehend chattel interests nor incorporeal hereditaments. *Stone v. Stone*, 1 R. I. 425, 428.

"Land" has various meanings, and it may, in a statute touching assessment of companies for the relief of the poor in respect of pipes for the conveyance of water or gas as "occupiers of land," mean the ground on which a chattel is deposited in the exercise of an easement, though in other acts of Parliament it means a legal interest in the soil. *Chelsea Water Works v. Bowley*, 17 Q. B. 358, 361.

"Land," as used in Rev. St. c. 4, § 7, excepting from the jurisdiction of justices of the peace actions wherein the title of lands, tenements, and hereditaments is involved, etc., is sufficiently comprehensive to include a right of way over the real estate of another, whether held by the public or an individual. *Whitman v. Town of Pownal*, 19 Vt. 223, 227.

A devise of "lands" does not include an advowson. *Westfaling v. Westfaling*, 3 Ark. 459, 464.

The term "land," in statutes conferring power to condemn, is taken in its legal sense, and includes both the soil and buildings and other structures on it, and any and all interests therein. An easement may be taken under authority to take land. *State v. King County Superior Court*, 72 Pac. 89, 92, 31 Wash. 445 (citing 1 *Lewis on Eminent Domain*, § 285).

"The word 'land' has, in law, a well-settled meaning, which includes the surface

of the ground and everything that is on it and under it, but does not comprehend incorporeal hereditaments." *Whitlock v. Greacen*, 21 Atl. 944, 48 N. J. Eq. (3 Dick.) 359.

Technically, "land" applies only to corporeal property, but it may, when appearing to have been used with such intent, include an incorporeal interest in lands (*Brower v. Tichenor*, 41 N. J. Law [12 Vroom] 345; *Boston Water Power Co. v. Boston & W. R. Corp.*, 40 Mass. [23 Pick.] 360, 395), and is so used in a deed which, after describing the land conveyed, provided that there was also conveyed a certain strip along a ditch to secure a free flow of water through the ditch, where the granting clause recited a conveyance only of the land hereinbefore described. *Overton v. Moseley*, 33 South. 696, 698, 135 Ala. 599.

At the common law the word "land" never included incorporeal hereditaments. *Hegan v. Pendennis Club*, 23 Ky. Law Rep. 861, 863, 64 S. W. 464.

Franchise of corporation.

Within Rev. St. c. 13, tit. 1, § 2, declaring that the term "land" shall be construed to include the land itself, all buildings or other articles erected upon or affixed to the same, all trees and underwood growing thereon, and all mines, minerals, quarries, and fossils in and under the same, except mines belonging to the state, "land" does not include the franchise of a corporation. *People v. Commissioners of Taxes*, 10 N. E. 437, 441, 104 N. Y. 240, 248.

A railroad's franchise is an incorporeal hereditament, as distinguished from "land," which is a corporeal hereditament. *Gibbs v. Drew*, 16 Fla. 147, 149, 26 Am. Rep. 700.

Where a borough charter authorized certain officers to pave the public streets, and gave them power to determine what lands and buildings would be specially benefited by such improvements, and to apportion the cost accordingly, a railroad franchise was not "lands and buildings" within the charter. *Farmers' Loan & Trust Co. v. Borough of Ansonia*, 61 Conn. 76, 85, 23 Atl. 705.

Highway or right of way.

Under a charter authorizing the assessment of abutting "lands or lots" for the improvement of a street, a railroad right of way is included, it being land. *Indianapolis & V. Ry. Co. v. Capitol Pav. & Const. Co.*, 54 N. E. 1076, 1077, 24 Ind. App. 114.

"Lands," as used in 8 & 9 Vict. c. 20, providing that railway companies shall maintain fences to separate the right of way from the "adjoining lands" not taken, includes land which adjoined the railway, but was used for a public highway; and, where a railway company's right of way

joined the highway, it was the duty of the company to maintain a fence between the right of way and the highway. *Manchester, S. & L. Ry. Co. v. Wallis*, 14 O. B. 213, 223.

In Gen. St. § 3461, authorizing railroad companies to change the location of their roads with the approval of the railroad commissioners, and take lands for additional tracks, depots, etc., "lands" includes public highways or streets. "The word 'lands' is comprehensive, and may include anything that may be classed as real estate." *State v. Railroad Com'rs*, 15 Atl. 756, 56 Conn. 308.

In 1 Rev. St. 360, § 1, providing that all lands within this state, whether owned by individuals or by corporations, shall be liable to taxation, etc., the word "lands" includes a street railway. *People v. Cassity*, 46 N. Y. 46, 49.

In an ordinance providing that a street improvement shall be paid for by a special taxation upon lands, blocks, or parcels of land contiguous to the improvement, "land" should be construed as synonymous with the word "property" as used in a statute authorizing special assessments, and hence not to exclude the intersecting streets along the property to be taxed. *Cunningham v. City of Peoria*, 41 N. E. 1014, 1016, 157 Ill. 499.

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Ice.

The ice formed by the congealing of a flowing stream running in its natural channel, attached to the soil, constitutes a part of the land, and belongs to the owner of the bed of the stream. It is the attaching of property to something else by which the owner of one thing becomes possessed of the right to another, and does not differ from alluvian or accretion, which is but an imperceptible deposit or addition of earth, ers, floods, or other causes upon land. *State v. Pottmeyer*, 33 Ind. 402, 403, 5 Am. Rep. 224.

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The Tennessee Code provides that the word "land" shall be held to include lands,

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Coal and minerals in places, the title to which has been severed from the title to the surface, constitute "land," within Rev. St. c. 33, § 7, providing that whenever a person having color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he shall be adjudged as the legal owner, etc. *Catlin Coal Co. v. Lloyd*, 52 N. E. 144, 147, 176 Ill. 275.

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Swamp and boggy land along the outer edge of which a meandered line had been

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"Land," in its most general sense, comprehends any ground, soil, or earth whatsoever, as meadow, pastures, woods, moors, waters, marshes, furzes and heaths," while "tenements" is a word of greater meaning and extent sometimes, and includes not only land, but rents, commons, and several other rights and interests issuing out of or concerning land. *Canfield v. Ford* (N. Y.) 28 Barb. 336, 338.

Town lots.

"Lands," as used in Act Jan. 10, 1857, § 1, limiting to two years the right to maintain an action for the recovery of any lands, or for the possession thereof, against any person who may hold such lands by virtue of a purchase thereof at a sheriff's or auditor's sale for the nonpayment of taxes, or under an auditor's deed, should be construed to include town lots. *City of Helena v. Horner*, 23 S. W. 966, 58 Ark. 151.

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The word "land" is a comprehensive term, including standing trees, buildings, fences, stones, and waters, as well as the earth we stand on. Standing trees must be regarded as part and parcel of the land in which they are rooted and from which they draw their support. *Kingsley v. Holbrook*, 45 N. H. 313, 319, 86 Am. Dec. 173.

The word "land," in the ordinary legal sense, comprehends everything of a fixed and permanent nature, and therefore embraces growing trees. The setting fire to and destroying growing fruit trees is therefore an injury to land, and an action to recover damages for such destruction must be brought in the county in which the land is situated, under Rev. St. art. 1194, subd. 14, requiring suits for the recovery of damages to land to be brought in the county in which the land is situated. *Gulf, C. & S. F. Ry. Co. v. Foster* (Tex. Civ. App.) 44 S. W. 198, 199.

By the common law, trees are a part and parcel of the land upon which they are growing or standing, for the term "land" embraces not only the soil but its natural

joined the highway, it was the duty of the company to maintain a fence between the right of way and the highway. *Manchester, S. & L. Ry. Co. v. Wallis*, 14 O. B. 213, 223.

In Gen. St. § 3461, authorizing railroad companies to change the location of their roads with the approval of the railroad commissioners, and take lands for additional tracks, depots, etc., "lands" includes public highways or streets. "The word 'lands' is comprehensive, and may include anything that may be classed as real estate." *State v. Railroad Com'rs*, 15 Atl. 756, 56 Conn. 308.

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productions, and trees growing or standing upon land are not distinguishable in their character of real estate from the soil until they are actually severed from the soil. *Fox v. Pearl River Lumber Co.*, 81 South. 583, 80 Miss. 1.

The term "land," when used without any qualification, refers not only to the soil, but to everything else which is attached to it or which constitutes a part of it, the buildings, mines, trees, growing crops, etc. Even trees which have been cut and which are lying on the land have been said to pass under a grant of the land. *Gulf Red Cedar Lumber Co. v. O'Neal*, 30 South. 466, 472, 131 Ala. 117, 90 Am. St. Rep. 22.

Water and water power.

The word "land" includes the water in the earth, which is the result of natural and ordinary percolation through the soil, such water being a part of the land itself. *Edwards v. Haeger*, 54 N. E. 176, 177, 180 Ill. 99.

"Land" includes water power, used or unused. *Kimberly & Clark Co. v. Hewitt*, 44 N. W. 303, 75 Wis. 371.

As the term "land" is used when speaking of land as a subject of ownership, it includes land covered with water. *Hardin v. Jordan*, 11 Sup. Ct. 808, 814, 140 U. S. 371, 35 L. Ed. 428 (citing Lord Coke).

By the statutes of Maine the word "land" includes all tenements and hereditaments connected therewith, and all interest therein. Hence the right of a riparian proprietor to the use of the water flowing in a natural stream is to be regarded as land; not as a mere easement or appurtenance, but inseparably connected with the soil itself. *Hamor v. Bar Harbor Water Co.*, 3 Atl. 40, 43, 78 Me. 127.

The word "land" includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings and fixtures. The diversion of water which only has a right to flow in a certain channel is in effect "taking land," within Gen. Laws Tex. 1899, p. 102, providing for the organization of irrigating ditch companies, and that they may obtain the right of way over private land by condemnation, and also within Rev. St. art. 628, § 6, authorizing canal companies to condemn any land necessary for their uses. *McGee Irrigating Ditch Co. v. Hudson* (Tex.) 22 S. W. 967, 968.

Priv. Laws 1851, p. 61, incorporating a certain railroad company, and granting it a right of way through the state, authorizing it to take and use any "lands," streams, and materials of every kind belonging to the state for the location of depots, construction of bridges, station grounds, etc., necessary for the maintenance and complete operation

of the road, provided that nothing should be done to interrupt the navigation of such streams, cannot be construed to include lands belonging to the state covered by the waters of Lake Michigan, and hence the company has no authority to fill up and use such lands. *Illinois Cent. R. Co. v. City of Chicago*, 50 N. E. 1104, 1107, 173 Ill. 471, 53 L. R. A. 408.

LAND AND BUILDING CORPORATION.

Corporations organized for the erection of buildings and making other improvements on real property may raise funds in shares not exceeding \$200 each, payable in periodical installments. Such bodies are known as "land and building corporations," and may be organized with or without a capital stock. Civ. Code, Idaho. 1901, § 2298.

LAND CERTIFICATE.

See "Valid Land Certificate."

As personal property, see "Personal Property."

Unlocated land certificate as real estate, see "Real Property."

LAND DAMAGES.

In fixing the valuation of real estate of a railroad company within a town for purposes of taxation, the expression "land damages," as used in the report of the referee on objections to an assessment for taxation of railroad property, in which he added to the valuation what the railroad would have been obliged to pay in addition to the price of the land as land damages, is understood to mean those damages which the railroad would have been compelled to pay for depreciation of land, adjoining that actually taken by the railroad, by reason of such taking. *People v. Hills*, 58 N. Y. Supp. 434, 435, 27 Misc. Rep. 290.

As used in Laws 1872, c. 882, § 8, providing that commissioners shall, as soon as practicable, ascertain and determine the costs, expenses, and land damages of certain drainage, "land damages" includes the expense of a right of way for the drain acquired by purchase from the owner. *In re Lent*, 62 N. Y. Supp. 227, 231, 47 App. Div. 349.

LAND DEPARTMENT.

"Land Department" is a special tribunal intrusted with the power of determining what lands are subject to grants and exceptions therein. *Northern Pac. R. Co. v. Barden* (U. S.) 46 Fed. 592, 617.

The Land Department of the United States (including in that term the Secretary of the Interior and Commissioner of the General Land Office and their subordinate offi-

cers) constitutes a special tribunal, vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of, and also the power to execute its conveyance to the parties it decides are entitled to it. *United States v. Winona & St. P. R. Co.* (U. S.) 67 Fed. 948, 956, 15 C. C. A. 96.

LAND DELIVERED.

A return of "land delivered" on an elegit is a legal satisfaction of the judgment, and, if the judgment be afterward revived on a scire facias against the defendant alone, this will not preclude the terre tenant from setting up such defense. *Hinesly v. Hunn's Adm'r* (Del.) 5 Har. 236.

LAND DISTRICT.

"Land district," as used in Rev. St. § 2334 [U. S. Comp. St. 1901, p. 1435], which provides "that the Surveyor General may appoint in each land district, containing mineral lands, as many competent surveyors as shall apply for appointment to survey mining claims," means a division of the state or territory, as the case may be, created by law, in which is located a land office for the disposition of the public lands therein. *United States v. Smith* (U. S.) 11 Fed. 487, 491.

LAND FORCES.

Unquestionably, in a certain and general sense, the terms "army" and "land forces" do embrace militia in actual service. The militia do serve on land, and therefore, in a popular sense, are a part of the land forces; but in the Constitution and laws of the United States, the militia, though in service, and the army or land forces are quite distinct. In the eighth section of the first article of the Constitution it is declared, among other things, that Congress shall have power to raise and support armies, to provide and maintain a navy, to make rules for the government of the land and naval forces, to provide for calling forth the militia, and to provide for organizing the army and disciplining the militia. If the militia employed in the service of the United States were, in the constitutional sense, a part of the "land forces," there would have been no necessity or propriety, after prescribing that Congress should have power to provide for the government of the United States forces, to also provide by a separate clause that they should have power to govern such part of the militia as might be employed in its service. *Ex parte Henderson* (U. S.) 11 Fed. Cas. 1067, 1073.

LAND HELD IN FEE.

Act June 16, 1893, § 72, authorized the property of a public corporation, not essen-

tial to the purposes of the corporation, to be levied on and sold, and authorized its other property to be reached by sequestration. Act April 7, 1870, provides for sale on execution of all the property of such a corporation, "except lands held in fee," and is expressly declared to be "in addition" to the provisions of Act June 16, 1836, § 72, and "in lieu" of the proceedings by sequestration under that act. Held, that the exception as to "lands held in fee" is limited to land not only held in fee, but also not dedicated to corporate purposes, or essential to the exercise of the corporate franchises, which is still to be sold on execution under the act of 1836. A right to take natural gas from the land of another is not "land held in fee," nor are the appurtenances and privileges necessary to the enjoyment of the right. *Greensburg Fuel Co. v. Irwin Nat. Gas Co.*, 29 Atl. 274, 275, 162 Pa. 78.

LANDS LET TO LEASE.

"Lands let to lease" are those conveyed only for life, years, or at will. *Wright v. Hardy*, 24 South. 697, 699, 76 Miss. 524.

LAND LINE.

The words "land line," as used in an instruction in an action of ejectment concerning a boundary, will be construed as synonymous with "boundary." *Henderson v. Dennis*, 53 N. E. 65, 66, 177 Ill. 547.

LAND-LOCKED SALMON.

For the purpose of the chapter relating to fish and fisheries, the term "land-locked salmon" means any of the species or varieties of salmon that do not periodically and habitually run to the sea, being the same locally known as "salmon trout" and "black spotted trout." Rev. St. Me. 1883, p. 375, c. 40, § 82.

LAND OFFICE.

"Land Office," as used in Act Cong. May 27, 1880, c. 105, 21 Stat. 142 [U. S. Comp. St. 1901, p. 1502], providing that all legal surveys returned to the Land Office before March 3, 1857, on entries made prior to a certain date, shall be valid, should be construed to mean "General Land Office." *Fussell v. Gregg*, 5 Sup. Ct. 631, 638, 113 U. S. 550, 28 L. Ed. 993.

LAND ON WHICH IT STANDS.

As used in a deed conveying a store building and the land on which it stands, without other description of boundaries, the phrase "land on which it stands" includes the fee of the land to the middle of the

highway on the line of which the store is located. *Gear v. Barnum*, 37 Conn. 229, 231.

LAND POOR.

A person is land poor when he has a great deal of unproductive land and perhaps is obliged to borrow money to pay taxes, but it does not follow, because a person is land poor, that he is not responsible in a financial way. *Matteson v. Blackmer*, 9 N. W. 445, 446, 46 Mich. 393.

LAND PROPERTY.

When a man devises his "land property," it is as much as to say all his interest in the subject devised. *Foster v. Stewart*, 18 Pa. (6 Harris) 23, 24.

LAND SOLD BY CONGRESS.

Act March 3, 1845, c. 76, provided for the admission of the state of Iowa into the Union, and Act April 18, 1818, c. 67, authorized the admission of Illinois. Both acts declare that 5 per cent. of the net proceeds of land lying within the state, and afterwards "sold by Congress," shall be reserved and appropriated for certain public purposes of the state. Held, that the words "lands sold by Congress" were limited to public land lying within the state, belonging to the United States, at the time of the admission of the states into the Union, which were actually sold by Congress for a pecuniary consideration, and did not include bounty lands or lands disposed of by the United States in satisfaction of military land warrants. *Iowa v. McFarland*, 4 Sup. Ct. 210, 216, 110 U. S. 471, 28 L. Ed. 198.

LAND USED IN OPERATING A RAILROAD.

An exemption of "land used in operating a railroad" did not exempt land belonging to the railroad and forming a part of its depot grounds, but which was included within the inclosure of one owning adjoining lands under the mistaken belief of all that it belonged to him. *Vicksburg & M. R. Co. v. Lewis*, 10 South. 32, 68 Miss. 29.

LAND WARRANTS.

As certificates, see "Certificate."

LANDS OF UNITED STATES.

Under Rev. St. § 5388 [U. S. Comp. St. 1901, p. 3649], which provides a punishment for every person who unlawfully cuts, etc., any timber standing upon the "lands of the United States," lands granted to the Cherokee Tribe of Indians by the treaty of

May 6, 1828, and subsequent treaties, are not included. *United States v. Reese* (U. S.) 27 Fed. Cas. 742, 745.

LANDS, TENEMENTS, AND HEREDITAMENTS.

In the construction of statutes the words "real estate" or "real property" shall be deemed synonymous with the phrase "lands, tenements, and hereditaments." Rev. Code Del. 1893, p. 43, c. 5, § 1, subd. 7.

The term "lands, tenements, and hereditaments" is generally construed to include all lands and interest in lands, corporeal or incorporeal, which would descend to an heir at law. *Bedlow v. Stillwell*, 36 N. Y. Supp. 129, 91 Hun, 384.

An assignment by an insolvent debtor of all lands, tenements, and hereditaments is sufficient to pass all the grantor's real estate, without a more particular description. *Pingree v. Comstock*, 35 Mass. (18 Pick.) 46, 52.

The terms "land" and "real estate," as used in the chapter relating to conveyances, shall be construed as coextensive in meaning with the terms "lands, tenements, and hereditaments," and as embracing all mining claims and other chattels real. *Mills' Ann. St. Colo.* 1891, § 456.

"Lands, tenements, and hereditaments," as used in the act concerning conveyances (Revision, p. 155, § 14), which provides that every deed or conveyance of or for any "lands, tenements, or hereditaments" to any purchaser of the same shall be recorded, does not include leases for years, but only applies to freehold estates. *Hutchinson v. Bramhall*, 7 Atl. 873, 875, 42 N. J. Eq. (15 Stew.) 372.

LANDS, TENEMENTS, AND PROPERTY.

As used in Act April 10, 1867, authorizing a certain railroad company to enter upon, acquire, take, and appropriate such "lands, tenements, and property" along, adjoining, etc., to the railroad or elsewhere that they may deem necessary, etc., should be construed to exclude established roads and streets. *Appeal of Pennsylvania R. Co.* (Pa.) 5 Atl. 872, 875.

LANDS WHICH MAY BELONG TO HIM.

The phrase "lands which may belong to him," in a grant of a ferry right to a certain person operating a ferry across a certain river from lands that may belong to him, operates to limit the right to lands which may belong to the grantee, and cannot be extended to any lands which his

heirs or assigns may subsequently acquire, although the grant is made to the original grantee, his heirs and assigns. *Mills v. St. Clair County*, 7 Ill. (2 Gilman) 197, 229.

LANDED.

The owner of oil, insuring it for inland transportation, took out a marine policy, which provided that the risk should continue until the goods were safely "landed," but the "rider" on the policy stated that the insurance was on oil in tank cars in transit. Held, that the word "landed" did not mean that the risk continued until the oil was removed from the cars, but the risk terminated on delivery of the oil by placing the oil on the consignee's siding at its refinery. *Crew-Levick Co. v. British & Foreign Marine Ins. Co. (U. S.)* 77 Fed. 858, 859.

Where an act of Parliament provided that the owners of a certain wharf should be entitled to charge for all goods which should be "landed or discharged" at such rates as are generally taken or received for any goods "loaded or discharged" on any of the wharves in the port of London, the owners had no right to claim wharfage for goods shipped off from their wharves. *The Dock Co. v. La Marche*, 8 Barn. & C. 42.

LANDED ESTATE.

All my landed estate, see "All."

In an act of the Legislature dated March 12, 1852, authorizing the police jury to levy a tax on landed estate to pay the amount of subscription to the stock of corporations undertaking works of internal improvement, the phrase "landed estate" embraces not only the land, but all houses, fixtures, and improvements of every kind thereon, and all machinery, neat cattle, horses, and mules, when attached to and used on a plantation or farm. The ordinary meaning of the words "landed estate" seems to be an interest in and pertaining to lands. Thus we say a "landed proprietor," and mean thereby any person having an estate in lands, whether highly improved or not. *Police Jury of Parish of St. Mary v. Harris*, 10 La. Ann. 676, 677.

In construing a will in which testator devised all his real and personal estate to two daughters, equally to be divided between them as tenants in fee, and containing a subsequent clause that, "notwithstanding the former devise for the benefit of my wife and daughters, I empower my executors to do all acts and execute all instruments which they may consider requisite to the partition of my 'landed estate,' and I devise the same to them as joint tenants," the court said that "the term 'landed estate,' which was used in the will, was not intended merely to be de-

scriptive of the realty as distinguished from the personality," and it was held that the devise to the executors gave them a legal estate in fee, and that they took such estate not only by virtue of the terms "estate" or "landed estate," employed in the will, but by necessary implication from the power given to them to sell and dispose of the property. *Bradstreet v. Clarke (N. Y.)* 12 Wend. 602, 662.

LANDED PROPERTY.

"Landed property," as used in the taxation act, is synonymous with "real estate." *United Railways & Electric Co. v. City of Baltimore*, 49 Atl. 655, 656, 93 Md. 630, 52 L. R. A. 772.

Under an act (2 Md. Assem. 1888, c. 98, § 19) annexing certain territory to a municipal corporation, and providing that until a certain year the rate of taxation on the landed property in the territory annexed should not exceed the rate in the county in which the city was situated, etc., it is held that the term "landed property" means rural property, in contradistinction to real estate located in the city, and for all practical purposes was any property before laid out in city lots. *Sindall v. City of Baltimore*, 49 Atl. 645, 647, 93 Md. 526.

LANDING.

See "Public Landing"; "Reserve Landing."

"Landing in the United States," as used in Act July 5, 1884, c. 220, § 11, 23 Stat. 117 [U. S. Comp. St. 1901, p. 1310], making it a crime to aid in the landing in the United States from any vessel any Chinese person not lawfully entitled to enter the United States, does not refer to persons already within the United States, or to persons who arrive on a vessel from a port or place within the United States. *United States v. Wilson (U. S.)* 60 Fed. 890, 894.

As unloading.

Merchandise was taken from a vessel during the night in a boat and taken to the wharf. Part of the goods were unloaded on the wharf, but afterwards the whole of the merchandise was returned to the vessel. Held, that this was not a "landing," within the meaning of the act of Congress of March 2, 1799, prohibiting landing, etc., under certain circumstances. *United States v. Smith (U. S.)* 27 Fed. Cas. 1246.

The act of 1807 fixes the rates of wharfage in the city of Charleston: "For 'landing' every bale or case of cotton, 4 cents per bale or case; for 'shipping' every bale or case of cotton, 4 cents per bale or case." Held, that the words "landing" and "shipping,"

as used in the statute, should be construed to mean that the wharf owner is entitled to 4 cents per bale only for receiving the cotton from drays, railroad cars, and other vehicles and loading it on vessels. "Landing" means taking the cotton from the ship and putting it on the land, and "shipping" means putting the cotton on board of a ship to be transported; the two operations being the exact opposite of each other. "Landing" should not be construed to be a part of "shipping," so as to entitle a wharf owner to 4 cents per bale for receiving cotton from vehicles, etc., and 4 cents additional for loading it on the ship, since such construction would make the charge for shipping 8 cents per bale instead of 4, as the act declares. The "landing" and "shipping" meant by the statute are two separate and distinct things, and not different parts of the same transaction of shipping, and the act was intended to fix the charge in case of possible importation, as well as in case of exportation. *Lesesne v. Young*, 12 S. E. 414, 417, 33 S. C. 543.

The act of December 22, 1839 (Cobb, Dig. 38), fixed rates for the wharfage of vessels for the "landing" of produce and goods and for the "shipping" of the same, giving to the owners or occupiers of such wharves the right to charge certain fixed rates. Under the port regulations of Savannah two vessels were allowed to lie abreast at a wharf, and, for the sake of convenience in transshipment, the cargo was not actually landed upon the wharf and then reshipped to the second vessel, but was carried directly from one to the other, it being the unvarying interpretation that such transshipment included both landing and shipping, and it was held that the wharf owner would have the right to charge the rates allowed for landing and shipping, in the absence of any contract to the contrary. The word "landing," as used among the shippers and wharfingers of the port, means taking the cargo out of a vessel, and the word "shipping," putting the cargo into a vessel, either with or without the intervention of the wharf, and where a cargo is transferred from one vessel to another, both lying abreast at the same wharf, there is both a "landing" and a "shipping." *Robertson v. Wilder*, 69 Ga. 340-345.

As wharf or place for unloading.

A "landing" implies a place where vessels can be moored and loaded or discharged. *Waite v. O'Neill* (U. S.) 76 Fed. 408, 417, 22 C. C. A. 248, 34 L. R. A. 550.

The act of 1836 dedicating land for a "public landing" should be construed to comprehend a wharf. It is undoubtedly true that a "landing" does not necessarily include a wharf, but the difference is simply that a wharf is an improved landing, and no less

a landing because it is a wharf. *Reighard v. Flinn*, 44 Atl. 1080, 1082, 194 Pa. 352.

The term "landing" means either the bank or wharf to or from which persons or things may go from or to some vessel in the contiguous waters, or it is the yard or open place which is used for deposit and the convenient communication between the land and water. *State v. Graham* (S. C.) 15 Rich. Law, 310.

A "landing" is defined to be a place on a river or other navigable water, for lading and unloading goods, or for the reception and delivery of passengers. "It is either the bank or wharf to or from which persons may go from or to some vessel in the contiguous waters." *Portland & W. V. R. Co. v. City of Portland*, 12 Pac. 265, 269, 14 Or. 188, 58 Am. Rep. 299. A landing "is a bank or wharf to or from which persons may go from or to some vessel in the contiguous waters." *City of Napa v. Howland*, 25 Pac. 247, 248, 87 Cal. 84; *State v. Randall* (S. C.) 1 Strob. 110, 111, 47 Am. Dec. 548.

An indictment for obstructing a "public landing" is not sustained by proof that a public road leading to the landing was obstructed by the defendant at a place within 100 yards of the landing. *State v. Graham* (S. C.) 15 Rich. Law, 310.

Act Feb. 17, 1871, provides that in all proceedings, etc., to procure the right to construct lateral railroads or for the acquisition of wharves or landings, the appeal to the courts from the report of the viewers shall extend to the necessity of the proposed railroad, wharf, or landing. Held, that the word "landing" as used in the statute means a wharfage place for crafts, not a harbor for them, whether laden or empty. *Hays v. Briggs*, 74 Pa. (24 P. F. Smith) 373, 375.

LANDING NET.

A "landing net" is a kind of scoop net used to bring to land or hand a fish which has been caught. Its use is not to catch fish separately as they are caught in drift nets and seines, but its use is to land the fish when caught. A fish is caught when hooked, and a landing net is not necessarily a part of the act of catching, but simply a convenient means of obtaining physical possession. It is useless as a separate appliance for catching fish, and is in no sense a complete appliance for so doing, and the use of it after a fish is caught with a hook is not a violation of Act May 22, 1899, prohibiting the catching of fish with a net. *Commonwealth v. Wetherill*, 8 Pa. Dist. R. 653, 655.

LANDLORD.

The person letting the land is called the "landlord," and the party to whom the lease

is made is called the "tenant." *Becker v. Becker*, 43 N. Y. Supp. 17, 22, 13 App. Div. 342; *Jackson v. Harsen* (N. Y.) 7 Cow. 323, 326, 17 Am. Dec. 517.

A "landlord," who may appear in an action of ejectment and defend the cause in the name of the tenant or in his own name, means one whose title is connected to and consistent with the possession of the occupant. *Williams v. Brunton*, 8 Ill. (3 Gilman) 600, 620; *State v. Call*, 22 South. 266, 268, 39 Fla. 504 (citing *Troublesome v. Estill*, 4 Ky. [1 Bibb] 128; *Layton v. Ten*, 13 N. J. Law [1 J. S. Green] 66; *Fair-Claim v. Sham-Tile*, 3 Burrows, 1290; *Roe v. Doe*, Barnes, 193; *Sherry v. State Bank* [Ind.] 8 Blackf. 542; *Newell, Eject. p.* 225, § 8).

As co-owner.

"Landlord," as used in 1 Rev. St. 505, § 33, providing that whenever any half year's rent or more shall be in arrear from any tenant to his landlord, and no sufficient distress can be found to satisfy the rent due, the landlord may bring an action of ejectment for the recovery of the possession of the demised premises, does not mean a person holding the whole interest, instead of a person claiming a part of the whole interest in the lease. It is not unreasonable to say that by descent each heir becomes the landlord of the portion of the estate which descends to him, and thus comes within the words of the statute. *Cruger v. McLaury*, 41 N. Y. 219, 224.

Lessor's grantee.

"Landlord," as used in Civ. Proc. § 2231, subdiv. 1, providing that a tenant may be removed for holding over without the landlord's permission, is not restricted to designate the lessor only, but includes the grantee of the latter's estate. *Lang v. Everling*, 23 N. Y. Supp. 329, 332, 3 Misc. Rep. 530.

As occupant of land.

See "Occupant—Occupier."

Owner not equivalent.

An allegation, in a petition in summary proceedings to obtain the possession of real estate, that the petitioner is the "landlord" of the defendant, is not equivalent to an allegation that plaintiff is the owner, and therefore is not in compliance with Code Civ. Proc. § 2235, requiring the petition to state the interest of the petitioner. "It is not a statement that the petitioner is the owner of the premises so far as the term 'landlord' may be taken as synonymous with 'owner,' but is a mere allegation of the relations of the parties, without setting forth a description of the petitioner's interest in the premises involved in the proceedings." *Engel, Heller Co. v. Henry Elias Brewing Co.*, 75 N. Y. Supp. 1080, 1082, 37 Misc. Rep. 480.

Innkeeper not equivalent.

An allegation that plaintiff is a "landlord, proprietor of the M. House," in a suit to enforce an alleged lien on baggage, etc., of a guest, is not sufficient as an allegation that plaintiff is a tavern keeper. *Southwood v. Myers*, 66 Ky. (3 Bush) 681, 685.

LANDOWNER.

A township which, under Rev. St. 1896, § 5630, is subject to an assessment for a public drain, payable from the township fund, is a "landowner" within the meaning of the provision that petitions shall be dismissed on representation of two-thirds of the landowners. *Zumbro v. Parnin*, 40 N. H. 1085, 1087, 141 Ind. 430.

LANE.

The term "lane" is not a legal term. It signifies simply a narrow way, which may be either public or private, and is oftener, perhaps, private than public. The description of a proposed highway, in proceedings for its establishment, as starting from the easterly side of a certain "lane," is sufficiently definite, though the lane be private property. *Hunter v. City of Newport*, 5 R. I. 325, 331.

Where a statute imposed a penalty on any person who should smoke or have in his possession any lighted pipe or cigar, in any street, "lane," or passage way, it was held that the terms street, lane, or passage way include any way which was actually open and used for the ordinary purposes of an open way. *Commonwealth v. Thompson*, 53 Mass. (12 Metc.) 231, 232.

As a public highway.

A lane is not necessarily a public highway, and therefore a showing that a heifer was killed at a place where a "lane" crossed a railroad does not show that it was killed at a highway crossing. *Indianapolis & C. R. Co. v. McClure*, 26 Ind. 370, 375, 89 Am. Dec. 467.

The term "lane," as used in St. 1803, c. 11, annexing South Boston to Boston, and providing that the selectmen of Boston were authorized to lay out such streets and lanes as in their judgment would be for the common benefit of the proprietors of the land and of the town of Boston, etc.; should be construed as synonymous with "public ways" or "highways." *Commonwealth v. City of Boston*, 33 Mass. (16 Pick.) 442, 445.

"Lanes," as used in a statute giving a gas company the right or privilege to dig up public streets and lanes for the purpose of laying down their mains and pipes, does not signify the land of individuals over which

there is only a private right of way, but, construed with reference to the maxim *noscitur a sociis*, must be held to mean only such ways as the public have acquired a right to use. The right which the company has is only to use land, the whole beneficial use of which has been previously taken from the owner and appropriated for a public use. *Commonwealth v. Lowell Gaslight Co.*, 94 Mass. (12 Allen) 75, 76.

LANGUAGE.

Language "is the conveyance in which thoughts and ideas are transmitted from one to another. The multiplicity of thoughts and complexity of ideas necessitate either a startling increase in the coinage of words, or the giving to existing words many meanings, such as primary or secondary, general or specified, popular or technical." *Cavan v. City of Brooklyn*, 5 N. Y. Supp. 758, 759.

The word "language" is broad enough to include words written as well as words spoken. *Stevenson v. State*, 16 S. E. 95, 96, 90 Ga. 456.

The word "language," in Pen. Code, § 103, declaring that opprobrious words or abusive language may or may not, as shall be determined by the jury, amount to the justification of an assault or of an assault and battery, does not include grimaces or facial expressions of contempt, made in the presence of accused, to hold him up to contempt and ridicule. *Behling v. State*, 36 S. E. 85, 110 Ga. 754.

LANZAS.

In *Trevino v. Fernandez et al.*, 13 Tex. 630, 660, "lanzas" is defined to consist of a certain service in money which the nobles and grandees pay each year.

LAPPAGE.

Within the rule that color of title only extends to the boundaries marked by the color,—the deed,—and can extend no further, though they may be circumscribed, as they will not even cross another line unless there is actual possession across that line, or "lappage" as it is called. *Johnston v. Case*, 42 S. E. 957, 958, 131 N. C. 491.

LAPSE.

In an action to recover possession of a mining claim, a finding that the claim of one of the parties had "lapsed" did not amount to a finding that such claim was forfeited, as the term "lapsed" is unknown to mining usage or laws. *Contreras v. Merck*, 63 Pac. 336, 337, 131 Cal. 211.

"Lapse," as used in 3 Litt. & S. St. Law, 400, providing that legacies and devises to children and grandchildren shall not lapse by the dying of the legatee or devisee before the testator, provided such legatee or devisee shall have children living at the death of the testator, who would take as heirs by descent or as distributee of the legatee or devisee, "is not to be restricted in its construction to cases where legacies or devises technically fall back into the estate, but applies to all cases where it would have fallen back or gone to others under the will." *Yeats v. Gill*, 48 Ky. (9 B. Mon.) 203, 206.

"Lapse," as used in a will in which the testatrix devised certain property to her niece M., and provided that, "should she not survive me or should she die leaving no heirs of her body, then in either such case this bequest and devise is to lapse and go to my residuary legatees hereinafter named, and it is so to lapse if she fails to have issue of her body, whether she should or should not survive me," is not used in its technical sense of "nonvest," but is employed in a sense broad enough to designate either the falling in of the estate in the event that the testatrix's niece should not survive her, or the falling in of such estate on the happening of the limitation or condition subsequent; that is, the death of the niece without issue living. Hence, M.'s estate vested immediately on the death of the testatrix. *Van Pretres v. Cole*, 73 Mo. 39, 45.

LAPSED DEVISE.

There is a distinction between a "lapse" and a "void" devise. In the former case the devisee dies in the intermediate time between the making of the will and the death of the testator, but in the latter case the devise is void from the beginning, as if the devisee be dead when the will was made. *Murphy v. McKeon*, 32 Atl. 374, 53 N. J. Eq. (8 Dick.) 406.

LAPSED LEGACY.

A "lapsed legacy" is one which has never vested or taken effect. It has been defined as one which, originally valid, afterwards fails because the capacity or willingness of the donee to take has ceased to exist before he obtained a vested interest in the gift. *Booth v. Baptist Church*, 28 N. E. 238, 241, 126 N. Y. 215.

A "lapsed legacy" is a legacy which fails by reason of the death of the legatee before the death of the testator, where no other words are found in the will to prevent such a lapse. It presupposes the existence of such legacy and of a legatee. A gift to a person deceased prior to the execution of the will is not a legacy, but is void because there is no one in existence to take, and in such

a case as that there can be no lapsed legacy. *Meeker v. Meeker* (N. Y.) 4 Redf. Sur. 29, 30.

Every legacy is said to "lapse" that fails by reason of the death of the legatee in the life of the testator. *Brown*, Law Dict. "Lapse," 304. The disposition made by the law, in the absence of any statutory provision, is not material. It went to the residuary legatees or devisees, if there were such, and if not it went to the heir, or, where the failure occurred in a devise to a class by the death of one of the members, it went to the survivors. But whether it went to residuary legatees, or to the heir, or to the survivors of a class, it did not affect the essential character of the extinguished gift. It was, properly speaking, a lapsed legacy or devise in either case. *Woolley v. Paxson*, 24 N. E. 599, 601, 46 Ohio St. 307.

In some places a distinction has been taken between "lapsed devises" and "lapsed legacies." A lapsed legacy is in law the same as no legacy, for residuary purposes. *Mann v. Hyde*, 39 N. W. 78, 80, 71 Mich. 278.

LARCENOUS INTENT.

A "larcenous intent" exists where a man knowingly takes and carries away the goods of another without any claim or pretense of right, with intent wholly to deprive the owner of them or convert them to his own use. *Wilson v. State*, 18 Tex. App. 270, 274, 51 Am. Rep. 309.

LARCENY.

See "Grand Larceny"; "Mixed Larceny"; "Petit Larceny"; "Simple Larceny"; "Single Larceny."

Key as subject of, see "Key."

Marten as subject of, see "Marten."

"Larceny" is derived from the Norman-French "larcyn," and signifies a felonious, wrongful, and fraudulent taking and carrying away by any person of the personal goods of another, with the felonious intent to convert them to his own use and make them his own property without the consent of the owner. Under the common law, to make a thing "larceny" it must have been felonious. A wrongful taking of another's property did not necessarily constitute larceny. By larceny was meant an intentional taking, a taking without claim of right, a taking in knowing disregard of the rights of the owner, a taking with the intent of stealing. *State v. Rechnitz*, 52 Pac. 264, 265, 20 Mont. 488.

"Larceny," by the common law, is the felonious or fraudulent taking and carrying away by any man or woman of the mere per-

sonal goods of another, neither from the person nor by night, from the house of the owner. *State v. South*, 28 N. J. Law (4 Dutch.) 28, 31, 74 Am. Dec. 250 (quoting 3 Co. Inst. 107, c. 47); *State v. Hawkins* (Ala.) 8 Port. 461, 463, 33 Am. Dec. 294; *State v. Chambers*, 22 W. Va. 779, 786, 46 Am. Dec. 550. A definition conformable to this is also given in *Hammon's Case*, 2 Leach, 1089, describing larceny as a "felonious taking of the property of another." *United States v. Moulton* (U. S.) 27 Fed. Cas. 11, 12.

Blackstone, in his Commentaries, defines "larceny" as the felonious taking and carrying away of the goods of another. Book 4, p. 230. Bishop, in his Criminal Law, defines "larceny" to be the taking or removing by trespass of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner of his ownership therein, and, perhaps it should be added, for the sake of some advantage to the trespasser. Wharton defines it to be the taking and carrying away of a thing unlawfully, without claim of right, with intention of converting it to a use other than that of the owner. Whart. Cr. Law, § 862. *Hawkins* (P. C. c. 33, § 1) says simple grand larceny is the felonious and fraudulent taking and carrying away by any person of the mere personal goods of another, not from the person nor out of the house, above the value of 12 pence. *State v. Chambers*, 22 W. Va. 779, 786, 46 Am. Rep. 550.

Archbold defines "larceny" thus: "When a man knowingly takes and carries away the goods of another without any claim or pretense of right, with intent wholly to deprive the owner of them and to appropriate or convert them to his own use." *State v. South*, 28 N. J. Law (4 Dutch.) 28, 29 (citing Archb. Cr. Law, 119); *State v. Chambers*, 22 W. Va. 779, 786, 46 Am. Rep. 550; *State v. Hawkins* (Ala.) 8 Port. 461, 463, 33 Am. Dec. 294.

"Larceny" is defined to be the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place, with a felonious intent to convert them to his, the taker's, use, and make them his property without the consent of the owner. *State v. South*, 28 N. J. Law (4 Dutch.) 28, 29, 74 Am. Dec. 250 (cited and approved in 3 Chit. Cr. Law, 679; 2 East, P. C. c. 16, § 2; Rosc. Cr. Ev. 467; 2 Russ. Crimes [4th Ed.] 93; 3 Greenl. Ev. § 150); *State v. Fitzpatrick* (Del.) 32 Atl. 1072, 1073, 9 Houst. 385; *Gardner v. State*, 26 Atl. 30, 33, 55 N. J. Law (26 Vroom) 17; *People v. Nichols* (N. Y.) 3 Parker, Cr. R. 579, 581; *Tamplin v. Addy* (N. Y.) 8 Cow. 239, 241, note; *In re Gannett*, 39 Pac. 496, 497, 11 Utah, 283; *Fetkenhauer v. State*, 88 N. W. 294, 296, 112 Wis. 491; *State v. Chambers*, 22 W. Va. 779, 786, 46 Am. Rep. 550.

Larceny is the felonious stealing, taking, and carrying away the personal property of another. *State v. Parry*, 21 South. 30, 31, 48 La. Ann. 1483. See, also, *Keeton v. State*, 66 S. W. 645, 70 Ark. 163; *State v. Parker*, 34 Ark. 158, 160, 36 Am. Rep. 5; *Commonwealth v. James*, 18 Mass. (1 Pick.) 375, 383; *State v. Brown*, 68 Tenn. (9 Baxt.) 53, 54, 40 Am. Rep. 81; *Bailey v. State*, 18 Tex. App. 426, 431; *Edmonds v. State*, 70 Ala. 8, 9, 45 Am. Rep. 67; *People v. Nichols* (N. Y.) 3 Parker Cr. R. 579, 581; *Barnhart v. State*, 154 Ind. 177, 178, 56 N. E. 212, 213.

Larceny was an offense at the common law, and includes the felonious taking of any personal property. It is a crime *malum in se*. In *re Gannett*, 39 Pac. 496, 497, 11 Utah, 283.

Larceny consists of the unlawful taking of the personal property of another with the felonious intent to deprive the owner of it. *People v. Johnson*, 45 N. W. 1119, 1120, 81 Mich. 573.

Larceny is the felonious taking and carrying away of the goods of another, with the intent to convert them to the use of the taker without the consent of the owner. *State v. Pullen* (Del.) 50 Atl. 538, 539, 3 Pennewill, 184; *State v. Conlan* (Del.) 50 Atl. 95, 3 Pennewill, 218; *State v. Butler* (Del.) 43 Atl. 480, 2 Pennewill, 127; *United States v. Otey* (U. S.) 31 Fed. 68, 70; *State v. Patton* (Del.) 41 Atl. 193, 194, 1 Marv. 552.

Larceny is the felonious stealing, taking and carrying, riding or driving away, the personal property of another. *Haywood v. State*, 41 Ark. 479, 482, 484, 485.

Larceny is the wrongful and unlawful taking and carrying or leading away of a thing, with felonious intent, without claim of right, and without the owner's consent, with intention of permanently converting it to a use other than that of the owner. *Phillamalee v. State*, 78 N. W. 625, 626, 58 Neb. 320.

A person who, with intent to deprive or defraud the true owner of property, or of the use and benefit thereof, or to appropriate the same to the use of the taker or of any other person, either takes from the possession of the true owner, or secretes, withholds, or appropriates to his own use, or that of any other person, other than the true owner, any money, personal property, etc., is guilty of larceny. *People v. Bosworth*, 19 N. Y. Supp. 114, 117, 64 Hun, 72.

The definition of "larceny" as "the felonious taking and carrying away of the personal goods of another" is defective in omitting the word "stealing," which, as applied to larceny, is a technical word, and absolutely essential to a proper definition of the

crime. *Hix v. People*, 41 N. E. 862, 863, 157 Ill. 382.

The word "larceny," as used in a bond insuring a firm against any pecuniary loss from the fraudulent or dishonest acts of its agents amounting to larceny, means larceny as defined in the criminal law, and therefore, unless larceny is proven against the agent, the sureties on the bond are not liable for his acts. *Reed v. Fidelity & Casualty Co.*, 42 Atl. 294, 189 Pa. 596.

Simple larceny is the felonious taking and carrying away of the personal goods of another. *Commonwealth v. Prewitt*, 6 Ky. Law Rep. 195, 82 Ky. 240; *State v. Berryman*, 8 Nev. 262, 270.

Larceny is the felonious taking and carrying away of the property of another with intent to convert it to the carrier's own use and deprive the owner of his use thereof. *State v. Patton* (Del.) 1 Marv. 552, 553, 41 Atl. 193.

To constitute the offense of larceny in any form, there must be a taking from the possession, a carrying away against the will of the owner, and a felonious intent to convert it to the offender's use. *State v. Rutherford*, 53 S. W. 417, 419, 152 Mo. 124.

Larceny is the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, with a felonious intent to convert them to the taker's own use, and make them his own property, without the consent of the owner. *State v. Waghalter*, 76 S. W. 1028, 1031, 177 Mo. 676.

"Larceny" is usually defined as the felonious and fraudulent taking and carrying away by any person of the goods of another. *United States v. Moulton* (U. S.) 27 Fed. Cas. 11, 14.

It is an essential element of the crime of larceny that the property of the owner has been wrongfully taken and carried away, or that the person accused of the larceny has knowingly abetted, aided, encouraged, and advised such wrongful taking before the actual theft of the property or at the time thereof. *Watts v. People*, 68 N. E. 563, 565, 204 Ill. 233.

Statutory definitions.

"Larceny" is defined by the statute to be the felonious stealing, taking, carrying, leading, or driving away the personal property of another. *State v. McKee*, 53 Pac. 733, 734, 17 Utah, 370.

To constitute larceny under Gen. St. 1878, c. 117, § 5, making conversion or embezzlement by the trustee, etc., larceny, it is necessary (1) that the person was acting as a trustee, etc.; (2) that the money or prop-

erty alleged to have been stolen was in his possession by virtue of such office or appointment; (3) that he secreted or withheld it, or appropriated it to his own use or to that of a person other than the true owner entitled to it. *State v. Farrington*, 59 Minn. 147, 149, 150, 60 N. W. 1088, 28 L. R. A. 395.

"Larceny" is defined by Pen. Code, § 580, as the taking of personal property, accomplished by fraud or stealth, and with intent to deprive the owner thereof. *Territory v. Anderson*, 50 N. W. 124, 6 Dak. 800.

"Larceny," as defined by Pen. Code, § 528, embraces every act which was larceny at common law, and some others which were formerly indictable as false pretenses or embezzlement. *People v. Walker*, 83 N. Y. Supp. 372, 374, 85 App. Div. 556.

Under the statutes a person who, with intent to deprive or defraud the true owner of his property, obtains possession of it from the true owner by color or aid of fraudulent or false representations or pretense, or of any false token or writing, is guilty of larceny. *State v. Southall*, 77 Minn. 296, 298, 79 N. W. 1007.

"Larceny" is defined by Pen. Code, § 528, as follows: "A person who with intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person either takes from the possession of the true owner or secretes, withholds or appropriates to his own use, or that of any person other than the true owner any money or personal property is guilty of larceny." *People v. Bosworth*, 19 N. Y. Supp. 114, 117, 64 Hun. 72; *People v. Smith*, 33 N. Y. Supp. 989, 991, 86 Hun. 485.

"Larceny" is defined by statute in North Dakota as the taking of personal property, accomplished by fraud or stealth, with intent to deprive another thereof. *State v. Tough* (N. D.) 96 N. W. 1025, 1028.

"Larceny" is defined by statute in Massachusetts as a criminal taking, obtaining, or converting the personal property, with intent to defraud or deprive the owner permanently of the use of it; including all forms of larceny, criminal embezzlement, and obtaining by criminal false pretenses. *Commonwealth v. Kelley*, 68 N. E. 346, 347, 184 Mass. 320.

"Larceny" is defined by the Pen. Code, § 484, as the felonious stealing, taking, carrying, leading, or driving away the personal property of another. *People v. Lopez*, 27 Pac. 427, 90 Cal. 569; *People v. Smith*, 44 Pac. 663, 665, 112 Cal. 333; *People v. Davis*, 31 Pac. 1109, 97 Cal. 194. See, also, 1 Starr & C. Ann. St. p. 800; *Hix v. People*, 41 N. E. 862, 863, 157 Ill. 382. It is held that under this definition the indictment or information need not allege the taking to be against the will of

the owner. *People v. Davis*, 31 Pac. 1109, 97 Cal. 194; *People v. Ammerman*, 50 Pac. 15, 118 Cal. 23; *People v. Jones*, 53 Cal. 58, 59; *People v. De Coursey*, 61 Cal. 134, 135; *People v. Nelson*, 56 Cal. 77, 80. Under this definition it is held that a charge stating that grand larceny is the stealing, taking, or carrying away of the property of another is incorrect for failure to incorporate the word "feloniously." *People v. Cheong Foon Ark*, 61 Cal. 527, 528.

Abstraction distinguished.

See "Abstract—Abstraction."

Animus furandi.

Blackstone defines "larceny" to be the "felonious taking and carrying away the goods of another." 4 Bl. Comm. 230. This taking and carrying away, he says, must also be felonious; that is, done *animus furandi*; or, as the civil law expresses it, *lucri causa*. It is thus defined by Lord Coke in his Institutes, and by Hawkins in his Pleas of the Crown. 1 Hawk. P. C. 93. This definition has been objected to as not being sufficiently certain, the word "felonious" itself requiring a definition; and Archbold submits the following: "Larceny, as far as respects the intent with which it is committed (and the intent here is a material part of the offense), may perhaps be correctly defined thus: Where a man knowingly takes and carries away the goods of another, without any claim or pretense of right, with intent wholly to deprive the owner of them, and to appropriate or convert them to his own use." And Chief Justice Eyre, in Pears' Case, defined the offense thus: "The wrongful taking of goods, with intent to spoil the owner of them, *lucri causa*." It is apparent from the definition, and is so expressly laid down in the books, that the criminal intention constitutes the offense, and is the only criterion by which to distinguish a larceny from a trespass. According to this definition, to constitute the offense, it is not sufficient that the goods be taken for the purpose of destruction, as, if one should take the horse of another, for the purpose of destroying him, to injure his neighbor, and should destroy him, such an offense would be punishable as malicious mischief, but it would want one of the essential ingredients of larceny, the *lucri causa*—the intention to profit by the act—by the conversion of the property. *State v. Hawkins* (Ala.) 8 Port. 461, 463, 33 Am. Dec. 294.

Eyre, C. B., says: "Larceny is the wrongful taking of the goods, with the intent to spoil the owner of them, *lucri causa*." Blackstone says the taking must be felonious; that is, done *animus furandi*, or, as the civil law expresses it, *lucri causa*. The point arrived at by these two expressions, "*animus furandi*" and "*lucri causa*," the meaning of which has been much discussed, seems to be this: that

the goods must be taken into possession of the thief with the intention of depriving the owner of his property in them. *State v. Slingerland*, 7 Pac. 280, 282, 19 Nev. 135 (citing *Roscoe*, Cr. Ev. p. 621); *State v. Hawkins* [Ala.] 8 Port. 461, 463, 33 Am. Dec. 294. A taking and carrying away without the felonious intent would not be larceny. *Keeton v. State*, 66 S. W. 645, 70 Ark. 163.

Larceny is the felonious taking and carrying away of the personal goods of another. To be felonious, the taking must necessarily be willful. *Haul v. State*, 75 Tenn. (7 Lea) 685, 686.

To constitute larceny, there must be a taking and a carrying away of personal property with intent to steal it. Such intent in all cases at common law renders the taking and carrying away felonious, and taking without carrying away is not larceny. For this reason it has always been held necessary that an indictment for larceny should allege both these facts. *Commonwealth v. Adams*, 73 Mass. (7 Gray) 43, 44.

Larceny is the unlawful taking and carrying away by any person of the personal goods of another from any place, with a felonious intent to convert them to the taker's own use without the consent of the owner. The felonious intent is the peculiar and distinctive element of this wrongful taking of the goods of another, and is the gist of the offense. *State v. Hollingsworth* (Del.) 41 Atl. 143, 1 Marv. 528.

Larceny is the felonious taking and carrying away of the personal goods of another with the intent to deprive the owner permanently of his property. The taking must be with a felonious intent, otherwise there is no larceny. If one should take the property of another believing that it was with the latter's consent, there could be no larceny, because no criminal intent. *Mead v. State*, 25 Neb. 444, 445, 41 N. W. 277.

The felonious and fraudulent taking of property with intent to deprive the owner thereof is larceny, even if the defendant did not intend to convert the same to his own use. *People v. Jaurez*, 28 Cal. 380, 381.

To constitute the crime of larceny, a felonious intention is, as a general rule, an indispensable ingredient. This intent must be either to appropriate the property to the use and benefit of the taker, or to wholly and permanently deprive the owner of it. And taking property with the intent to conceal it, for the purpose of inducing the owner to offer a reward for its return and to obtain the reward, is sufficient to constitute the crime. A delivery of property on condition of immediate payment does not transfer the right of possession to such property unless condition is performed, and if the receiver wrongfully retains it without making payment, and

with felonious intent, he is guilty of larceny. *Currier v. Stata*, 60 N. E. 1023, 1024, 157 Ind. 114.

In a prosecution for larceny, the act of the prisoner, the mere taking, does not constitute the offense, but the act coupled with the intent to steal. *State v. Welch*, 21 Minn. 26. In larceny the crime does not consist in the wrongful taking of the property, for that might be a mere trespass, but it consists in the wrongful taking with felonious intent; and if the defendant, for any reason whatever, indulged no such intent, the crime has not been committed, so that evidence of defendant's intoxication as bearing on the question of intent is admissible. *State v. Koerner*, 78 N. W. 981, 983, 8 N. D. 292, 73 Am. St. Rep. 752.

The taking of a bird cage of inconsiderable value, with no motive of gain, but rather in a spirit of wanton mischief, for the purpose of retaliation and without an intention of converting the property to the use of the taker, does not constitute a larceny. In *re Crocheron* (N. Y.) 1 City H. Rec. 177.

An intention to obtain money under a fraudulent and false pretense, meaning at the time to appropriate the money under this pretense, is evidence from which the jury may infer the animus furandi necessary to constitute larceny, but it is not the animus furandi itself. There may be a fraudulent intent to obtain money which is not a felonious intent. So there may be a taking of money by a man with intention to obtain it under a fraudulent and false pretense, and to appropriate it to himself under that pretense, which might not be a felonious taking. An instruction in such a case in larceny without finding the felonious intent or the intent to steal is not perfectly correct in law. *Weston v. United States* (U. S.) 29 Fed. Cas. 823, 824.

To constitute the crime of larceny, there must be evidence of a felonious intent in the taking. Something more than the mere act of taking is necessary to be shown before the jury can proceed to inquire into the intent. There must be evidence to show that the taking was done under circumstances inconsistent with an honest purpose, such as in doing clandestinely, or, when charged with, denying the fact, or secretly or forcibly or by artifice, and that there was original felonious intent, general or special, at the time of taking. *State v. Foy*, 42 S. E. 934, 935, 131 N. C. 804.

The crime of larceny cannot be perpetrated without a criminal intent—animus furandi, or intent to steal. Where one, therefore, takes the property of another, honestly believing that he has a legal right to it, or, in other words, under a bona fide claim of right, there can be no larceny, although the

taking may constitute an inexcusable trespass. It is not sufficient, however, for the taker to have a mere impression that he has a claim of right to the property, in order to exempt him from the charge of larceny in the taking of it. This might amount to a vague notion, unaccompanied with honesty of conviction. *Morrisette v. State*, 77 Ala. 71, 74.

To constitute the offense of larceny, it is absolutely necessary that the taking of the goods be with a felonious intent. Hence one who drives away and sells stock of another, thinking it his own, is not guilty of larceny, because of the absence of felonious intent. *People v. Devine*, 30 Pac. 378, 379, 95 Cal. 227.

One tenant in common of an outstanding crop cannot be guilty of larceny of any part or the whole of the crop thus held in common, and parties cannot be guilty of larceny of property, the ownership or title of which they honestly believe to be in themselves. *Bonham v. State*, 65 Ala. 456, 457.

It is apparent from the definitions, and is so expressly laid down in the books, that the criminal intention constitutes the offense, and is the only criterion by which to distinguish a larceny from a trespass. According to this definition, to constitute the offense, it is not sufficient that the goods be taken for the purpose of destruction, as, if one should take the horse of another for the purpose of destroying him, to injure his neighbor, and should destroy him, such an offense would be punishable as malicious mischief, but it would want one of the essential ingredients of larceny—the *lucri causa*,—the intention to profit by the act—by the conversion of the property. *State v. Hawkins* (Ala.) 8 Port. 461, 463, 33 Am. Dec. 294.

Larceny is the felonious taking and carrying away the personal goods of another. The taking must be *lucri causa*, and done without the least color of right or excuse for the act, with the intent to deprive the owner not temporarily, but permanently, of the property. *Fields v. State*, 46 Tenn. (6 Cold.) 524, 526.

After citing all of the numerous well-known definitions of "larceny," the court concludes that larceny may be safely defined as follows: "The wrongful taking possession of the goods of another with intent to deprive the owner of his property in them;" observing that it is not necessary to add to this definition the words "without any claim or right by the taker," as that is excluded by the latter branch of the definition relating to the intent; nor is it necessary to say that the taking must be against the will of the owner, as that is included in the word "wrongful." *State v. Moore*, 14 S. W. 182, 183, 184, 101 Mo. 316.

"Larceny" is defined in St. 1893, § 2371, as the taking of personal property, accom-

plished by fraud or stealth, and with intent to deprive another thereof. The gist of the crime is clearly the intent to deprive another of the property described in the indictment. *Stell v. Territory*, 71 Pac. 653, 654, 12 Okl. 377.

The word "larceny," as used in the statute relative to the unlawful branding and marking of live stock, is used in its ordinary sense, so as to include a criminal intent. *Bradley v. People*, 9 Pac. 783, 784, 8 Colo. 599.

Larceny implies a taking with felonious intent, and where that intent is impossible the crime is impossible. *People v. Cummins*, 11 N. W. 184, 186, 47 Mich. 334.

St. 1893, § 2371, defines "larceny" as the taking of personal property, accomplished by fraud or stealth, and with intent to deprive the owner thereof. To constitute larceny under this statute, it is not necessary that the taking should be with the purpose to convert the thing stolen to the pecuniary advantage or gain of the taker, but it is sufficient if the taking be fraudulent or by stealth, and with the intent to wholly deprive the owner of the property. The intent must be felonious, and must be to deprive the owner not temporarily, but permanently, of the property, and need not be *lucri causa*. A taking of personal property with the intent to deprive the owner of it temporarily and return the same to him is not larceny, but is trespass; it is not a felony, but a misdemeanor. *Mitchell v. Territory*, 54 Pac. 782, 784, 7 Okl. 527.

To constitute larceny, there must be a felonious intent, which means to deprive the owner temporarily or permanently of his own property without color of right or excuse therefor, and to convert it to the taker's use without the consent of the owner; and where one hires a team and buggy of another, pretending that he wants them to drive to a certain place and to be gone a specified time, when in fact he merely intends to take them for a ride to another or more distant place and then leave them for the owner to get again, with no intention to permanently use the team or to deprive the owner of them entirely, the intent necessary to constitute the crime does not exist. In *re Mutchler*, 40 Pac. 283, 284, 55 Kan. 164.

The gist of common-law larceny is the felonious taking of what is another's, with the simultaneous intent in the taker of misappropriating it. *State v. Rigall*, 70 S. W. 150, 151, 169 Mo. 659.

To constitute the offense of larceny in any form, there must be a taking from the possession, a carrying away against the will of the owner. East, in his *Pleas of the Crown*, defines "larceny" to be the wrongful or fraudulent taking or carrying away by any person of the personal goods of another

from any place, with a felonious intent to convert them to his own use and make them his property, without the consent of the owner. The taking must be done *animo furandi*, or, as civilians express it, *lucri causa*. The felonious intent is the material ingredient of the offense. *State v. Waller*, 74 S. W. 842, 843, 174 Mo. 518 (citing *Witt v. State*, 9 Mo. 671).

To constitute larceny, it must be shown that the property was taken and carried away with the specific felonious intent to steal it. *State v. Kavanaugh* (Del.) 53 Atl. 335.

An instruction that larceny is the taking and carrying or leading away the personal property of another without his consent and against his will, with intent to appropriate the same to the use of the taker, is held erroneous because omitting to charge that the taking must be with a felonious intent. *Thompson v. People*, 4 Neb. 524, 528.

Larceny is committed whenever a person wrongfully takes and carries away the personal goods of another without any pretense of right, with a felonious intent to deprive the owner of them or to appropriate them to the taker's use. It is essential that there should exist at the time of the taking a felonious intent to deprive the owner of his property against his will. *Robinson v. State*, 113 Ind. 510, 512, 16 N. E. 184.

To constitute larceny, there must have been a felonious intent *animo furandi*. The malicious killing of a horse is a misdemeanor under the Penal Code. These two offenses are distinct; in either case there is a trespass, but in larceny the taking must be for the purpose of converting to the use of the taker, while in malicious mischief no such intent is necessary. *People v. Woodward* (N. Y.) 31 Hun, 57, 60.

Same—At time of taking.

To constitute the crime of larceny, there must be a simultaneous combination of an unlawful taking and asportation and an intent to steal, and where a person received an overpayment by mutual mistake, and after discovering it feloniously converted it, there was no larceny. *Cooper v. Commonwealth*, 60 S. W. 938, 939, 110 Ky. 123, 52 L. R. A. 136, 96 Am. St. Rep. 426.

In order to convict of larceny, the jury must be satisfied that the taking of the property by the accused was with felonious intent. It is not sufficient to find that after the taking it was converted to the use of the defendant with a felonious intent, but it is necessary to find that the felonious intent existed at the time of the taking. *People v. Miller*, 11 Pac. 514, 4 Utah. 410.

The Supreme Court in Kentucky has held, in the case of *Elliott v. Commonwealth*,

75 Ky. (12 Bush) 176, that: "The material ingredients to constitute the crime of larceny are that the goods must be taken *animo furandi* and against the will of the owner of them. Hence, in a class of cases when it appears that the goods were taken by the delivery or consent of the owner or of some one having authority to deliver them, and they are converted by the party to whom they are delivered, it is often a very difficult question to determine the nature of the offense;" and when property comes lawfully into the possession of a person, either as agent, bailee, part owner, or otherwise, a subsequent appropriation of it is not larceny, unless the intent to appropriate it existed in the mind of the taker at the time it came into his possession. *Smith v. Commonwealth*, 27 S. W. 852, 96 Ky. 85, 49 Am. St. Rep. 287.

An intent to steal, existing at the time of obtaining the property, is an essential element of the crime of "larceny," both at common law and as defined by *Wagner's St. p. 456, § 25*, but not of the crime of larceny by a bailee by section 37. Hence, where defendant had borrowed a wagon and horses from the owners, and was making away with them and attempting to convert them to his own use when he was arrested, he cannot be convicted on an indictment in the ordinary form for grand larceny without proof that he obtained the property with the intent of stealing them, and it did not matter that upon the evidence he might have been found guilty of larceny by embezzlement, under section 37, without such proof. *State v. Stone*, 68 Mo. 101, 104.

To establish the charge of larceny, it is necessary to show that the property of another was taken and carried away by accused with intent to steal it. The intent to steal it at the time of taking and carrying away must be established, because if that is not established, even supposing all the other essentials of the evidence were established, the accused is not guilty of larceny. *State v. Patton* (Del.) 41 Atl. 193, 194, 1 Marv. 552.

In larceny the taking must be with a felonious intent to deprive the owner, not temporarily, but permanently, of his property. Where a horse, alleged to have been stolen, had been running upon a ranch for a number of years, during which time people were in the habit of catching him and riding him off for temporary purposes, it not being known who was his owner or whether he had any owner, the catching and riding of such horse by defendant was not larceny. He could not have intended to deprive the owner of his property. No owner was known to be in existence. To make the case one of larceny, it must be shown that at the time of the taking the defendant had formed the felonious intention. *Johnson v. State*, 36 Tex. 375, 377.

The most approved definition of "larceny" is the wrongful or fraudulent taking and carrying away by any person the mere personal goods of another from any place, with the felonious intent to convert them to his, the taker's, own use and make them his property, without the consent of the owner. Under this definition it is held, that lost goods may be the subject of larceny, but that the finder of lost goods who takes possession of them, not intending to steal them at the time of the original taking, is not rendered guilty of larceny by any subsequent felonious intention to convert them to his own use. *Ransom v. State*, 22 Conn. 153, 156. Where an iron safe containing money was thrown into the river by the blowing up of a steamboat, and several months thereafter was found by persons who did not know to whom it belonged, and there were no marks to indicate the ownership, the fact that they refused to give it up when told as to the ownership, and claimed that they were entitled to it because they had found it in the river, did not make them guilty of larceny. To constitute larceny, the intention to steal must have been formed at the time of the taking. *State v. Conway*, 18 Mo. 321, 323.

In order to convict of larceny, it is necessary to show that the property was taken with the intent then existing in the mind of the defendant to steal the property. This intent may be shown by the subsequent acts and conduct of the defendant. But if the original purpose is innocent, and the defendant afterwards conceives the purpose of appropriating the property to his own use, he is not guilty of larceny. *State v. Wood*, 46 Iowa, 116, 117.

To constitute larceny, there must be a taking and carrying away the personal property of another with a felonious intent. But that rule has been somewhat modified in various particulars. The intent to steal need not have existed at the time of obtaining possession of the property, if followed by a felonious appropriation, and the theft is complete at the time of such appropriation. Where, however, the felonious intent exists at the time the property is obtained by false pretense, it is larceny, and the crime is complete at the time possession of the property is so obtained. *State v. Davenport*, 17 S. E. 37, 38, 38 S. C. 348.

Larceny is the felonious taking of property of another without the knowledge or consent of that other, and with the intent of the party taking, at the time of the taking, to permanently deprive the owner thereof, and with the further intent at said time to wholly and permanently appropriate it to the use of the party taking it. *State v. Minor*, 77 N. W. 330, 331, 106 Iowa, 642.

Asportation.

To constitute larceny, there must be a taking and a carrying away of personal property with intent to steal it. Taking without carrying away is not larceny. *Commonwealth v. Adams*, 73 Mass. (1 Gray) 43, 44.

"Larceny" is defined by Pen. Code, § 484 to be "the felonious stealing, taking or carrying away the personal property of another." Under this statute, evidence that defendant was found in possession of an overcoat taken from a dummy, but still fastened to it by a chain through the sleeves, the dummy being on the sidewalk and tied to the building by a string, does not show larceny, as there was no asportation, and to constitute larceny the goods must be carried away. *People v. Myer*, 17 Pac. 431, 75 Cal. 383.

The mere possession of another's property with intent to steal it is not larceny until intent is ripened into act. *State v. Newman*, 9 Nev. 48, 57, 16 Am. Rep. 8.

Larceny is the felonious taking and carrying away the personal goods of another, with the intention of appropriating the same to one's own use without the consent of the owner. To constitute the offense, there must be a taking, which is as essential an ingredient of the crime as the asportation. Taking is a material part of the larceny, but it may be presumed from the possession of the goods. When there is no trespass in taking the goods, the offense is not larceny. *State v. Copeland*, 86 N. C. 691, 695.

A conviction of larceny cannot be sustained on the testimony of a witness to the effect that he gave the defendant an ax and cut some corn, and by dropping some of the corn on the ground tolled a hog for a distance of 20 rods, when defendant struck the hog with the ax and the hog squealed whereupon the witness and defendant immediately ran away, leaving the hog where it was. The usual definition of "larceny" is a felonious taking and carrying away of the personal goods of another. There must be a taking possession of the goods with intent to deprive the owner of his property. The facts of this case, taken alone, do not constitute larceny. It is not a reasonable inference from them that there was such a complete asportation as to consummate the offense. *Edmonds v. State*, 70 Ala. 8, 9, 45 Am. Rep. 67.

"To constitute larceny, it is necessary that the property should be taken from the possession of the owner or person in possession thereof with a felonious intent, and it may be committed by any person." *People v. Burr* (N. Y.) 41 How. Prac. 293, 294.

When the taking is from the person, no further asportation is necessary in order to constitute a larceny. *People v. Lonnen*, 73 Pac. 586, 587, 139 Cal. 634.

Asportation to new jurisdiction as new offense.

Larceny consists in the wrongful taking and carrying away of chattels of another with felonious intent to convert them to the taker's own use, and is a crime at common law, and consequently an offense in every jurisdiction in which the common law is part of the governing law. And at common law every asportation is a new taking. So it is held that, when a person steals goods in another state and brings them into this state, the person stealing cannot be indicted and punished here for the crime committed in the former state, but the act of bringing the stolen goods into this state is a new larceny, for which the party may be indicted and punished in the courts of this state. *Worthington v. State*, 58 Md. 403, 409, 42 Am. Rep. 338.

Though, to constitute larceny, a taking and carrying away of the goods by trespass and an intent to steal them must concur, if, after one has taken what completes the theft, he continues traveling away with and still intending to steal them, each step may be treated as a new trespass and fresh larceny, so that he may be indicted either in the county where he first took the goods, or in any other into which, the intent to steal continuing, he carries them. It is immaterial to this result whether the taking to the new county is immediate or long after the original theft, but it must be felonious in the new county. *People v. Prather*, 66 Pac. 483, 484, 134 Cal. 386.

The very essence of the crime of larceny is the felonious taking and removal of the property stolen. The taking being the chief factor or principal ingredient of the crime, there can be no crime unless there is a felonious taking, and the taking is the act by which control and dominion of the thing stolen is gained by the thief and lost to the owner. Having possession of the property after being feloniously taken, or removing it from place to place after the commission of the crime, cannot be said, in the ordinary sense of the word, to be a new "taking," or the commission of a new offense. Therefore the bringing into the state of Nebraska of goods stolen in another state is not larceny. *Van Buren v. State*, 91 N. W. 201, 203, 65 Neb. 223.

The bringing into a state by the thief of goods stolen in another state is not larceny in the state to which the goods are brought. *People v. Loughridge*, 1 Neb. 11, 12, 93 Am. Dec. 325.

The stealing of property in one state, and the bringing of it into another state, *animo furandi*, is larceny in the state into which the property is brought. *State v. Ellis*, 3 Conn. 185, 188, 8 Am. Dec. 175.

Burglary distinguished.

Larceny is the felonious taking of the goods or the property of another with intent to deprive the owner thereof and to convert the same to the taker's use, while burglary is the entering of any house, room, apartment, tenement, shop, or warehouse, etc., in the nighttime, with intent to commit a felony. Burglary and larceny are thus two distinct crimes, and larceny is not necessarily included in a burglary. In order to sustain an indictment for burglary, it would only be essential to prove a felonious entry with the intent, while to convict on a charge of larceny it becomes necessary to show a taking, for the entry may have been without any felonious intent. *Territory v. Willard*, 21 Pac. 301, 302, 8 Mont. 328.

Larceny is an offense against personal property; burglary is an offense against realty and the security of its occupant. Larceny and burglary are therefore distinct crimes, and an acquittal of the former is not a bar to an indictment for the latter. *Commonwealth v. Tadrick*, 1 Pa. Super. Ct. 555, 565.

Consent of owner.

The consent of the authorized agent of the owner would be in legal effect the consent of the owner. *Fetkenhauer v. State*, 88 N. W. 294, 296, 112 Wis. 368.

Larceny may exist although the possession of the alleged stolen goods is obtained with the consent of the owner, if that consent is obtained by deception, and with the intent not to return the same, but to appropriate them and deprive the owner of them. *Crum v. State*, 47 N. E. 833, 835, 148 Ind. 401.

If, by trick or artifice, the owner of property is induced to part with the custody or naked possession of it to one who receives the property *animo furandi*, the owner still meaning to retain the right of property, the taking will be larceny. Thus it is larceny where the defendants so fraudulently conduct a gambling game or lottery as to give the prosecutor no chance of winning, and he parts with his money through fraud or fear. *State v. Skilbrick*, 66 Pac. 53, 54, 25 Wash. 555, 87 Am. St. Rep. 784.

Larceny is the felonious stealing, taking, and carrying away of the personal property of another. When the act of taking coexists with a felonious intent to deprive the owner of his property, the offense is complete. Hence, it is held that a person obtaining possession of property with the consent of the owner, but with the intention to deprive the owner of it, is guilty of larceny, because a fraudulent receipt of the property of another amounts to a taking without his consent. *People v. Salorse*, 62 Cal. 139, 141.

The fact that the owner may voluntarily deliver over the custody of his property does

not protect the person procuring it from being guilty of larceny, where it is received by him with a felonious intention. If a party takes goods from the owner, though with the owner's consent, with an intent to steal them, such taking amounts to larceny. *Macino v. People* (N. Y.) 12 Hun, 127, 129.

Even though the owner is induced to part with his property by fraudulent means, yet if he actually intends to part with it, and delivers up possession absolutely, it is not larceny. But it is held that where two persons conspire together fraudulently to get possession of the money of another, with a felonious intent to convert it to their own use, and by means of a fraudulent contrivance or device succeed in inducing the owner to deliver the temporary possession thereof for a specific purpose, and then without his consent, and against his wishes, convert the same to their own use, they are guilty of larceny. *Loomis v. People*, 67 N. Y. 322, 326, 23 Am. Rep. 123.

Larceny may be committed of a box of matches which were placed on the counter of a store, to be used by the public in lighting their pipes and cigars in the room and for their accommodation. By so placing the matches the owner had not abandoned his right to them. They could only be appropriated in a particular manner, and in a very limited quantity, with his consent. Taking them by the boxful without felonious intent would have been a trespass, and with it a larceny. *Mitchum v. State*, 45 Ala. 29, 30.

The offense of larceny at common law is established by proof on the part of the prosecution showing that defendant obtained possession of the property by some trick, fraudulent device, or artifice, with the intention of appropriating it to his own use or that of another. *People v. Walker*, 83 N. Y. Supp. 372, 374, 85 App. Div. 558.

"Larceny" is defined to be "the felonious taking and carrying away of the personal goods of another," or "the wrongful and fraudulent taking and carrying away by one person of the mere personal goods of another from any place, with a felonious intent to convert them to the taker's own use and make them his own property without the consent of the owner." From this definition it is seen that there must be a taking, and this implies that the consent of the owner of the goods is wanting. If the owner of the goods deliver them to the offender upon any trust, a violation of the trust will not afford any ground of a larceny. So, where a quantity of pig iron in bars was delivered to a common carrier to transport by canal, and on the passage the carrier stopped his boat and with felonious intent put off from the boat 100 bars of the iron, and then proceeded and delivered the remainder, the facts do not

constitute larceny at common law, but the carrier was guilty of embezzlement. *People v. Nichols* (N. Y.) 3 Parker, Cr. R. 579, 581.

To constitute larceny, it is not needful that the property stolen should have been taken from the possession of the owner by a trespass; but if a person obtains possession of property from the owner for a special purpose by some device, trick, artificial fraud, or false pretense, intending at the time to appropriate it to his own use, and he subsequently does appropriate it to his own use, and not to the special purpose for which he received it, he is guilty of larceny. *People v. Laurence*, 21 N. Y. Supp. 818, 820, 66 Hun, 574.

Defendant broker, in negotiating a sale of land for his principal, solicited complainant to purchase it, and falsely represented that he had an arrangement by which it could be transferred to another person at a larger profit. It was agreed that the profits, when made by a resale, were to be equally divided between them. Complainant paid a small amount on the purchase price, and a few days later was told by defendant that the principal would reduce the price one-third on the immediate payment of \$1,000. Complainant then delivered \$1,000 to defendant, under an agreement that it should not be paid to anybody until the former had a chance to examine the title. Defendant never paid the \$1,000 to any one, and he had never intended to. Held, that the facts established a common-law larceny, and not the offense merely of procuring money by false pretenses, within the rule that one who obtains possession of property from the owner for a special purpose by a false pretense, intending at the time to appropriate it to his own use, and who subsequently does appropriate it to his own use, and not to the special purpose for which he received it, is guilty of larceny. *People v. Sumner*, 53 N. Y. Supp. 817, 33 App. Div. 338.

Conversion of property found.

A person who finds lost property under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person who is not entitled thereto, without first having made every reasonable effort to find the owner and restore the property to him, is guilty of larceny. *Pen. Code N. Y. § 539*; *People v. Seaton*, 15 N. Y. Supp. 270, 272, 60 Hun, 584.

Different grades.

Larceny, at the common law, was divided into simple, and mixed or compound. Blackstone defines "simple larceny" as the felonious taking and carrying away of the personal goods of another. Of "mixed or compound larceny" he says: "It has all the

properties of simple larceny, but is accompanied with either one or both of the aggravations of taking from one's home or person." It would therefore seem that compound larceny is not, in character or general distinction, in any wise different from simple larceny. It is different only in the aggravated circumstances of being committed in a house or from a person. Blackstone says that, "although attaching to itself a higher degree of guilt than simple larceny, yet it is not at all distinguished from the other at common law." *State v. Tofte*, 54 Pac. 1062, 1063, 59 Kan. 753.

The word "larceny," in Rev. St. Ill. c. 38, § 23, which declares that an assault with intent to commit murder, rape, mayhem, robbery, larceny, or other felony shall subject the offender to imprisonment in the penitentiary, is broad enough to embrace all grades of larceny, and therefore includes both grand larceny and petty larceny, and makes an assault with intent to commit the latter crime a penitentiary offense. *Kelly v. People*, 24 N. E. 56, 132 Ill. 363.

In Iowa the offense of "larceny" is defined by statute. Rev. St. 173, §§ 40, 41, describe the offense of larceny, declaring that if the property stolen is of the value of \$25 and upwards it should be deemed larceny, and section 44 provides that every person who is convicted of larceny shall be imprisoned in the penitentiary. By these sections it is clear that the Legislature recognized and applied the term "larceny" as meaning grand larceny, in contradistinction to petty larceny. To that sense the application of those sections appears to be exclusively confined. Section 45 defines "petty larceny" as stealing property of a value less than \$25. *State v. Chambers* (Iowa) 2 G. Greene, 308, 309.

The word "larceny" will comprehend petty larceny as well as grand larceny. *State v. Smith*, 16 Mo. 550, 551.

A statement of the value of the property is a necessary part of a description of the offense of larceny, for the reason that the punishment of larceny is graduated by statute with reference to the value of the property taken. *State v. Perley*, 30 Atl. 74, 75, 86 Me. 427, 41 Am. St. Rep. 564.

The term "larceny," in the Constitution, providing that the Legislature shall have power and shall enact the necessary laws to exclude from the right of suffrage all persons convicted of perjury, bribery, "larceny," or infamous crime, and in the statute providing that persons hereafter convicted of felony, bribery, perjury, "larceny," or other infamous crime shall not be entitled to vote, embraces petit larceny, which, under the Declaration of Rights in the Constitution, is an infamous crime. *State v. Buckman*, 18 Fla. 267, 270.

Larceny, or theft, at common law is distinguished into two sorts, the one called "simple larceny" or "plain larceny," unaccompanied with any other atrocious circumstance, and "mixed larceny" or "compound larceny," which also includes in it the aggravation of a taking from one's house or person. Simple larceny, then, is the felonious taking and carrying away of the personal goods of another; mixed or compound larceny is such as has all the properties of the former (simple larceny), but is accompanied by either one or both of the aggravations of taking from one's house or person. "Larceny from the person" is either by privately stealing from a man's person, as by picking his pocket, or by open and violent assault. "Open and violent larceny from a person," or "robbery," is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear. *Anderson v. Winfree*, 4 S. W. 351, 352, 85 Ky. 597.

Hill's Ann. Laws, § 1763, provides if any person shall steal any goods or chattels, the property of another, such person shall be deemed guilty of larceny. Larceny at common law was classed as "simple larceny," and "larceny accompanied with violence or putting in fear," which was denominated "robbery." Simple larceny was subdivided into "grand larceny," which consisted in the felonious taking of goods above the value of 12 pence, and "petit larceny," in which the value of the property so taken was 12 pence or under. 1 Hale, P. C. 503. "Simple larceny" was unaccompanied with any atrocious circumstances, while "mixed larceny" or "compound larceny" included the aggravation of a taking from one's house or person. 4 Bl. Comm. 229. By Hill's Ann. Laws, § 1764, larceny of goods in a building renders the person convicted thereof subject to punishment by imprisonment in the penitentiary not less than one nor more than seven years, regardless of the value of the property feloniously taken. It will thus be seen that the grade of the offense is not measured by such value, nor by penalty imposed for a violation of the property rights of another, but is determined by the circumstances which aggravate the taking. *State v. Savage*, 60 Pac. 610, 611, 36 Or. 191.

The word "larceny," as used in Rev. Laws, § 4133, providing that a person who in the nighttime breaks and enters a dwelling house, church, or either of the other places or buildings described, with intent to commit murder, rape, robbery, larceny, or other felony, shall be imprisoned in the state prison, etc., includes not only grand but petit larceny. *State v. Keyser*, 56 Vt. 622, 623.

To constitute the offense of "larceny," according to our definitions, there must be

at least a wrongful taking of the property of another with a felonious intent. And the offense of the violation of the sanctity of the mails by one sworn to protect it, committed by taking out of the mail any of the things described in the statutes, aiming at an offense similar in character to and having the ingredients of the common-law offense of larceny, is an aggravated larceny, because committed by one in a place of trust, but still it is larceny. *Jones v. United States* (U. S.) 27 Fed. 447, 450.

Embezzlement distinguished.

See, also, "Embezzle—Embezzlement."

The crime of "larceny" is distinguished from that of "embezzlement" in that in the former case property is unlawfully taken and retained, while in the latter it comes lawfully into the hands of the party embezzling, by virtue of the position of trust he occupies, and is unlawfully appropriated by him. *United States v. Lee* (U. S.) 12 Fed. 816, 818.

To constitute larceny, there must be a taking, and this implies that the consent of the owner of the goods is wanting. If the owner of the goods deliver them to the offender upon any trust, a violation of the trust will not afford any ground of a larceny. *People v. Nichols* (N. Y.) 3 Parker, Cr. R. 579, 581.

The gist of common-law "larceny," as distinguished from "embezzlement," is the felonious taking of what is another's with the simultaneous intent in the taker of misappropriating it, while in statutory embezzlement there is no felonious taking, for the thing comes to the servant by delivery either from the master or a third person. *Spalding v. People*, 49 N. E. 993, 998, 172 Ill. 40.

False pretenses distinguished.

To constitute the crime of larceny, there must be a trespass committed and a felonious intent, and without these elements no such offense can be made out. "The distinction," says the court, "which exists between larceny and false pretense is a very nice one, but no case has gone to the extent of holding that where the owner of property parts with the possession, intending to surrender absolutely his title thereto, the case is one of larceny." *Thorne v. Turck*, 94 N. Y. 90, 95, 46 Am. Rep. 126.

If by trick or artifice the owner of property is induced to part with the custody or naked possession to one who receives the property *animo furandi*, the owner still meaning to retain the right of property, the taking will be larceny; but if the owner part not only with the possession, but the right of property also, the offense of the party ob-

taining it will not be larceny, but that of obtaining goods by false pretenses. *Smith v. People*, 53 N. Y. 111, 114, 13 Am. Rep. 474; *Commonwealth v. Elchelberger* (Pa.) 13 Atl. 422, 426, 4 Am. St. Rep. 642; *People v. Rae*, 6 Pac. 1, 2, 66 Cal. 423; *State v. Kuba*, 20 Wis. 217, 224, 225, 91 Am. Dec. 890.

As a generic term.

The terms "larceny" and "embezzlement," in a bond conditioned to reimburse an employer for such pecuniary loss as he may sustain by any act of fraud or dishonesty, amounting to larceny or embezzlement, committed by a designated employé, are used as generic terms to indicate the dishonest and fraudulent breach of any duty or obligation upon the part of an employé to pay over to his employer or account to him for any money, securities, or other personal property, the title to which is in the employer, that may in any manner come into the possession of the employé. *Champion Ice Mfg. & Cold-Storage Co. v. American Bonding & Trust Co.*, 75 S. W. 197, 198, 25 Ky. Law Rep. 239.

As infamous crime.

See "Infamous Crime."

As offense against state.

Larceny is no more an offense against the particular political subdivision in which the offense occurs than against the person whose property he unlawfully takes. It is a crime in the arrest and punishment for which counties have no corporate duty to perform, but it belongs exclusively to the state. It is an offense against the state, and not against the county, it being a matter not of local but of general concern that persons guilty of such offense should be apprehended and tried. *Northern Trust Co. v. Snyder*, 89 N. W. 460, 467, 113 Wis. 516, 90 Am. St. Rep. 867.

As involving personality only.

At common law "larcenies" are restricted to personal property. Real estate could not be the subject of the offense of larceny; hence it is held that words charging plaintiff with stealing the door of a house are not actionable per se, as they impute only the offense of a trespass of property, and do not involve moral turpitude. *Blackburn v. Clark* (Ky.) 41 S. W. 430, 431.

In designating the constituent elements of "larceny" of a thing which is or has been a part of the realty, the court cites with approval Blackstone's explanation of the distinction between the taking of things personal and of things which savor of the realty, as follows: "These things [things that savor of the realty] were parcel of the real estate, and therefore, while they continued so, could not by any possibility be the subject of theft,

being absolutely fixed and immovable; and if they were severed by violence, so as to be changed into movables, and at the same time, by one and the same continued act, carried off by the person who severed them, they could never be said to be taken from the proprietor in their newly acquired state of mobility." But if the act of severance and that of carrying away be separated, so that they do not constitute one and the same continued act, the distinction between personal goods and those that savor of the realty ceases to protect the wrongdoer from a criminal prosecution, and a charge of larceny can be sustained. So it is held that while the waste coal carried from a mine by a stream on the land of another is real estate, and belongs to such other, yet one who unlawfully enters on the land in a boat, scoops up the coal lodged along the channel and bank of the stream, cleans and sifts it, deposits the cleaned coal, little by little, on a flatboat, transports the boat load to bins, and shovels the coal from the boat to the bins, may be convicted of larceny, since the loading, transportation, and unloading are not so connected with the severance of the coal from the land as to be one and the same continuous act of trespass. *Commonwealth v. Steimling*, 27 Atl. 297, 299, 156 Pa. 400.

"Larceny" is described in the Criminal Code of Utah as the felonious stealing, taking, carrying, leading, or driving away the personal property of another. "Personal property" may be said generally to include everything the subject of ownership, not being landed or an interest in land. Books containing a phonographic report of the testimony taken on a trial, and having no value except for such report, are personal property, not title deeds or choses in action, and are the subject of larceny under the statute. *People v. McGrath*, 17 Pac. 116, 117, 5 Utah, 525.

"Larceny," at common law, was confined to goods and chattels. It did not refer to land, because land could not be feloniously taken and carried away except in insignificant parcels thereof. *People v. Cummings*, 46 Pac. 284, 285, 114 Cal. 437.

Presumed to be a crime.

In determining whether a person demanded as a fugitive from justice in extradition proceedings is charged with a crime against the laws of the state from whose justice he is alleged to have fled, it may be presumed that larceny is a crime in a state where the common law prevails. *Katyuga v. Cosgrove*, 50 Atl. 679, 680, 67 N. J. Law, 213.

Property of another.

An indictment failing to allege that the property was the property of another does not charge the crime of larceny. *People v.*

Hanselman, 18 Pac. 425, 426, 76 Cal. 460, 9 Am. St. Rep. 238.

Larceny is the taking possession and carrying away the goods of another, with a felonious intent to convert them to the use of the taker or of some other person. There are, it is said, exceptional cases where the owner may be guilty of stealing his own goods. *Black v. State*, 3 South. 814, 815, 83 Ala. 81, 3 Am. St. Rep. 691.

Larceny is the felonious taking and carrying away of the personal goods of another. Hence a man cannot be guilty of larceny of his own property from a bailee. *Commonwealth v. Tobin* (Pa.) 2 Brewst. 570.

Larceny is the felonious taking and carrying away of the personal property of another, which the thief knew at the time of the taking was the property of another, with intent to deprive him of the ownership of his own property. *State v. Dredde*, 41 Atl. 925, 38 Md. 413.

The gist of the offense of larceny consists in feloniously taking the property of another, and the quality of the act is not affected by the fact that the property stolen, instead of being owned by one or by two persons jointly, is the several property of different persons. *State v. Kieffer* (S. D.) 95 N. W. 289, 290.

Robbery distinguished.

Robbery is the felonious taking of personal property of another by violence or putting in fear; or, perhaps we may say, it is the felonious taking of the personal property of another by subduing him by actual violence, or a show of it. It is not simply stealing from the person of another, and it is different from all stealing. We might steal from the person of another; for instance, from one who was asleep. That would be larceny, and not robbery. *Commonwealth v. Hollister*, 27 Atl. 386, 387, 157 Pa. 13, 25 L. R. A. 349.

Larceny and robbery are generically the same, the one being merely an aggravated form of the other. Each is the felonious taking of the personal property of another, although in robbery the felonious taking is accomplished by force or threats. The textbooks speak of robbery as an aggravated species of larceny. *People v. Crowley*, 35 Pac. 84, 100 Cal. 478. See, also, *Keeton v. State*, 66 S. W. 645, 70 Ark. 163; *People v. Cleary*, 13 Pac. 77, 78, 72 Cal. 59.

Larceny and robbery are each the felonious taking of the personal property of another, although in robbery the taking is accomplished by force or threats. *People v. Crowley*, 35 Pac. 84, 100 Cal. 478.

Stealing distinguished.

The word "steal" cannot be accepted as the equivalent of "larceny." It is but one

word in the definition, and does not even define all the verb action. "Steal, take, and carry away" have always been indissolubly conjoined, each as essential to the other in order to constitute the crime of larceny. *Barnhart v. State*, 56 N. E. 212, 214, 154 Ind. 177 (citing *Hale*, P. C. 513).

In *Hughes v. Territory*, 56 Pac. 708, 8 Okl. 28, it was held that Sess. Laws 1825, p. 20, art. 1, § 1, making it criminal to steal any mare, colt, etc., created a separate and distinct offense from "larceny" as defined by St. 1893, § 2371. Mr. Justice Burwell said: "An examination of the authorities will show that 'larceny' and 'stealing' at common law had the same meaning; and consequently 'stealing,' as here defined, is the wrongful or fraudulent taking and removing of personal property, by trespass, with a felonious intent to deprive the owner thereof, and to convert the same to his (the taker's) own use." The Legislature has modified the meaning of the word "larceny" as used in the crimes act, so that the taking of personal property, accomplished by fraud or stealth, and with intent to deprive another thereof, is larceny, regardless of whether or not it was taken for the purpose of depriving the owner thereof, and for the purpose of converting it to the use of the taker. Therefore, while "stealing" and "larceny" at common law were synonymous terms, our statute has given to the word "larceny" a much broader meaning than it then had, while "steal" or "stealing" has not been defined by our statutes, and must be construed according to its common-law meaning. *Sullivan v. Territory*, 58 Pac. 650, 8 Okl. 499.

Theft synonymous.

See, also, "Theft."

"Larceny" is synonymous with "theft." *Mathews v. State*, 36 Tex. 675, 676.

Things savoring of realty.

"Mr. Wharton, in treating of larceny, holds that at common law larceny cannot be committed of things which savor of the realty, though when severed the rule is otherwise; but the common-law rule that, to constitute theft of an article attached to the realty, there must be a severance prior to the asportation, does not obtain in this state, and hence the removal of rails from a fence, and with larcenous intent, is theft." *Harberger v. State*, 4 Tex. App. 26, 28, 30 Am. Rep. 157.

Trespass.

"Larceny," by the common law, is defined to be the felonious taking and carrying away of the personal goods or property of another. From this definition it follows that every larceny necessarily includes a trespass, for a trespass to personal property is nothing

more than the unlawful and forcible taking of the goods of another without such felonious intent. *Johnson v. People*, 113 Ill. 99, 103.

LARCENY BY BAILEE.

See "Embezzle—Embezzlement."

Within the meaning of the criminal law, a "bailment," says Bishop in his work on Criminal Law, is where one has personal property intrusted to him, to be returned or delivered to another in specie when the object of the trust is accomplished, and the offense of "larceny by bailee" consists in the unlawful and felonious conversion of the property or money by the bailee to his own use. In *Welsh v. People*, 17 Ill. (7 Peck) 339, Caton, J., in distinguishing between "simple larceny" and "larceny by bailee," where the alleged larceny is perpetrated by obtaining the possession of the goods by the voluntary act of the owner under the influence of false pretenses and fraud, says: "There is no real difficulty in deducing the correct rule by which to determine whether the act was a larceny and felonious, or a mere cheat and swindle. The rule is plainly this: If the owner of the goods alleged to have been stolen parts with both the title and the possession to the alleged thief, then neither the taking nor the conversion is felonious. It can but amount to a fraud; it is obtaining goods under false pretenses. If, however, the owner parts with the possession voluntarily, but does not part with the title, expecting and intending that the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way, as directed or agreed upon for his benefit, then the goods may be feloniously converted by the bailee, so as to relate back and make the taking and conversion a larceny." *State v. Skinner*, 46 Pac. 368, 369, 29 Or. 599.

LARCENY FROM THE HOUSE.

"Larceny from the house" is defined by Code, § 4413, as the breaking or entering any house with intent to steal, or, after breaking and entering, of stealing any goods, wares, merchandise, or any other thing of value. *Roberts v. State*, 83 Ga. 369, 370, 375, 9 S. E. 675.

LARCENY FROM THE PERSON.

Robbery distinguished, see "Robbery."

"Larceny from the person," as mentioned in 22 Stat. 530, providing a penalty for that crime, consists in the wrongful and fraudulent taking, and does not include the idea of force and violence, or fraud accompanied by force, nor does it imply that the taking must be secret. *Williams v. United States*, 3 App. D. C. 335, 345.

Larceny from the person is considered a higher offense than was stealing, because involving an invasion of the person of the citizen, as well as the stealing of the property. It includes all cases of pocket-picking and similar offenses, and extends to every case of stealing where the property stolen is on the person or in the immediate charge and custody of the person from whom the theft is made. *State v. Eno*, 8 Minn. 220 (Gil. 190, 192).

LARD.

In its ordinary meaning, "lard" is the fat of swine which is melted and separated from the flesh, but as used in the title of Acts 22d Gen. Assem. c. 79, entitled "An act to prevent fraud in the sale of lard and to provide punishment for the violation thereof," it is construed to include not only pure lard, but adulterations thereof, hence the act is not unconstitutional on the ground that the subject is not expressed in the title. *State v. Snow*, 47 N. W. 777, 778, 81 Iowa, 433, 11 L. R. A. 355.

LAREM.

The word "larem" in 2 Domat p. 487, which provides, "Ubi quis larem ac fortunarium suarum summarum constituit," if viewed according to its signification in writers of acknowledged authority, will be found to designate either the tutelary deity of the hearth or the only home of the family. *Chaine v. Wilson* (N. Y.) 16 How. Prac. 552, 562.

LARGE.

See "At Large."

In a contract of sale of "all the large cottonwood and sycamore trees" on a certain island, to be paid for by measurement of the logs cut from such trees, the purpose indicated was to sell all the cottonwood and sycamore trees on the island large enough to be made into logs which could be taken to the bank and there measured as logs. *Bement v. Claybrook*, 31 N. E. 556, 557, 5 Ind. App. 193.

In the charter of a turnpike corporation providing that at each place where the toll shall be collected a signboard shall be erected with the rates of toll "fairly and legibly written thereon in large or capital letters," the term "large or capital letters" means letters of a large size. The general object of the Legislature was to have the letters legible, and they intended that if the letters were large it should be sufficient, although they were not capitals, and that if they were capitals they should nevertheless be of a large size. What are usually called "small

letters," if made large, should seem to be more easy to read than capital letters. *Nichols v. Bertram*, 20 Mass. (3 Pick.) 342, 344.

An indictment charging the setting fire to, burning, and destroying of "large parts" of a courthouse will be understood to mean that defendant set fire to the courthouse itself. *Lavelle v. State*, 36 N. E. 135, 136, 136 Ind. 233.

LARGER.

"Larger portion," as used in St. c. 39, § 9, providing that all ratable personal property shall be taxed in the town in which the owner shall have had his actual place of abode for the "larger portion of the 12 months" next preceding the 1st day of April in each year, means more than half of them in duration of time, and hence persons who have had no actual abode in the state for more than 6 of the 12 months before the 1st day of April preceding the assessments are not subject to this provision. *Allman v. Griswold*, 12 R. I. 339, 342.

LASCIVIOUS.

"Lascivious" means that which tends to excite lust. *United States v. Britton* (U. S.) 17 Fed. 731, 733.

The word "lascivious," as used in Rev. St. § 3893, prohibiting the deposit of lewd, obscene, "lascivious," or indecent publications in the mails, is to be construed as having the same meaning as given to it at common law in prosecutions for obscene libel. *United States v. Clark* (U. S.) 38 Fed. 500, 501; *Swearingen v. United States*, 16 Sup. Ct. 562, 563, 161 U. S. 446, 40 L. Ed. 765.

The words "lascivious," "lewd," "obscene," or "of an indecent character," in the federal statute prohibiting the sending of such matter through the mail, does not necessarily mean that the separate words are of such a character, but the character of the letter is to be determined by treating it as a whole. *United States v. Hanover* (U. S.) 17 Fed. 444.

"Lascivious," as used in Rev. St. § 3893, making it a criminal offense to place in the mails any obscene, lewd, or "lascivious" publication, signify that form of immorality which has relation to sexual impurity. *Swearingen v. United States*, 16 Sup. Ct. 562, 563, 161 U. S. 446, 40 L. Ed. 765; *United States v. Males* (U. S.) 51 Fed. 41, 42.

An instruction was approved, in a prosecution for the violation of a statute prohibiting the mailing of "obscene, lascivious, lewd, or indecent" publications, that the question what constitutes obscene, lewd, lascivious, or indecent publications is largely a question for the conscience and opinion of the jury,

but that before it can be said that a publication is "lascivious" it must be calculated, with the ordinary reader, to deprave his morals or lead to impure purposes. *Dunlop v. United States*, 17 Sup. Ct. 375, 380, 165 U. S. 483, 41 L. Ed. 799.

The words "obscene, lewd, or lascivious," in Rev. St. U. S. § 3893, prohibiting the sending through the mail of any obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, are not descriptive of language of merely an insulting character, but is limited to the use of words or pictures appealing to the animal passion, stimulating it, corrupting and debauching the mind and heart. *United States v. Durant* (U. S.) 46 Fed. 753.

The words "obscene, lewd, and lascivious," in Rev. St. U. S. § 3893, making it criminal to transmit any obscene, lewd, or lascivious book, etc., through the mail, does not clearly characterize letters inclosed in envelopes, directed to a debtor, on which the words "dead beats" are printed in such a manner as to attract attention. The purpose of the act was to prevent the mails from being used to circulate matter to corrupt the morals of the people. The history of this legislation clearly shows that Congress determined to exclude from the mails impure and immodest writings, and that rough and coarse language are not within the terms of the act. *Ex parte Doran* (U. S.) 32 Fed. 76, 77.

Imputation of crime.

Rev. St. U. S. § 3893, prohibiting the transmission of any "obscene, lewd, or lascivious" print, writing, etc., through the mails, etc., does not include a letter imputing to the person addressed an atrocious crime, though exceedingly coarse and vulgar, where it has no tendency to excite libidinous thoughts or impure desires, or to deprave and corrupt the morals of those whose minds are open to such influences. The words imply something tending to suggest libidinous thoughts or excite impure desires. *United States v. Wightman* (U. S.) 29 Fed. 636.

That a man and woman did "lasciviously and lewdly associate" is shown by an indictment for adultery which alleges that they did unlawfully associate, bed, and cohabit together, and did commit adultery. *State v. Stubbs*, 13 S. E. 90, 108 N. C. 774.

As lewd.

25 Stat. 496, forbidding the sending of obscene or lascivious pamphlets, writings, etc., through the mail, "lascivious" means one describing dissolute or unchaste acts, scenes, or incidents, or one the reading whereof, by reason of its contents, is calculated to excite lustful and sensual desires in

those whose minds are open to such influences. The word is synonymous with "lewd." *United States v. Clarke* (U. S.) 38 Fed. 732, 733.

"Lascivious" is defined to mean loose, wanton, lewd, lustful, tending to produce voluptuous or lewd emotions. The word is used in such sense in Rev. St. U. S. § 3893, prohibiting the transmission in the mails of obscene, "lascivious" books, pamphlets, etc. *United States v. Bebout* (U. S.) 28 Fed. 522, 524.

"Lascivious" is defined by Webster as synonymous with "wanton," "lewd," or "loose." *State v. Lawrence*, 27 N. W. 126, 129, 19 Neb. 307.

LASCIVIOUS BEHAVIOR.

Rev. St. c. 99, § 8, making "gross lewdness and lascivious behavior" punishable by imprisonment, etc., includes an indecent exposure of the person of a man to a woman, with a view to excite unchaste desires on her part and to induce her to yield. The crime does not depend upon the number of persons to whom a man thus exposes himself, whether one or many. *State v. Millard*, 18 Vt. 574, 578, 46 Am. Dec. 170.

LASCIVIOUSLY ASSOCIATE.

"Lascivious carriage and behavior" means "all those wanton acts between persons of different sexes, flowing from the exercise of lustful passions, which are grossly indecent and unchaste, and which are not otherwise punished as crimes against chastity and public decency." *Fowler v. State* (Conn.) 5 Day, 81, 84.

LAST.

The term "commercial lasts" is one indicating a vessel's carrying capacity, and a "last" is taken as the equivalent of 6,000 pounds. *Reck v. Phoenix Ins. Co.*, 29 N. E. 137, 138, 130 N. Y. 160.

Former implied.

A statute providing that every illegitimate child shall be deemed to be settled in city or town of the "last" legal settlement of the mother supposes that the settlement of the mother might be changed. *Cana-Joharie v. Johnstown* (N. Y.) 17 Johns. 41, 44.

The word "last," as used in Act March 3, 1883, c. 97, 22 Stat. 473, providing that all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous, and in the

regular navy, in the lowest grade having graduated pay held by such officer since "last entering" the service, does not imply entering the service more than once. Where a person has entered the service once, it is his last entry as well as his first entry. Where an officer has entered the service twice, his second entry in his last entry, and that entry is to be taken and applied in the statute to his case. But where an officer has entered the service but once, that entry is to be taken as the "last entry" within the meaning of the statute. *United States v. Mullan*, 8 Sup. Ct. 79, 80, 123 U. S. 186, 31 L. Ed. 140.

Sole not equivalent.

"Last," as used in a will which testator designated as his last will, is not equivalent to "sole," and does not necessarily revoke all former wills. *Freeman v. Freeman*, 27 Eng. Law & Eq. 351, 357.

LAST ANTECEDENT.

The rule of grammar, which is also the rule of construction in law, is that the relative clause relates to the nearest antecedent that will make sense. The rule is as ancient as the language. Finch, in his *Discourse on Law* (Ed. 1759, bk. 1, c. 3, p. 8), states it thus: "Words of construction must be referred to the nearest antecedent, where the matter itself does not hinder." 5 Com. Dig. marg. p. 333, says the relative is referred to the "last antecedent," and cites numerous cases. Croom, in his *Maxims*, cites *Noys* to the effect that relative words refer to the next antecedent, and says the "last antecedent" is the last word that can be made an antecedent so as to make sense." *Wood v. Baldwin*, 10 N. Y. Supp. 195, 196, 56 Hun, 647.

LAST ASSESSMENT.

"Last assessment," as used in Const. art. 9, § 12, which limits the power of counties to contract indebtedness to 5 per cent. of the last assessment for state and county taxes, means the assessment as fixed by the State Board of Equalization, and not as made by the local assessors. *People v. Hamill*, 29 N. E. 280, 134 Ill. 606.

"Last assessment roll," as used in an act relating to the issue of bonds for the aid of a railroad, and requiring affidavits of the assessors as to the required consent of taxpayers, the assessment roll used in the affidavit to be the last assessment roll, means the last assessment roll preceding the making of such affidavit, and not the last assessment preceding the issuing of the bonds. *Phelps v. Lewiston* (U. S.) 19 Fed. Cas. 450, 459.

"Last assessment roll," as used in Act 1857, § 2, providing that it should be lawful

for a town commissioner to borrow on the faith and credit of the town, provided the consent in writing of a majority of the taxpayers representing a majority of the taxable property in the town appearing on the last assessment roll should be first obtained for subscribing for the stock of a railroad company, means the last assessment roll next preceding the subscription, and not the one next preceding the passage of the act or any amendment to it. *Town of Duanesburgh v. Jenkins* (N. Y.) 40 Barb. 574, 580.

LAST CHILD.

"Last or only child," as used in Act 1843, providing that a mother, after having intermarried, shall not be entitled to any part or portion of the estate of a child who shall die intestate and without issue, unless it shall be the "last or only child," means the last surviving child, the only child, and not the latest child born. *Holder v. Harrell*, 6 Ga. 125, 127.

LAST CLEAR CHANCE.

The term "doctrine of the last clear chance" has been used in personal injury cases to designate the doctrine of discovered peril. "It raises the question whether defendant could, by the exercise of ordinary care, have prevented the injury notwithstanding the negligence of the deceased, and whether the negligence of the defendant could, under all the circumstances of the case, be held to be such gross and continuing negligence as would be deemed the proximate cause of the injury. If, in spite of the negligence of the deceased, the defendant could, by the exercise of reasonable care, have discovered the dangerous situation of the deceased, and have prevented the accident by any means that would not have really endangered the safety of its train, the defendant would have been guilty of negligence, and such negligence would be the immediate, and therefore proximate, cause of the injury." *McLamb v. Wilmington & W. R. Co.*, 29 S. E. 894, 898, 122 N. C. 862.

"Last clear chance" is the doctrine that notwithstanding the previous negligence of a plaintiff, if, at the time the injury was done, it might have been avoided by the exercise of reasonable care on the part of the defendant, the defendant will be liable for the failure to exercise such care. *Styles v. Receivers of Richmond & D. R. Co.*, 24 S. E. 740, 741, 118 N. C. 1084 (citing *Gunter v. Wicker*, 85 N. C. 310; *Davies v. Mann*, 10 Mees. & W. 545).

LAST DAY OF TERM.

"Last day of the term," as used in Code 1880, § 2282, providing that the minutes of the circuit court shall be entered and read and signed on the last day of the term,

means the day of the final adjournment, and is synonymous with the "end of the term" in section 1718, requiring a bill of exceptions to be presented within 10 days before the end of the term. *Jones v. Williams*, 62 Miss. 183, 184.

Where the condition of a bond was that the obligor would, 15 days after the "last day of the term" at which judgment should be rendered in a certain suit, notify the judgment creditor, etc., the phrase "after the last day of the term" had reference to the last day of the term, and not to the day on which a special judgment had been entered up. *Parsons v. Hathaway*, 40 Me. 132, 133.

LAST EQUALIZED VALUATION.

Laws 1885, c. 187, § 1, provides for county aid to towns in building bridges whose cost exceeds one-fourth of 1 per cent. of all the taxable property of the town "according to the last equalized valuation." Held, that the phrase "last equalized valuation" meant last valuation before the annual town meeting in April, 1886, and hence referred to the valuation of 1885. *State v. Pierce County Sup'rs*, 37 N. W. 233, 234, 71 Wis. 327.

LAST GENERAL ELECTION.

The term "last general election," in 2 Comp. Laws, par. 3070, providing that a board of county commissioners consisting of three members shall be elected in each county, but that in any county in which at the last general election there were polled 4,000 or more votes the board shall consist of five members, must be construed to mean the last general election preceding the time when the commissioners are required by law to assume the duties of the office, so that where the right to five commissioners had accrued by the required vote, if at the election at which the extra commissioners are voted for less than 4,000 votes are cast, the right to five commissioners is lost, and the election of extra commissioners void. *State v. Woodbury*, 30 Pac. 1006, 1008, 17 Nev. 337.

LAST HEREINBEFORE DESCRIBED.

A tax deed contained several distinct descriptions of real estate, and the granting clause provided "that the real property last hereinbefore described is conveyed," etc. Held, that the words "last hereinbefore described," as so used, applied only to the last entire description of real estate, and rendered the conveyance invalid on its face as to any tracts other than that intended in such last description. *Spicer v. Howe*, 16 Pac. 825, 827, 38 Kan. 465.

Where, in a deed, four lots were described together, and in subsequent recitals all four were referred to as "such property," the

subsequent phrase in the granting clause of "the real property last hereinbefore described" included all of them, and the deed effectually conveyed them all. *Cartwright v. Korman*, 26 Pac. 48, 49, 45 Kan. 515.

LAST ILLNESS.

See, also, "Last Sickness."

A "last illness," within the meaning of Act Feb. 24, 1834, making a physician's bill for attendance and medicine furnished during the last illness of a decedent a preferred claim against his estate, means the immediate illness resulting in the decedent's death. It does not include the illness of one caused by a serious injury from which he so far recovers that he is able to attend to business, but has a subsequent relapse from which he dies, and therefore the claim of the physician attending him before the relapse is not preferred. In *re Reese's Estate* (Pa.) 2 Pears. 482. Nor can it be construed to include a lingering illness that has stretched across many months or many years. Men sometimes die from disease of the heart, lungs, or other organs, which commence with infancy, terminating only with old age. They are never well, always complaining, but lingering on throughout the usual period allowed to human life. In other instances the disease runs its course in a shorter time, but still the patient lingers, down at times, up and about at others. Such cases, where the illness is so protracted, the statute certainly does not contemplate. Where the disease assumes a fatal form, runs its course rapidly, the patient virtually prostrated, and the services of a physician constantly necessary, the case just as certainly is contemplated. Where a person suffered from softening of the brain, the progress of disease being gradual and slow, the patient living for more than a year after the doctor's attendance commenced, going about the house, waiting upon herself generally, once visiting abroad for several weeks, the disease manifesting itself only in weakness and irritability up to within a short time of her death, when it resulted in apoplexy, prior to which time the doctor's attendance was irregular, he going only when called, but subsequently to the apoplexy his visits were regular and pretty constant, the latter period is the "last illness" for the services during which the doctor is entitled to preference. In *re Duckett's Estate* (Pa.) 1 Kulp, 227.

The term "last illness," in Act Feb. 24, 1834 (P. L. 70), includes any sickness for which a physician is called, which continues until the death of the patient. It is not necessary that the sickness should in the first instance confine the patient to her room. In *re Wasson's Estate*, 8 Pa. Dist. R. 480, 481.

The term "last illness," within the rule that claims against the estate of a decedent during his last illness are to be preferred, includes medical services rendered to deceased for a year and a half prior to his death, during which time he was suffering from an incurable progressive disease which resulted in his death. *In re Stagger's Estate*, 8 Pa. Super. Ct. 260, 263.

LAST MENTIONED.

Where, in an action for forgery, in the second count the check was set out in the identical language of the check described in the first count, but it was distinguished throughout by being described as the "last-mentioned check," the court said that it was not possible "from the face of the indictment to say that the same check was intended to be described in both counts, and, though the copies are alike verbatim et literatim, it is not to be assumed that each is a copy of one and the same original instrument." *People v. Shotwell*, 27 Cal. 400. Certainly not, because such a presumption would be contrary to the plain meaning and intent of the words "last-mentioned check" as used in the second count. *State v. Malin*, 14 Nev. 288, 290.

If, in a pleading, subject A. is mentioned, and then subject B., and afterwards a statement is made respecting "the last-mentioned" subject, the court will refer the words "the last-mentioned" to A., when by referring them to B. an incongruity would be occasioned, and where the opposite party, instead of demurring on the ground of ambiguity, has pleaded over. *Brancker v. Molyneux*, 1 Mann. & G. 710, 720.

LAST PAST.

"Last past," as used in a declaration in ejectment in which the lease was stated to have been made on the 7th of July, 1825, to hold from the 6th day of July then last past, is construed to refer to the 6th day of July, 1825, not to the 6th day of July, 1824, which was before plaintiff's lessor's title accrued. *Burhans v. Vanness*, 10 N. J. Law (5 Halst.) 102, 107.

Arbitration bonds were dated August 21, 1813, and the award was dated August 23, 1813, and recited, "Bonds dated the 21st of August last past." Held, that the words "last past" should be construed to refer to the day—that is, the 21st—last past, and not to the month of August. *Brown v. Hankerson* (N. Y.) 3 Cow. 70, 72.

LAST PLACE OF ABODE.

A proof of service of summons on a person at his "last and usual place of abode in C. county" is equivalent to "usual place of abode," as required by Rev. St. § 2636. It

means that the service was made at the person's last and usual place of abode, and that such place of abode was then in C. county. The words "last and" are mere surplusage. The last and usual place of abode of a person is necessarily his present usual place of abode. *Healey v. Butler*, 27 N. W. 822, 823, 66 Wis. 9.

One who owned real estate and carried on business in Massachusetts until the year 1841, when he removed to another state, where he continued to reside, will in 1843 be deemed to have a "last and usual place of abode" in Massachusetts. *Tilden v. Johnson*, 60 Mass. (6 Cush.) 354, 359.

LAST PORT OF DISCHARGE.

A policy on a vessel insured her from London to any port or ports on the river Platte until her arrival at her "last port of discharge" on that river. It was the master's intention to discharge her cargo at Buenos Ayres, but before reaching Buenos Ayres he heard that that place was in the hands of the enemy, and therefore went to Montevideo, with an intent to make a complete discharge if the market were favorable, but otherwise to proceed to Buenos Ayres, if possible. After discharging a part of the cargo, and not finding the market so favorable as he expected, but while he was still discharging, a loss happened by a peril of the sea under the policy. Held, that since Buenos Ayres, to which other port in the Platte he had contemplated to go, was at the time of his arrival in that river, and continued up to the time of the loss, in the hands of the enemy, so that he could not legally go there, Montevideo must be taken to be the ship's "last port of discharge," within the meaning of those words in the policy, and hence that the risk terminated on her arrival at that port. *Brown v. Vigne*, 12 East, 283.

LAST PUBLICATION.

The words "last publication," in the statute providing that the printer shall receive no pay for publication of the notice of a sale for delinquent taxes unless the affidavit of publication is transmitted within six days after the last publication of the statement and notice, should be taken in their natural and ordinary sense, as referring to the last issue of the paper in which the statement and notice were legally published, and not to the completed period of publication. *Chippewa River Land Co. v. J. L. Gates Land Co.*, 95 N. W. 954, 118 Wis. 345; *Pinkerton v. J. L. Gates Land Co.*, 95 N. W. 1089, 1093, 118 Wis. 514.

LAST SECTION.

A reference to the "last" or "preceding" section, or other provision of a statute, means

the section or other division immediately preceding. Laws N. Y. 1892, c. 677, § 10.

LAST SICKNESS.

The "last sickness" is considered to be that of which the debtor died. Civ. Code La. 1900, art. 3199.

"Last sickness," as used in St. 1821, c. 51, § 25, making the expenses of the last sickness of an insolvent a preferred claim against his estate, means "the sickness which is terminated by his death." The question whether a certain sickness continued until testator's death is a question for the jury. *Huse v. Brown*, 8 Me. (8 Greenl.) 167, 169.

In a statute requiring that nuncupative wills must be made "in the time of the last sickness," the words must be taken in their ordinary signification. It is a reasonable and necessary implication that the testator, at the time of making the will, supposed that his sickness would prove his last sickness; that he should be impressed with the probability that he would never recover. *Harrington v. Stees*, 82 Ill. 50, 54, 25 Am. Rep. 290.

"Last sickness," within the meaning of statutes giving preferences to expenses of the last sickness, cannot be determined by the application of any definite rule. "The court can lay down no rule or limitation for the duration of the last sickness of a man, nor for the degree of attention to be paid for him. A wounded man may linger a long time in a helpless state, and chronic diseases run through more time than a year. We must construe the act liberally, and let it inure to its proper end—the full relief of the sick and the infirm." *McVoy v. Percival* (S. C.) *Dud. Law*, 337, 339.

Where, subsequent to an alleged donatio causa mortis, a will is made and regularly proved, the making of such will is conclusive evidence that the gift was not made during such a "last sickness" as the law requires to constitute a disposition of property causa mortis. *Adams v. Nicholas* (Pa.) 1 Miles, 90, 93.

As in extremis.

The phrase "last sickness," in the statute declaring that no will shall be good unless made in the last sickness of the deceased, means in extremis. *Prince v. Hazelton* (N. Y.) 20 Johns. 503, 513, 11 Am. Dec. 307.

"Last sickness," with reference to nuncupative wills, means in extremis. This expression was understood by writers before 29 Car. II to mean the veriest extremity, when a man "lieth languishing for fear of sudden death, and dareth not to stay the writing of his testament." *Sykes v. Sykes* (Ala.) 2 Stew. 363, 369, 20 Am. Dec. 40.

"Last sickness," as used in Revision, p. 1245, providing that nuncupative wills must be made at the time of the last sickness of the testator, should be construed as meaning "in extremis," and hence an alleged nuncupative will made by testatrix during her last illness, nine days before her death, cannot be admitted to probate where the proof is clear that she had time and capacity to subsequently make a written will if she had so desired. *Carroll v. Bonham*, 9 Atl. 371, 42 N. J. Eq. (15 Stew.) 625.

Lingering illness.

The term "last sickness," as used in Code 1880, providing that a nuncupative will made during a person's last sickness, etc., shall be valid, etc., does not include a lingering illness which did not incapacitate the testator. The words "last sickness" should not be extended over a lingering disease covering months or weeks, during which and after the spoken words there was afforded, both by the mental and physical condition of the party, every opportunity and inducement to prepare a written will. *Sadler v. Sadler*, 60 Miss. 251, 255; *Prince v. Hazleton* (N. Y.) 20 Johns. 502, 515, 11 Am. Dec. 307.

"The 'last sickness' means the sickness which results in death. It may be more or less extended, according to the circumstances of the disease. If it is an acute disease, where a man was well until he was confined to his bed, and then died, it would count only from the time in which he was prostrated and confined to his bed. But if it was lingering, admitting of transient temporary recuperation, followed immediately by relapses, and every day adding to his aggregate weakness, the last sickness would commence from the time the final and fatal relapse commenced." *United States v. Frisbie* (U. S.) 28 Fed. 808, 810.

LAST SICKNESS EXPENSES.

The "last sickness expenses," within the meaning of a statute directing a preference as to funeral and other expenses of the last sickness, includes a debt due to plaintiff as a nurse. *McVoy v. Percival* (S. C.) 1 *Dud. Law*, 337, 339.

LAST THREE DAYS OF THE SESSION.

The phrase "last three days of the session," as used in Const. Minn. art. 4, § 11, providing that within three days after an adjournment of the Legislature the Governor may approve, sign, and file in the office of the Secretary of State any act passed "during the last three days of the session," and the same shall become law, means working days when the Legislature is in actual session for the transaction of business, and hence does not include Sunday. Therefore a

bill passed on Saturday was within the provision, though the adjournment did not occur until the following Tuesday. *John V. Farwell Co. v. Mathels (U. S.)* 48 Fed. 863, 634.

LAST WILL.

In the construction of statutes the words "last will" shall be construed as meaning "last will and testament." *Ky. St.* 1903, § 463.

A "last will," says Swineburn, "is a lawful disposing of that which any one would have done after death." It is a voluntary disposition of property, in the mode recognized by law, to take effect after death. *Reagan v. Stanley*, 79 Tenn. (11 Lea) 316, 322.

LAST WILL AND TESTAMENT.

"A 'last will and testament' may be defined as the disposition of one's property to take effect after death." *Barney v. Hayes*, 29 Pac. 282, 284, 11 Mont. 571, 28 Am. St. Rep. 495 (quoting 1 Redf. Wills, 5).

The words "will and testament" and the phrase "last will and testament" are exactly synonymous by common usage all over the world. *Hill v. Hill*, 35 Pac. 360, 7 Wash. 409.

LASTLY.

The use of "lastly," in the conclusion of a will, denotes that the intentions of the testator with relation to the subjects of that paper were final. *Cogbill v. Cogbill (Va.)* 2 Hen. & M. 467, 507.

LATA CULPA.

"Lata culpa" is the term used in the civil law to designate gross faults or neglects. *Brand v. Schenectady & T. R. Co. (N. Y.)* 8 Barb. 368, 378.

LATE.

The term "late in May" means a date later than the 17th. Thus, evidence that payment was demanded of the debtor "late in May" is not sufficient to show that the demand was made before he was attached as trustee on the 17th of the month. "We should not call the 13th, two days previous to the middle of the month, 'early' in the month, and we cannot say that the 17th day, two days subsequent to the middle, is 'late' in the month. The 17th day is about the middle of the month, and we must consider a demand to have been made subsequent to that day." *Ersine v. Ersine*, 13 N. H. 436, 443.

Death implied.

In the trial of a slave for a capital offense, it was necessary to prove his ownership, and it was alleged that he was the property of "the late W. C." Held that, in the sense in which the adjective "late" is here used, it means existing at a period not long since past, but now departed this life, and therefore, as the accused was alleged to be the property of a person nonexistent, and hence not capable of owning property, the ownership of accused was not alleged, and the indictment was defective. *Pleasant v. State*, 17 Ala. 190, 191.

Expiration implied.

Where mandamus is directed to certain persons as township committee, and returned by them as "late" township committee, it is in effect saying that they were the committee when the writ was awarded, but that their office had since expired. *State v. Griscom*, 8 N. J. Law (3 Halst.) 136, 137.

Removal implied.

The use of the word "late" in a petition for letters of administration, describing the deceased as "late" a resident of the county, is to be construed as showing that deceased was "last" a resident of the county; and therefore it is a sufficient showing of facts giving the court jurisdiction, in compliance with the statute that administration shall be granted in the county where the deceased was a resident at or immediately previous to his death. *Beckett v. Selover*, 7 Cal. 215, 233, 68 Am. Dec. 237.

Where a record of the probate court described the will "as the last will of a person 'late' of B. county, deceased," it was insisted that the word "late" showed that the deceased was not a resident. The court said: "We have consulted all the standard dictionaries of the English language and several of the best law dictionaries, and we do not find that the word 'late' was ever used in the sense of 'last,' but always, when used as here, in the sense of 'recently' or 'formerly.' We have found but one case, *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237, in which it seems to have been construed in the sense of 'last,' while in *Holmes v. Custance*, 12 Ves. 279, where the description was 'Robert Holmes, late Norwich,' Sir William Grant, Master of the Rolls, said: 'Every one knows that the sense of "late" is not "recently," but "formerly," of Norwich.' Thus the record does not show that the deceased was a non-resident. *Hoffman v. Fleming*, 64 N. E. 63, 65, 66 Ohio St. 143.

LATELY.

The use of the word "lately," in a bill to set aside a deed of property to a wife on the ground that it had been bought and

paid for with her husband's money, and was held by her for the benefit of her husband, and to aid him in defrauding his creditors, who were plaintiffs, and praying that such premises be declared to be held in trust for the complainants, alleging that the business "lately" carried on upon the premises was carried on by the husband in the name of the wife, and that they claimed and pretended that both the premises and the business belonged to the wife, made the charge indefinite, but the court considered it as going back to the purchase of the property. *Quidort's Adm'r v. Pergeaux*, 18 N. J. Eq. (3 C. E. Green) 472-479.

LATENS.

"Latens" is that which seemeth certain and without ambiguity, for anything that appeareth on a deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity." *Pringle v. Rogers*, 44 Atl. 275, 276, 193 Pa. 94 (citing *Lycoming Mut. Ins. Co. v. Sailer*, 67 Pa. [17 P. F. Smith] 108).

LATENT.

"The ordinary meaning of the word 'latent,' when used in the description of any substance possessing inherent power, would import that such power was not manifest, was hidden, concealed, not visible or apparent. It would not fairly describe a condition where the power was in part displayed or manifest." *Celluloid Mfg. Co. v. Celuloid Mfg. Co.* (U. S.) 42 Fed. 900, 906.

LATENT AMBIGUITY.

See, also, "Ambiguitas Latens."

A "latent ambiguity" occurs where a writing is perfect and intelligible upon its face, but from some circumstance admitted in proof a doubt arises as to the applicability of the language employed to a particular person or thing; but it is by no means a universal rule that general parol evidence is admissible to explain even latent ambiguities or that such questions in every instance are questions of fact for the jury. Cases of latent ambiguity may be classed under three heads: The first arises when the description contained in a written instrument of the person, thing, or place intended is applicable with equal certainty to each of several subjects, as a devise to "my cousin John," when the testator has two cousins John. The second class of cases of latent ambiguity is where the name or description, or both, of the person or thing intended to be referred to, is in some respect so far incomplete or erroneous as not to refer with precision to any particular person or thing,

and therefore the defect or omission has to be supplied by implication, as, for example, a devise to "Katherine Earnly," while no person of that name claimed the legacy, but one Gertrude Yardly did. The third class of cases of latent ambiguity is where the name used applies perfectly to one person or thing, while a description applies as perfectly to another, as in devise in a will to "Anna Maria German, wife of Jonathan German," there is a latent ambiguity, it appearing that Anna Maria was not in fact the wife, but the daughter, of Jonathan German, but that his wife was named Katherine. *Stokeley v. Gordan*, 8 Md. 496, 505; *Flood v. Kerwin*, 89 N. W. 845, 847, 113 Wis. 673; *Patch v. White*, 6 Sup. Ct. 710, 712, 117 U. S. 210, 29 L. Ed. 860; *Whitcomb v. Rodman*, 40 N. E. 553, 554, 156 Ill. 116, 28 L. R. A. 149, 47 Am. St. Rep. 181.

"Latent ambiguity exists where on the face of the paper no doubt or uncertainty exists, but by proof aliunde the language is shown to be alike applicable to two or more persons, things, etc. When this is the case, the uncertainty or ambiguity may be explained or cleared up by the same character of proof as that by which it is made to appear." *Chambers v. Ringstaff*, 69 Ala. 140, 143; *Smith v. Jeffryes*, 15 Mees. & W. 561, 562; *Bartlett v. Town of Nottingham*, 8 N. H. 300, 304; *Petrie v. Trustees of Hamilton College*, 53 N. E. 216, 217, 158 N. Y. 458; *Webster v. Paul*, 10 Ohio St. 531, 534; *Hayward Homestead Tract Ass'n v. Miller*, 26 N. Y. Supp. 1091, 6 Misc. Rep. 254; *Austin v. Southworth*, 34 N. Y. Supp. 88, 90, 13 Misc. Rep. 45; *Eckford v. Eckford*, 58 N. W. 1093, 1096, 91 Iowa, 54, 26 L. R. A. 370 (citing *Wig. Wills*, 197).

"A latent ambiguity is that which seemeth certain for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity." *Craven v. Butterfield*, 80 Ind. 503, 510 (approvingly cited in *Mudd v. Dillon*, 65 S. W. 973, 975); *Lycoming Mut. Ins. Co. v. Sailer*, 67 Pa. (17 P. F. Smith) 108, 112; *Bradley v. Washington, A. & G. Steam Packet Co.*, 38 U. S. (13 Pet.) 89, 97, 10 L. Ed. 72; *Cubberly v. Cubberly*, 12 N. J. Law (7 Halst.) 308, 311; *Putnam v. Bond*, 100 Mass. 58, 60, 1 Am. Rep. 82; *Aldrich v. Griffith*, 29 Atl. 376, 378, 66 Vt. 390; *Hammond v. Ridgeley's Lessee* (Md.) 5 Har. & J. 245, 255, 9 Am. Dec. 522; *Door v. School Dist. No. 26*, 40 Ark. 237, 241; *Cleveland v. Burnham*, 25 N. W. 407, 409, 64 Wis. 347; *Jackson v. Sill* (N. Y.) 11 Johns. 201, 215, 6 Am. Dec. 363; *Hawkins v. Garland's Adm'r*, 76 Va. 149, 152, 44 Am. Rep. 158; *Lathrop v. Blake*, 23 N. H. 46, 60; *Trustees of South New Market Methodist Seminary v. Peaslee*, 15 N. H. 317, 327; *Eckford v. Eckford*, 58 N. W. 1093, 1096, 91 Iowa, 54, 26 L. R. A. 370; *Deery v. Cray*, 77 U. S. (10 Wall.) 263.

270, 19 L. Ed. 887; *Walker v. Wells*, 25 Ga. 141, 142, 71 Am. Dec. 164.

"A latent ambiguity therefore exists in a sentence or expression only when the real meaning or intention of the writer is hidden or concealed. It does not appear on the face of the words used, nor is its existence known until these words are brought into contact with collateral facts. It is only when you come to apply the words, bringing them alongside the facts which existed when used, and to read them in the exact light in which they were written, that you make up the latent ambiguity, if one exists." *Hawkins v. Garland's Adm'r*, 76 Va. 149, 152, 44 Am. Rep. 158 (citing *Bac. Max.* 23).

Latent ambiguity arises where the words of a written instrument are plain and intelligible, but by reason of extraneous facts a certain and definite application of those words is found impossible. In such case, to preserve the instrument, to give it operation and effect, to prevent it from being defeated by uncertainty, parol evidence to explain its intent and to fix its application is admissible. Where a devise is to a particular person by name, and there are two or more of that name; where a bequest is made to a person by name, and there is no person of that name; where a bequest is to a person by description, and there are more persons than one answering that description; where a testator gives a particular chattel, and he has two or more of the same description; where the testator gives a sum, part of his 4 per cent. bank annuities, and had no such stock, but stock of a different kind, called "long annuities"—in such cases facts outside the will render uncertain the application of words in themselves plain, and without explanation from parol evidence the devise or bequest must be void and inoperative." *Hand v. Hoffman*, 8 N. J. Law (3 Halst.) 71, 72.

It is sometimes difficult to say when an ambiguity is apparent on the face of the instrument and when it results from extraneous matters, to which the instrument relates, but which are not defined or specified in it. There seems to be an intermediate class of cases, partaking of the nature both of patent and latent ambiguities, as where the words are all sensible, and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject-matter in the contemplation of the parties. *Martin v. Bell*, 18 N. J. Law (3 Har.) 167, 169.

Latent ambiguities in written instruments are those ambiguities which do not arise from the equivocal character of the language employed by the parties, but which arise from facts which are not apparent on the face of the instrument; and it is immaterial whether this fact be judicially known

to the court or is shown by parol evidence. *Ives v. Kimball*, 1 Mich. 308, 313.

When the intention of a party or parties is clearly expressed, and a doubt exists, not as to the intention, but as to the object to which the intention applies, it is a latent ambiguity. *Breckenridge v. Duncan*, 9 Ky. (2 A. K. Marsh.) 50, 51, 12 Am. Dec. 359.

Ambiguities are of two kinds, latent or patent. A latent ambiguity occurs where the instrument is sufficiently certain and free from ambiguity, but the ambiguity is produced by some extrinsic or some collateral matter out of the instrument, as, for example, where a man devised property to his cousin A., and he has two cousins of that name, the ambiguity is latent, and parol evidence is admissible to explain the same; while a patent ambiguity occurs where a clause in an instrument is so defectively stated that a code of law which has to put a construction on the instrument is unable to collect the intention of the parties. Where by the terms of a contract of subscription a party undertook to give for the purpose of the subscription 20 acres of land, the uncertainty of the description or ambiguity was patent, and could not be rendered certain or explained by parol evidence. *Palmer v. Albee*, 50 Iowa, 429, 431.

There is a latent ambiguity in the description of premises conveyed in a deed when it is necessary to resort to surrounding circumstances to determine the description intended. *Lego v. Medley*, 48 N. W. 375, 377, 79 Wis. 211, 24 Am. St. Rep. 706.

A latent ambiguity is one which arises from some collateral circumstance or extrinsic matter, in cases where the instrument is itself sufficiently certain and intelligible. *Grimes' Ex'rs v. Harmon*, 35 Ind. 198, 208, 9 Am. Rep. 690.

A latent ambiguity arises from circumstances dehors the instrument. *Bruckner's Lessee v. Lawrence*, 1 Mich. (1 Doug.) 19, 27.

Error and mistake distinguished.

See "Error"; "Mistake."

Patent ambiguity distinguished.

See "Patent Ambiguity."

LATENT DANGERS.

"Latent dangers" are those not seen or perceptible to the senses by their presence. *Williams v. Walton & Whann Co.* (Del.) 32 Atl. 726, 729, 9 Houst. 322.

LATENT DEED.

A "latent deed" is a deed kept for 20 years or more in a man's scrutoire or strong box. Such a deed, when unaccompanied with

actual, distinctive, and adverse possession, is entitled to no consideration in a court of justice, and it is no ground for recovery in an action of ejectment against the actual possessor. *Wright v. Wright*, 7 N. J. Law (2 Halst.) 175, 177, 11 Am. Dec. 546.

LATENT DEFECT.

In ship.

Under the law of England a provision in a bill of lading exempting the shipowner from liability for damage caused by a latent defect covers damages from a defective rivet in the bulkhead side of a water tank, where the ship being a new one, the tank had been tested by hammer and water pressure, and the defect was where no external examination would have discovered it. *The Carib Prince* (U. S.) 63 Fed. 266, 268.

The term "latent defects," in a bill of lading exempting the owner from liability for loss occurring by latent defects in hull, even existing before shipment or sailing, does not include an open port, though unknown to the master on sailing. *Putnam v. The Manitoba* (U. S.) 104 Fed. 145, 151.

A leaky port on a new vessel, so near the water line as would render the steamer unfit for the carriage of cargo in the compartment into which such port opened, cannot be regarded as a "latent defect," since it was easily discoverable upon inspection by the water test, a test which is easily made, and which is customarily made, and which reasonable prudence requires to be made, as respects ports near the water line before a ship sails on her first voyage. *The Phoenix* (U. S.) 90 Fed. 116, 118.

A defect, in order to be latent, within the exceptions in a bill of lading of injuries arising from latent defects in hull, etc., must have been not discoverable at the time of the shipment. Such exception includes a latent and undiscovered defect in a rivet which existed at the commencement of the voyage, and therefore limits the implied warranty of seaworthiness if due diligence has been exercised. *The Carib Prince* (U. S.) 63 Fed. 254, 255, 15 C. C. A. 385.

In title.

A latent defect in the title of the vendor of real estate, entitling the vendee to a rescission of the contract, is one not discoverable by inspection made with ordinary care. A survey which would have disclosed the condition of the lot is too extreme diligence to be required. *Newell v. Turner* (Ala.) 9 Port. 420, 422.

LATU SENSU.

"*Latu sensu*" generally includes persons related or connected in the ascending line

by consanguinity or affinity, and in a more restricted sense it includes only those related by consanguinity. *Bernard v. Vignaud* (La.) 10 Mart. (O. S.) 482, 561.

LATERAL RAILROAD.

According to Webster "lateral" means proceeding from the side, as the lateral branches of a tree, lateral shoots; and this is the sense in which this word is to be understood when branch or lateral railroads are spoken of, and a lateral railroad is nothing more than an offshoot from the main line or stem, and the mere fact that a contemplated road runs in the same general direction with the main track will not deprive it of the character of a branch or lateral road, within the meaning of a charter giving the railroad power to construct branch or lateral roads. *Blanton v. Richmond, F. & P. R. Co.*, 10 S. E. 925, 926, 86 Va. 618.

A "lateral road" is but another name for a branch road. Both must have a principal road from which they proceed. They are appendages to, and are properly a part of, the main line, and must proceed from some part of the main trunk between its termini. *Newhall v. Galena & C. U. R. Co.*, 14 Ill. (4 Peck) 273, 276.

Whether a particular portion of a railway is a lateral or branch railroad, or not, does not depend upon its length or direction; but it must be connected with and lead from a main line already constructed in order to be such, and where a charter of a railroad company empowers it to construct only one specified branch road, another road, incorporated by the law of a different state, operated by the first road, is not a branch of such road, within a deed reserving a right of way over the granted premises in favor of such road or any of its branches; the word "branches" being taken to mean such branches as the railroad company was or might be legally authorized to construct. *Biles v. Tacoma, O. & G. H. R. Co.*, 32 Pac. 211, 213, 5 Wash. 509.

LATH.

"Lath" is defined to be a thin strip of wood, nailed to studs and furring to support the plastering, which is defined to be a mixture of lime, hair, and sand, to cover lath work between timbers or roof walling; and where the specifications of a building contract contain a general heading called "Plastering," under which lathing and plastering is described, and a contractor undertakes to do the plastering, it will be construed to mean all included under the general title, including the lathing. *Mellen v. Ford* (U. S.) 28 Fed. 639, 642, 644.

regular navy, in the lowest grade having graduated pay held by such officer since "last entering" the service, does not imply entering the service more than once. Where a person has entered the service once, it is his last entry as well as his first entry. Where an officer has entered the service twice, his second entry in his last entry, and that entry is to be taken and applied in the statute to his case. But where an officer has entered the service but once, that entry is to be taken as the "last entry" within the meaning of the statute. *United States v. Mullan*, 8 Sup. Ct. 79, 80, 123 U. S. 186, 31 L. Ed. 140.

Sole not equivalent.

"Last," as used in a will which testator designated as his last will, is not equivalent to "sole," and does not necessarily revoke all former wills. *Freeman v. Freeman*, 27 Eng. Law & Eq. 351, 357.

LAST ANTECEDENT.

The rule of grammar, which is also the rule of construction in law, is that the relative clause relates to the nearest antecedent that will make sense. The rule is as ancient as the language. Finch, in his *Discourse on Law* (Ed. 1759, bk. 1, c. 3, p. 8), states it thus: "Words of construction must be referred to the nearest antecedent, where the matter itself does not hinder." 5 Com. Dig. marg. p. 333, says the relative is referred to the "last antecedent," and cites numerous cases. Croom, in his *Maxims*, cites Noys to the effect that relative words refer to the next antecedent, and says the "last antecedent" is the last word that can be made an antecedent so as to make sense." *Wood v. Baldwin*, 10 N. Y. Supp. 195, 196, 56 Hun, 647.

LAST ASSESSMENT.

"Last assessment," as used in Const. art. 9, § 12, which limits the power of counties to contract indebtedness to 5 per cent. of the last assessment for state and county taxes, means the assessment as fixed by the State Board of Equalization, and not as made by the local assessors. *People v. Hamill*, 29 N. E. 280, 134 Ill. 606.

"Last assessment roll," as used in an act relating to the issue of bonds for the aid of a railroad, and requiring affidavits of the assessors as to the required consent of taxpayers, the assessment roll used in the affidavit to be the last assessment roll, means the last assessment roll preceding the making of such affidavit, and not the last assessment preceding the issuing of the bonds. *Phelps v. Lewiston* (U. S.) 19 Fed. Cas. 450, 459.

"Last assessment roll," as used in Act 1857, § 2, providing that it should be lawful

for a town commissioner to borrow on the faith and credit of the town, provided the consent in writing of a majority of the taxpayers representing a majority of the taxable property in the town appearing on the last assessment roll should be first obtained for subscribing for the stock of a railroad company, means the last assessment roll next preceding the subscription, and not the one next preceding the passage of the act or any amendment to it. *Town of Duanesburgh v. Jenkins* (N. Y.) 40 Barb. 574, 580.

LAST CHILD.

"Last or only child," as used in Act 1843, providing that a mother, after having intermarried, shall not be entitled to any part or portion of the estate of a child who shall die intestate and without issue, unless it shall be the "last or only child," means the last surviving child, the only child, and not the latest child born. *Holder v. Harrell*, 6 Ga. 125, 127.

LAST CLEAR CHANCE.

The term "doctrine of the last clear chance" has been used in personal injury cases to designate the doctrine of discovered peril. "It raises the question whether defendant could, by the exercise of ordinary care, have prevented the injury notwithstanding the negligence of the deceased, and whether the negligence of the defendant could, under all the circumstances of the case, be held to be such gross and continuing negligence as would be deemed the proximate cause of the injury. If, in spite of the negligence of the deceased, the defendant could, by the exercise of reasonable care, have discovered the dangerous situation of the deceased, and have prevented the accident by any means that would not have really endangered the safety of its train, the defendant would have been guilty of negligence, and such negligence would be the immediate, and therefore proximate, cause of the injury." *McLamb v. Wilmington & W. R. Co.*, 29 S. E. 894, 898, 122 N. C. 862.

"Last clear chance" is the doctrine that notwithstanding the previous negligence of a plaintiff, if, at the time the injury was done, it might have been avoided by the exercise of reasonable care on the part of the defendant, the defendant will be liable for the failure to exercise such care. *Styles v. Receivers of Richmond & D. R. Co.*, 24 S. E. 740, 741, 118 N. C. 1084 (citing *Gunter v. Wicker*, 85 N. C. 310; *Davies v. Mann*, 10 Mees. & W. 545).

LAST DAY OF TERM.

"Last day of the term," as used in Code 1880, § 2282, providing that the minutes of the circuit court shall be entered and read and signed on the last day of the term,

means the day of the final adjournment, and is synonymous with the "end of the term" in section 1718, requiring a bill of exceptions to be presented within 10 days before the end of the term. *Jones v. Williams*, 62 Miss. 183, 184.

Where the condition of a bond was that the obligor would, 15 days after the "last day of the term" at which judgment should be rendered in a certain suit, notify the judgment creditor, etc., the phrase "after the last day of the term" had reference to the last day of the term, and not to the day on which a special judgment had been entered up. *Parsons v. Hathaway*, 40 Me. 132, 133.

LAST EQUALIZED VALUATION.

Laws 1885, c. 187, § 1, provides for county aid to towns in building bridges whose cost exceeds one-fourth of 1 per cent. of all the taxable property of the town "according to the last equalized valuation." Held, that the phrase "last equalized valuation" meant last valuation before the annual town meeting in April, 1886, and hence referred to the valuation of 1885. *State v. Pierce County Sup'rs*, 37 N. W. 233, 234, 71 Wis. 327.

LAST GENERAL ELECTION.

The term "last general election," in 2 Comp. Laws, par. 3070, providing that a board of county commissioners consisting of three members shall be elected in each county, but that in any county in which at the last general election there were polled 4,000 or more votes the board shall consist of five members, must be construed to mean the last general election preceding the time when the commissioners are required by law to assume the duties of the office, so that where the right to five commissioners had accrued by the required vote, if at the election at which the extra commissioners are voted for less than 4,000 votes are cast, the right to five commissioners is lost, and the election of extra commissioners void. *State v. Woodbury*, 30 Pac. 1006, 1008, 17 Nev. 337.

LAST HEREINBEFORE DESCRIBED.

A tax deed contained several distinct descriptions of real estate, and the granting clause provided "that the real property last hereinbefore described is conveyed," etc. Held, that the words "last hereinbefore described," as so used, applied only to the last entire description of real estate, and rendered the conveyance invalid on its face as to any tracts other than that intended in such last description. *Spicer v. Howe*, 16 Pac. 825, 827, 38 Kan. 465.

Where, in a deed, four lots were described together, and in subsequent recitals all four were referred to as "such property," the

subsequent phrase in the granting clause of "the real property last hereinbefore described" included all of them, and the deed effectually conveyed them all. *Cartwright v. Korman*, 26 Pac. 48, 49, 45 Kan. 515.

LAST ILLNESS.

See, also, "Last Sickness."

A "last illness," within the meaning of Act Feb. 24, 1834, making a physician's bill for attendance and medicine furnished during the last illness of a decedent a preferred claim against his estate, means the immediate illness resulting in the decedent's death. It does not include the illness of one caused by a serious injury from which he so far recovers that he is able to attend to business, but has a subsequent relapse from which he dies, and therefore the claim of the physician attending him before the relapse is not preferred. In *re Reese's Estate* (Pa.) 2 Pears. 482. Nor can it be construed to include a lingering illness that has stretched across many months or many years. Men sometimes die from disease of the heart, lungs, or other organs, which commence with infancy, terminating only with old age. They are never well, always complaining, but lingering on throughout the usual period allowed to human life. In other instances the disease runs its course in a shorter time, but still the patient lingers, down at times, up and about at others. Such cases, where the illness is so protracted, the statute certainly does not contemplate. Where the disease assumes a fatal form, runs its course rapidly, the patient virtually prostrated, and the services of a physician constantly necessary, the case just as certainly is contemplated. Where a person suffered from softening of the brain, the progress of disease being gradual and slow, the patient living for more than a year after the doctor's attendance commenced, going about the house, waiting upon herself generally, once visiting abroad for several weeks, the disease manifesting itself only in weakness and irritability up to within a short time of her death, when it resulted in apoplexy, prior to which time the doctor's attendance was irregular, he going only when called, but subsequently to the apoplexy his visits were regular and pretty constant, the latter period is the "last illness" for the services during which the doctor is entitled to preference. In *re Duckett's Estate* (Pa.) 1 Kulp, 227.

The term "last illness," in Act Feb. 24, 1834 (P. L. 70), includes any sickness for which a physician is called, which continues until the death of the patient. It is not necessary that the sickness should in the first instance confine the patient to her room. In *re Wasson's Estate*, 8 Pa. Dist. R. 480, 481.

The term "last illness," within the rule that claims against the estate of a decedent during his last illness are to be preferred, includes medical services rendered to deceased for a year and a half prior to his death, during which time he was suffering from an incurable progressive disease which resulted in his death. *In re Stagger's Estate*, 8 Pa. Super. Ct. 260, 263.

LAST MENTIONED.

Where, in an action for forgery, in the second count the check was set out in the identical language of the check described in the first count, but it was distinguished throughout by being described as the "last-mentioned check," the court said that it was not possible "from the face of the indictment to say that the same check was intended to be described in both counts, and, though the copies are alike verbatim et literatim, it is not to be assumed that each is a copy of one and the same original instrument." *People v. Shotwell*, 27 Cal. 400. Certainly not, because such a presumption would be contrary to the plain meaning and intent of the words "last-mentioned check" as used in the second count. *State v. Malin*, 14 Nev. 288, 290.

If, in a pleading, subject A. is mentioned, and then subject B., and afterwards a statement is made respecting "the last-mentioned" subject, the court will refer the words "the last-mentioned" to A., when by referring them to B. an incongruity would be occasioned, and where the opposite party, instead of demurring on the ground of ambiguity, has pleaded over. *Brancker v. Molyneux*, 1 Mann. & G. 710, 720.

LAST PAST.

"Last past," as used in a declaration in ejectment in which the lease was stated to have been made on the 7th of July, 1825, to hold from the 6th day of July then last past, is construed to refer to the 6th day of July, 1825, not to the 6th day of July, 1824, which was before plaintiff's lessor's title accrued. *Burbans v. Vanness*, 10 N. J. Law (5 Halst.) 102, 107.

Arbitration bonds were dated August 21, 1813, and the award was dated August 23, 1813, and recited, "Bonds dated the 21st of August last past." Held, that the words "last past" should be construed to refer to the day—that is, the 21st—last past, and not to the month of August. *Brown v. Hankerson* (N. Y.) 3 Cow. 70, 72.

LAST PLACE OF ABODE.

A proof of service of summons on a person at his "last and usual place of abode in C. county" is equivalent to "usual place of abode," as required by Rev. St. § 2636. It

means that the service was made at the person's last and usual place of abode, and that such place of abode was then in C. county. The words "last and" are mere surplusage. The last and usual place of abode of a person is necessarily his present usual place of abode. *Healey v. Butler*, 27 N. W. 822, 823, 86 Wis. 9.

One who owned real estate and carried on business in Massachusetts until the year 1841, when he removed to another state, where he continued to reside, will in 1843 be deemed to have a "last and usual place of abode" in Massachusetts. *Tilden v. Johnson*, 60 Mass. (6 Cush.) 354, 359.

LAST PORT OF DISCHARGE.

A policy on a vessel insured her from London to any port or ports on the river Platte until her arrival at her "last port of discharge" on that river. It was the master's intention to discharge her cargo at Buenos Ayres, but before reaching Buenos Ayres he heard that that place was in the hands of the enemy, and therefore went to Montevideo, with an intent to make a complete discharge if the market were favorable, but otherwise to proceed to Buenos Ayres, if possible. After discharging a part of the cargo, and not finding the market so favorable as he expected, but while he was still discharging, a loss happened by a peril of the sea under the policy. Held, that since Buenos Ayres, to which other port in the Platte he had contemplated to go, was at the time of his arrival in that river, and continued up to the time of the loss, in the hands of the enemy, so that he could not legally go there, Montevideo must be taken to be the ship's "last port of discharge," within the meaning of those words in the policy, and hence that the risk terminated on her arrival at that port. *Brown v. Vigne*, 12 East, 283.

LAST PUBLICATION.

The words "last publication," in the statute providing that the printer shall receive no pay for publication of the notice of a sale for delinquent taxes unless the affidavit of publication is transmitted within six days after the last publication of the statement and notice, should be taken in their natural and ordinary sense, as referring to the last issue of the paper in which the statement and notice were legally published, and not to the completed period of publication. *Chippewa River Land Co. v. J. L. Gates Land Co.*, 95 N. W. 954, 118 Wis. 345; *Pinkerton v. J. L. Gates Land Co.*, 95 N. W. 1089, 1093, 118 Wis. 514.

LAST SECTION.

A reference to the "last" or "preceding" section, or other provision of a statute, means

the section or other division immediately preceding. Laws N. Y. 1892, c. 677, § 10.

LAST SICKNESS.

The "last sickness" is considered to be that of which the debtor died. Civ. Code La. 1900, art. 3199.

"Last sickness," as used in St. 1821, c. 51, § 25, making the expenses of the last sickness of an insolvent a preferred claim against his estate, means "the sickness which is terminated by his death." The question whether a certain sickness continued until testator's death is a question for the jury. *Huse v. Brown*, 8 Me. (8 Greenl.) 167, 169.

In a statute requiring that nuncupative wills must be made "in the time of the last sickness," the words must be taken in their ordinary signification. It is a reasonable and necessary implication that the testator, at the time of making the will, supposed that his sickness would prove his last sickness; that he should be impressed with the probability that he would never recover. *Harrington v. Stees*, 82 Ill. 50, 54, 25 Am. Rep. 290.

"Last sickness," within the meaning of statutes giving preferences to expenses of the last sickness, cannot be determined by the application of any definite rule. "The court can lay down no rule or limitation for the duration of the last sickness of a man, nor for the degree of attention to be paid for him. A wounded man may linger a long time in a helpless state, and chronic diseases run through more time than a year. We must construe the act liberally, and let it inure to its proper end—the full relief of the sick and the infirm." *McVoy v. Percival* (S. C.) *Dud. Law*, 337, 339.

Where, subsequent to an alleged donatio causa mortis, a will is made and regularly proved, the making of such will is conclusive evidence that the gift was not made during such a "last sickness" as the law requires to constitute a disposition of property causa mortis. *Adams v. Nicholas* (Pa.) 1 Miles, 90, 93.

As in extremis.

The phrase "last sickness," in the statute declaring that no will shall be good unless made in the last sickness of the deceased, means in extremis. *Prince v. Hazleton* (N. Y.) 20 Johns. 503, 513, 11 Am. Dec. 307.

"Last sickness," with reference to nuncupative wills, means in extremis. This expression was understood by writers before 29 Car. II to mean the veriest extremity, when a man "leth languishing for fear of sudden death, and dareth not to stay the writing of his testament." *Sykes v. Sykes* (Ala.) 2 Stew. 363, 369, 20 Am. Dec. 40.

"Last sickness," as used in Revision, p. 1245, providing that nuncupative wills must be made at the time of the last sickness of the testator, should be construed as meaning "in extremis," and hence an alleged nuncupative will made by testatrix during her last illness, nine days before her death, cannot be admitted to probate where the proof is clear that she had time and capacity to subsequently make a written will if she had so desired. *Carroll v. Bonham*, 9 Atl. 371, 42 N. J. Eq. (15 Stew.) 625.

Lingering illness.

The term "last sickness," as used in Code 1880, providing that a nuncupative will made during a person's last sickness, etc., shall be valid, etc., does not include a lingering illness which did not incapacitate the testator. The words "last sickness" should not be extended over a lingering disease covering months or weeks, during which and after the spoken words there was afforded, both by the mental and physical condition of the party, every opportunity and inducement to prepare a written will. *Sadler v. Sadler*, 60 Miss. 251, 255; *Prince v. Hazleton* (N. Y.) 20 Johns. 502, 515, 11 Am. Dec. 307.

"The 'last sickness' means the sickness which results in death. It may be more or less extended, according to the circumstances of the disease. If it is an acute disease, where a man was well until he was confined to his bed, and then died, it would count only from the time in which he was prostrated and confined to his bed. But if it was lingering, admitting of transient temporary recuperation, followed immediately by relapses, and every day adding to his aggregate weakness, the last sickness would commence from the time the final and fatal relapse commenced." *United States v. Frisbie* (U. S.) 28 Fed. 808, 810.

LAST SICKNESS EXPENSES.

The "last sickness expenses," within the meaning of a statute directing a preference as to funeral and other expenses of the last sickness, includes a debt due to plaintiff as a nurse. *McVoy v. Percival* (S. C.) 1 *Dud. Law*, 337, 339.

LAST THREE DAYS OF THE SESSION.

The phrase "last three days of the session," as used in Const. Minn. art. 4, § 11, providing that within three days after an adjournment of the Legislature the Governor may approve, sign, and file in the office of the Secretary of State any act passed "during the last three days of the session," and the same shall become law, means working days when the Legislature is in actual session for the transaction of business, and hence does not include Sunday. Therefore a

bill passed on Saturday was within the provision, though the adjournment did not occur until the following Tuesday. *John V. Farwell Co. v. Mathels* (U. S.) 48 Fed. 363, 634.

LAST WILL.

In the construction of statutes the words "last will" shall be construed as meaning "last will and testament." Ky. St. 1903, § 463.

A "last will," says Swineburn, "is a lawful disposing of that which any one would have done after death." It is a voluntary disposition of property, in the mode recognized by law, to take effect after death. *Reagan v. Stanley*, 79 Tenn. (11 Lea) 316, 322.

LAST WILL AND TESTAMENT.

"A 'last will and testament' may be defined as the disposition of one's property to take effect after death." *Barney v. Hayes*, 29 Pac. 282, 284, 11 Mont. 571, 28 Am. St. Rep. 495 (quoting 1 Redf. Wills, 5).

The words "will and testament" and the phrase "last will and testament" are exactly synonymous by common usage all over the world. *Hill v. Hill*, 35 Pac. 360, 7 Wash. 409.

LASTLY.

The use of "lastly," in the conclusion of a will, denotes that the intentions of the testator with relation to the subjects of that paper were final. *Cogbill v. Cogbill* (Va.) 2 Hen. & M. 467, 507.

LATA CULPA.

"Lata culpa" is the term used in the civil law to designate gross faults or neglects. *Brand v. Schenectady & T. R. Co.* (N. Y.) 8 Barb. 368, 378.

LATE.

The term "late in May" means a date later than the 17th. Thus, evidence that payment was demanded of the debtor "late in May" is not sufficient to show that the demand was made before he was attached as trustee on the 17th of the month. "We should not call the 13th, two days previous to the middle of the month, 'early' in the month, and we cannot say that the 17th day, two days subsequent to the middle, is 'late' in the month. The 17th day is about the middle of the month, and we must consider a demand to have been made subsequent to that day." *Erskine v. Erskine*, 13 N. H. 436, 443.

Death implied.

In the trial of a slave for a capital offense, it was necessary to prove his ownership, and it was alleged that he was the property of "the late W. C." Held that, in the sense in which the adjective "late" is here used, it means existing at a period not long since past, but now departed this life, and therefore, as the accused was alleged to be the property of a person nonexistent, and hence not capable of owning property, the ownership of accused was not alleged, and the indictment was defective. *Pleasant v. State*, 17 Ala. 190, 191.

Expiration implied.

Where mandamus is directed to certain persons as township committee, and returned by them as "late" township committee, it is in effect saying that they were the committee when the writ was awarded, but that their office had since expired. *State v. Griscom*, 8 N. J. Law (3 Halst.) 136, 137.

Removal implied.

The use of the word "late" in a petition for letters of administration, describing the deceased as "late" a resident of the county, is to be construed as showing that deceased was "last" a resident of the county; and therefore it is a sufficient showing of facts giving the court jurisdiction, in compliance with the statute that administration shall be granted in the county where the deceased was a resident at or immediately previous to his death. *Beckett v. Selover*, 7 Cal. 215, 233, 68 Am. Dec. 237.

Where a record of the probate court described the will "as the last will of a person 'late' of B. county, deceased," it was insisted that the word "late" showed that the deceased was not a resident. The court said: "We have consulted all the standard dictionaries of the English language and several of the best law dictionaries, and we do not find that the word 'late' was ever used in the sense of 'last,' but always, when used as here, in the sense of 'recently' or 'formerly.' We have found but one case, *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237, in which it seems to have been construed in the sense of 'last,' while in *Holmes v. Custance*, 12 Ves. 279, where the description was 'Robert Holmes, late Norwich,' Sir William Grant, Master of the Rolls, said: 'Every one knows that the sense of 'late' is not 'recently,' but 'formerly,' of Norwich.'" Thus the record does not show that the deceased was a non-resident. *Hoffman v. Fleming*, 64 N. H. 63, 65, 66 Ohio St. 143.

LATELY.

The use of the word "lately," in a bill to set aside a deed of property to a wife on the ground that it had been bought and

paid for with her husband's money, and was held by her for the benefit of her husband, and to aid him in defrauding his creditors, who were plaintiffs, and praying that such premises be declared to be held in trust for the complainants, alleging that the business "lately" carried on upon the premises was carried on by the husband in the name of the wife, and that they claimed and pretended that both the premises and the business belonged to the wife, made the charge indefinite, but the court considered it as going back to the purchase of the property. *Quidort's Adm'r v. Pergeaux*, 18 N. J. Eq. (S. C. E. Green) 472-479.

LATENS.

"'Latens' is that which seemeth certain and without ambiguity, for anything that appeareth on a deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity." *Pringle v. Rogers*, 44 Atl. 275, 276, 193 Pa. 94 (citing *Lycoming Mut. Ins. Co. v. Saller*, 67 Pa. [17 P. F. Smith] 108).

LATENT.

"The ordinary meaning of the word 'latent,' when used in the description of any substance possessing inherent power, would import that such power was not manifest, was hidden, concealed, not visible or apparent. It would not fairly describe a condition where the power was in part displayed or manifest." *Celluloid Mfg. Co. v. Celonite Mfg. Co.* (U. S.) 42 Fed. 900, 903.

LATENT AMBIGUITY.

See, also, "Ambiguitas Latens."

A "latent ambiguity" occurs where a writing is perfect and intelligible upon its face, but from some circumstance admitted in proof a doubt arises as to the applicability of the language employed to a particular person or thing; but it is by no means a universal rule that general parol evidence is admissible to explain even latent ambiguities or that such questions in every instance are questions of fact for the jury. Cases of latent ambiguity may be classed under three heads: The first arises when the description contained in a written instrument of the person, thing, or place intended is applicable with equal certainty to each of several subjects, as a devise to "my cousin John," when the testator has two cousins John. The second class of cases of latent ambiguity is where the name or description, or both, of the person or thing intended to be referred to, is in some respect so far incomplete or erroneous as not to refer with precision to any particular person or thing,

and therefore the defect or omission has to be supplied by implication, as, for example, a devise to "Katherine Earnly," while no person of that name claimed the legacy, but one Gertrude Yardly did. The third class of cases of latent ambiguity is where the name used applies perfectly to one person or thing, while a description applies as perfectly to another, as in devise in a will to "Anna Maria German, wife of Jonathan German," there is a latent ambiguity, it appearing that Anna Maria was not in fact the wife, but the daughter, of Jonathan German, but that his wife was named Katherine. *Stokeley v. Gordan*, 8 Md. 496, 505; *Flood v. Kerwin*, 89 N. W. 845, 847, 113 Wis. 673; *Patch v. White*, 6 Sup. Ct. 710, 712, 117 U. S. 210, 29 L. Ed. 800; *Whitcomb v. Rodman*, 40 N. E. 553, 554, 156 Ill. 116, 28 L. R. A. 149, 47 Am. St. Rep. 181.

"Latent ambiguity exists where on the face of the paper no doubt or uncertainty exists, but by proof allunde the language is shown to be alike applicable to two or more persons, things, etc. When this is the case, the uncertainty or ambiguity may be explained or cleared up by the same character of proof as that by which it is made to appear." *Chambers v. Ringstaff*, 69 Ala. 140, 143; *Smith v. Jeffries*, 15 Mees. & W. 561, 562; *Bartlett v. Town of Nottingham*, 8 N. H. 300, 304; *Petrie v. Trustees of Hamilton College*, 53 N. E. 216, 217, 158 N. Y. 458; *Webster v. Paul*, 10 Ohio St. 531, 534; *Hayward Homestead Tract Ass'n v. Miller*, 26 N. Y. Supp. 1091, 6 Misc. Rep. 254; *Austin v. Southworth*, 34 N. Y. Supp. 88, 90, 13 Misc. Rep. 45; *Eckford v. Eckford*, 58 N. W. 1093, 1096, 91 Iowa, 54, 26 L. R. A. 370 (citing *Wig. Wills*, 197).

"A latent ambiguity is that which seemeth certain for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity." *Craven v. Butterfield*, 80 Ind. 503, 510 (approvingly cited in *Mudd v. Dillon*, 65 S. W. 973, 975); *Lycoming Mut. Ins. Co. v. Saller*, 67 Pa. (17 P. F. Smith) 108, 112; *Bradley v. Washington, A. & G. Steam Packet Co.*, 38 U. S. (13 Pet.) 89, 97, 10 L. Ed. 72; *Cubberly v. Cubberly*, 12 N. J. Law (7 Halst.) 308, 311; *Putnam v. Bond*, 100 Mass. 58, 60, 1 Am. Rep. 82; *Aldrich v. Griffith*, 29 Atl. 376, 378, 66 Vt. 390; *Hammond v. Ridgeley's Lessee* (Md.) 5 Har. & J. 245, 255, 9 Am. Dec. 522; *Door v. School Dist. No. 26*, 40 Ark. 237, 241; *Cleveland v. Burnham*, 25 N. W. 407, 409, 64 Wis. 347; *Jackson v. Sill* (N. Y.) 11 Johns. 201, 215, 6 Am. Dec. 363; *Hawkins v. Garland's Adm'r*, 76 Va. 149, 152, 44 Am. Rep. 158; *Lathrop v. Blake*, 23 N. H. 46, 60; *Trustees of South New Market Methodist Seminary v. Peaslee*, 15 N. H. 317, 327; *Eckford v. Eckford*, 58 N. W. 1093, 1096, 91 Iowa, 54, 26 L. R. A. 370; *Deery v. Cray*, 77 U. S. (10 Wall.) 263.

270, 19 L. Ed. 887; *Walker v. Wells*, 25 Ga. 141, 142, 71 Am. Dec. 164.

"A latent ambiguity therefore exists in a sentence or expression only when the real meaning or intention of the writer is hidden or concealed. It does not appear on the face of the words used, nor is its existence known until these words are brought into contact with collateral facts. It is only when you come to apply the words, bringing them alongside the facts which existed when used, and to read them in the exact light in which they were written, that you make up the latent ambiguity, if one exists." *Hawkins v. Garland's Adm'r*, 76 Va. 149, 152, 44 Am. Rep. 158 (citing *Bac. Max.* 23).

Latent ambiguity arises where the words of a written instrument are plain and intelligible, but by reason of extraneous facts a certain and definite application of those words is found impossible. In such case, to preserve the instrument, to give it operation and effect, to prevent it from being defeated by uncertainty, parol evidence to explain its intent and to fix its application is admissible. Where a devise is to a particular person by name, and there are two or more of that name; where a bequest is made to a person by name, and there is no person of that name; where a bequest is to a person by description, and there are more persons than one answering that description; where a testator gives a particular chattel, and he has two or more of the same description; where the testator gives a sum, part of his 4 per cent. bank annuities, and had no such stock, but stock of a different kind, called "long annuities"—in such cases facts outside the will render uncertain the application of words in themselves plain, and without explanation from parol evidence the devise or bequest must be void and inoperative." *Hend v. Hoffman*, 8 N. J. Law (3 Halst.) 71, 72.

It is sometimes difficult to say when an ambiguity is apparent on the face of the instrument and when it results from extraneous matters, to which the instrument relates, but which are not defined or specified in it. There seems to be an intermediate class of cases, partaking of the nature both of patent and latent ambiguities, as where the words are all sensible, and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject-matter in the contemplation of the parties. *Martin v. Bell*, 18 N. J. Law (3 Har.) 167, 169.

Latent ambiguities in written instruments are those ambiguities which do not arise from the equivocal character of the language employed by the parties, but which arise from facts which are not apparent on the face of the instrument; and it is immaterial whether this fact be judicially known

to the court or is shown by parol evidence. *Ives v. Kimball*, 1 Mich. 308, 313.

When the intention of a party or parties is clearly expressed, and a doubt exists, not as to the intention, but as to the object to which the intention applies, it is a latent ambiguity. *Breckenridge v. Duncan*, 9 Ky. (2 A. K. Marsh.) 50, 51, 12 Am. Dec. 359.

Ambiguities are of two kinds, latent or patent. A latent ambiguity occurs where the instrument is sufficiently certain and free from ambiguity, but the ambiguity is produced by some extrinsic or some collateral matter out of the instrument, as, for example, where a man devised property to his cousin A., and he has two cousins of that name, the ambiguity is latent, and parol evidence is admissible to explain the same; while a patent ambiguity occurs where a clause in an instrument is so defectively stated that a code of law which has to put a construction on the instrument is unable to collect the intention of the parties. Where by the terms of a contract of subscription a party undertook to give for the purpose of the subscription 20 acres of land, the uncertainty of the description or ambiguity was patent, and could not be rendered certain or explained by parol evidence. *Palmer v. Albee*, 50 Iowa, 429, 431.

There is a latent ambiguity in the description of premises conveyed in a deed when it is necessary to resort to surrounding circumstances to determine the description intended. *Lego v. Medley*, 48 N. W. 375, 377, 79 Wis. 211, 24 Am. St. Rep. 706.

A latent ambiguity is one which arises from some collateral circumstance or extrinsic matter, in cases where the instrument is itself sufficiently certain and intelligible. *Grimes' Ex'rs v. Harmon*, 35 Ind. 198, 208, 9 Am. Rep. 690.

A latent ambiguity arises from circumstances dehors the instrument. *Bruckner's Lessee v. Lawrence*, 1 Mich. (1 Doug.) 19, 27.

Error and mistake distinguished.

See "Error"; "Mistake."

Patent ambiguity distinguished.

See "Patent Ambiguity."

LATENT DANGERS.

"Latent dangers" are those not seen or perceptible to the senses by their presence. *Williams v. Walton & Whann Co. (Del.)* 32 Atl. 726, 729, 9 Houst. 322.

LATENT DEED.

A "latent deed" is a deed kept for 20 years or more in a man's scrutoire or strong box. Such a deed, when unaccompanied with

actual, distinctive, and adverse possession, is entitled to no consideration in a court of justice, and it is no ground for recovery in an action of ejectment against the actual possessor. *Wright v. Wright*, 7 N. J. Law (2 Halst.) 175, 177, 11 Am. Dec. 546.

LATENT DEFECT.

In ship.

Under the law of England a provision in a bill of lading exempting the shipowner from liability for damage caused by a latent defect covers damages from a defective rivet in the bulkhead side of a water tank, where the ship being a new one, the tank had been tested by hammer and water pressure, and the defect was where no external examination would have discovered it. *The Carib Prince* (U. S.) 63 Fed. 266, 268.

The term "latent defects," in a bill of lading exempting the owner from liability for loss occurring by latent defects in hull, even existing before shipment or sailing, does not include an open port, though unknown to the master on sailing. *Putnam v. The Manitoba* (U. S.) 104 Fed. 145, 151.

A leaky port on a new vessel, so near the water line as would render the steamer unfit for the carriage of cargo in the compartment into which such port opened, cannot be regarded as a "latent defect," since it was easily discoverable upon inspection by the water test, a test which is easily made, and which is customarily made, and which reasonable prudence requires to be made, as respects ports near the water line before a ship sails on her first voyage. *The Phoenix* (U. S.) 90 Fed. 118, 118.

A defect, in order to be latent, within the exceptions in a bill of lading of injuries arising from latent defects in hull, etc., must have been not discoverable at the time of the shipment. Such exception includes a latent and undiscovered defect in a rivet which existed at the commencement of the voyage, and therefore limits the implied warranty of seaworthiness if due diligence has been exercised. *The Carib Prince* (U. S.) 63 Fed. 254, 255, 15 C. C. A. 385.

In title.

A latent defect in the title of the vendor of real estate, entitling the vendee to a rescission of the contract, is one not discoverable by inspection made with ordinary care. A survey which would have disclosed the condition of the lot is too extreme diligence to be required. *Newell v. Turner* (Ala.) 9 Port. 420, 422.

LATU SENSU.

"*Latu sensu*" generally includes persons related or connected in the ascending line

by consanguinity or affinity, and in a more restricted sense it includes only those related by consanguinity. *Bernard v. Vignaud* (La.) 10 Mart. (O. S.) 482, 561.

LATERAL RAILROAD.

According to Webster "lateral" means proceeding from the side, as the lateral branches of a tree, lateral shoots; and this is the sense in which this word is to be understood when branch or lateral railroads are spoken of, and a lateral railroad is nothing more than an offshoot from the main line or stem, and the mere fact that a contemplated road runs in the same general direction with the main track will not deprive it of the character of a branch or lateral road, within the meaning of a charter giving the railroad power to construct branch or lateral roads. *Blanton v. Richmond, F. & P. R. Co.*, 10 S. E. 925, 926, 86 Va. 618.

A "lateral road" is but another name for a branch road. Both must have a principal road from which they proceed. They are appendages to, and are properly a part of, the main line, and must proceed from some part of the main trunk between its termini. *Newhall v. Galena & C. U. R. Co.*, 14 Ill. (4 Peck) 273, 276.

Whether a particular portion of a railway is a lateral or branch railroad, or not, does not depend upon its length or direction; but it must be connected with and lead from a main line already constructed in order to be such, and where a charter of a railroad company empowers it to construct only one specified branch road, another road, incorporated by the law of a different state, operated by the first road, is not a branch of such road, within a deed reserving a right of way over the granted premises in favor of such road or any of its branches; the word "branches" being taken to mean such branches as the railroad company was or might be legally authorized to construct. *Biles v. Tacoma, O. & G. H. R. Co.*, 32 Pac. 211, 213, 5 Wash. 509.

LATH.

"Lath" is defined to be a thin strip of wood, nailed to studs and furring to support the plastering, which is defined to be a mixture of lime, hair, and sand, to cover lath work between timbers or roof walling; and where the specifications of a building contract contain a general heading called "Plastering," under which lathing and plastering is described, and a contractor undertakes to do the plastering, it will be construed to mean all included under the general title, including the lathing. *Mellen v. Ford* (U. S.) 28 Fed. 639, 642, 644.

LATTER PART.

A contract fixing the time for performance as the "latter part of January" should be construed to mean the whole of that part. A suit is not maintainable until after the expiration of that time. *Bailey v. Bicketts*, 4 Ind. 488, 491.

LAUDANUM.

Laudanum "is an alcholic preparation of opium, known in medical science as the tincture of opium, but properly known as laudanum; and very many people have no knowledge that the liquid known to them as 'laudanum' contains any opium whatever." *Higbee v. Guardian Mut. Life Ins. Co. of New York* (N. Y.) 66 Barb. 462, 472.

LAUNCH.

To launch is to cause to move or slide from the land into the water. The launching is a definite period, one well understood in shipbuilding. *Homer v. The Lady of the Ocean*, 70 Me. 350, 352.

LAUNDRY.

A laundry is a place where clothes are washed. *Commonwealth v. Pearl Laundry Co.*, 49 S. W. 26, 28, 105 Ky. 259.

LAUNDRYMAN.

A laundryman is one whose business it is to wash clothes. This term, however, does not include persons who merely receive and collect soiled clothes to be washed, acting as agents of those engaged in the laundry business, and receiving by way of compensation a discount from the price charged the general public. *Commonwealth v. Pearl Laundry Co.*, 49 S. W. 26, 28, 105 Ky. 259.

LAW.

See "Act of the Law"; "According to Law"; "Against Law"; "Agreeably to Law"; "Allowed by Law"; "Amendatory Law"; "Assignee in Law"; "At Law"; "Bankrupt Law"; "Breach of the Law"; "By Operation of Law"; "Civil Damage Law"; "Coercion by Law"; "Color of Law"; "Commercial Law"; "Common Law"; "Conclusion of Law"; "Constitutional Law"; "Criminal Law"; "Divine Law"; "Established by Law"; "Existing Laws"; "Ex Post Facto"; "Fence Law"; "Fixed by Law"; "Foreign Laws"; "Free Law"; "General Law"; "Governed by Law"; "Homestead Law";

"Human Law"; "Insolvent Law"; "Inspection Laws"; "International Law"; "Intestate Laws"; "Limited by Law"; "Local Law"; "Local Option Law"; "Maritime Law"; "Martial Law"; "Military Law"; "Moral Law"; "Municipal Law"; "Natural Law"; "Organic Law"; "Parliamentary Law"; "Partial Law"; "Penal Laws"; "Positive Laws"; "Prescribed by Law"; "Prize Law"; "Retrospective Law"; "Revenue Law"; "School Laws"; "Special Law"; "State Law"; "Statute Law"; "Statutory Law"; "Supreme Law"; "Town Laws"; "Warrant of Law"; "Written Laws."

All laws, see "All."

Amended law, see "Amend — Amendment."

Any other law, see "Any Other."

Private law, see "Private Act."

Law is the enforcement of justice among men. *McAllister v. Marshall* (Pa.) 6 Bin. 338, 350, 6 Am. Dec. 458.

"The definitions of the term 'law,' as found in our older text-books and in the English writers, failed to express the American idea of that term. Blackstone defines it to be 'a rule of action prescribed by the supreme power of a state, commanding what is right and forbidding what is wrong.' A definition of law in the sense in which it is used in America is 'a rule of conduct prescribed to the state or people thereof in accord with the Constitution of the United States and of the states, when enacted by a state Legislature.'" *State v. McCann*, 72 Tenn. (4 Lea) 1, 9.

Law is such rules as are prescribed by the supreme authority for the government of human action. *State v. Hockett*, 70 Iowa, 442, 454, 30 N. W. 742, 744. "Law is a rule of action." *People v. Tiphaine* (N. Y.) 3 Parker, Cr. R. 241, 244 (quoting 1 Bl. Comm. 44). Law is a rule of conduct. *Johnson v. Detrick*, 53 S. W. 891, 893, 152 Mo. 243. Law is a rule of civil conduct, prescribed by the supreme power of the state. *Thorne v. Cramer* (N. Y.) 15 Barb. 112, 114.

Law is the rule of action prescribed by a superior, which an inferior is bound to obey. *People v. Quant* (N. Y.) 12 How. Prac. 83, 89.

Law is a rule of action prescribed by the supreme power in the state. This involves the idea, not of local regulation, but of a general rule, alike applicable to all the state. *Pope v. Phifer*, 50 Tenn. (3 Heisk.) 682, 701.

Law is defined as a rule of conduct or right. The term implies that it is a rule for future cases. *O'Donoghue v. Akin*, 63 Ky. (2 Duv.) 478, 480.

Law is a rule, not a transient, sudden order from a superior to or concerning a particular person, but something permanent,

uniform, and universal. In re Opinion of the Justices, 33 Atl. 1076, 1078, 66 N. H. 629.

Law is a mode of human action respecting society, and must be governed by the same rules of equity which govern every private action. *State v. Ludington*, 33 Wis. 107, 116.

"Law signifies a rule of action, and in its most general and comprehensive sense it applies indiscriminately to all kinds of actions. Law is a rule of civil conduct prescribed by competent authority." *Davis v. Ballard*, 24 Ky. (1 J. J. Marsh.) 563, 576.

Law is a system of rules conformable to the standards of justice and on an enlarged view of the relations of persons and things as they practically exist. It is a mass of principles classified, reduced to order and put in the shape of rules, agreed on by ascertaining the common consent of mankind. *Duncan v. Magette*, 25 Tex. 245, 253.

"Laws," when used in reference to the legislative power to make laws and to alter and repeal them, means rules of civil conduct or statutes which the legislative will has prescribed. *State v. Denny*, 21 N. E. 252, 254, 118 Ind. 382, 4 L. R. A. 79 (citing *Cooley*, Const. Lim. p. 90).

Law is not an exact science, and, as said in *Citizens' Loan, Fund & Sav. Ass'n v. Friedley*, 23 N. E. 1075, 123 Ind. 143, 7 L. R. A. 669, 18 Am. St. Rep. 320, there is no attainable degree of skill or expense at which all differences of opinion or doubt in respect to questions of law are removed from the minds of lawyers and judges. *Hill v. Mynatt* (Tenn.) 59 S. W. 163, 167, 52 L. R. A. 883.

The laws of a state are the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. *Phelps v. The City of Panama*, 1 Wash. T. 518, 523.

The word "law" has a fixed and definite meaning. In its general sense it imports a rule of action, and more particularly it means a rule of civil conduct prescribed by the supreme power in the state, commanding what is right and prohibiting what is wrong. The law is an emanation from the supreme power, and cannot originate elsewhere. It is a rule which every citizen of the state is bound to obey. *Baldwin v. City of Philadelphia*, 99 Pa. 164, 170.

Law is a solemn expression of the will of the supreme power of the state. *Pol. Code Mont.* 1895, § 5150; *Pol. Code Cal.* 1903, § 4466.

A law is a rule of civil conduct prescribed by the supreme power of a state, which under the Constitution and for this purpose is the Legislature. *Leavenworth*

County Com'rs v. Miller, 7 Kan. 479, 501, 12 Am. Rep. 425.

Law is a rule of civil conduct, prescribed by the lawmaking power of the state, commanding what is right or prohibiting what is wrong. *Budd v. State*, 22 Tenn. (3 Humph.) 483, 490, 39 Am. Dec. 189; *Appeal of Locke*, 72 Pa. (22 P. F. Smith) 491, 508, 13 Am. Rep. 716.

Law is a rule of property and of conduct prescribed by the sovereign power. *Rev. Codes N. D.* 1899, § 2690; *Civ. Code S. D.* 1903, § 2.

The term "laws" includes, not only written expressions of the governing will, but also all other rules of property and conduct, in which the supreme power exhibits, and according to which it exerts, its governmental force. *Phelps v. The City of Panama*, 1 Wash. T. 518, 523.

Law is the solemn expression of legislative will. *Civ. Code La.* 1900, art. 1.

The law in a state is defined to be those rules which are ordained and made known by the Legislature, for the government of the people in the state, which they are bound to obey. Blackstone says it is a rule of civil conduct. "Law is," says he, "not a transient order from a superior to or concerning a particular person or thing, but something permanent, uniform, and universal. Therefore a particular act of the Legislature to confiscate the goods of Titus, or to attain him of high treason, does not enter into the idea of the law, for the operation of this act is spent on Titus only, and has no relation to the community in general." In *Jacob's Law Dictionary*, law is thus defined: "It is a rule and bond of men's actions, or it is a rule for the well government of a civil society, to give to every man that which doth belong to him." Rutherford, a writer on Natural Law, defines law to be, as applicable to the actions of men, a rule to which men are obliged to make their actions conformable. 1 *Ruth. Inst.* p. 15. Judge Kent defined law to be "a rule of civil conduct prescribed by the supreme power in a state." *State, to Use of Gentry, v. Fry*, 4 Mo. 120, 189.

Law is defined as a rule prescribed by the sovereign power, and incidentally it is said there is no such thing as a general commercial or general common law separate from and irrespective of a particular state or government whose authority makes it law. By whom is a general commercial law prescribed, and what tribunal has authority or recognition to declare or enforce it outside of the local jurisdiction of the government it represents? Even the law of nations, the widest reaching of all, is a law only in name. The so-called commercial law is likewise only a name. Upon many questions arising in the business dealings of

men the laws of modern civilized states are substantially, the same, and it is therefore common to say that such is the commercial law, but except as a convenient phrase such general law does not exist. There must be a state or government of which every law can be predicated and to whose authority it owes its existence as a law. Without such sanction it is not law at all. *Forepaugh v. Delaware, L. & W. R. Co.*, 18 Atl. 503, 504, 128 Pa. 217, 5 L. R. A. 508, 15 Am. St. Rep. 672.

"Every law may be said to consist of several parts: One declaratory, whereby the rights to be observed and the wrongs to be eschewed are clearly defined and laid down; another directory, whereby the subject is instructed and enjoined to observe those rights and abstain from the commission of those wrongs; a third remedial, whereby a method is pointed out to recover a man's private rights or redress his private wrongs; to which may be added a fourth, usually termed the sanction or vindicatory branch of the law, whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs and transgress or neglect their duty. Of all the parts of the law the most effectual is the vindicatory; for it is but lost labor to say, 'Do this,' or 'Avoid that,' unless we also declare, 'This shall be the consequence of your noncompliance.' The main strength and force of a law consists in the penalty annexed to it." *State v. Sawn*, 44 N. W. 492, 493, 1 N. D. 5.

As act.

The language of the constitutional provision that no legislative enactment shall contain more than one subject, which shall be clearly expressed in its title, differs in some respects in the different states. In some the word "act" is used, while in others the word "bill" or "law" is used. However, each of these provisions, as presented to the courts, means the final determination of the Legislature upon the particular subject embraced in such bill, act, or law. The word "act" is probably the best word to use; for it includes no action of the Legislature or of any person prior to the final act of the Legislature, and it includes the whole of the act, nothing more and nothing less. The word "law" is probably the worst word to use; for a portion of any act may be law, as well as the whole of the act. The word, however, as used in such connection, is intended to be synonymous with "act." *Sedgwick County Com'rs v. Bailey*, 13 Kan. 600, 608.

In the Constitution of New York the words "bill," "law," and "act" are used somewhat indefinitely; but it seems that there is little difference between the terms. *People v. Lawrence* (N. Y.) 36 Barb. 177, 187.

As all legislative enactments.

In Const. art. 14, § 15, providing that the General Assembly shall by law fix the compensation of certain officers according to the population in their respective counties, and that such law shall fix the scale of fees to be charged, the word "law" is not synonymous with "act." The word "law" means here law in a general sense, whatever has been enacted by the Legislature, whether it is embodied in one act, or in any number of acts; and, so far as the use of the term "law" in this section is concerned, it cannot be construed as compelling the Legislature to embody in one act provision for fees and salaries. *Airy v. People*, 40 Pac. 362, 365, 21 Colo. 144.

As both statute and common law.

The term "law," in R. L. § 4365, providing that, where an offense is declared by law to be punishable by imprisonment, etc., shall be construed to mean that it shall be in the house of correction, is not limited to statute law, but includes the common law, whenever it defines an offense and makes it punishable by imprisonment. *State v. Dyer*, 32 Atl. 814, 817, 67 Vt. 690.

"Laws of the state," as used in Rev. Laws, §§ 3610, 3618, providing that, before an insurance company located in a sister state could make a valid contract of insurance in Vermont, it must obtain from the Secretary of State a license for that purpose, and must be responsible by "the laws of the state" in which it is situated for the acts and neglects of its agents, as between the company and the assured and applicants for insurance, should not be construed as meaning only statute laws, but includes as well the common law, though the words "laws of the state" are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof. *Lycoming Fire Ins. Co. v. Wright*, 12 Atl. 103, 107, 60 Vt. 515.

As common law.

While in an enlarged sense the word "law" may include positive, as well as common, law, yet in technical precision the word "law" is usually restricted to the common law, and other words, such as "statute" or "act," are applied to legislative provisions. So it is held that a conclusion of a declaration of debt for a penalty under a statute, "contrary to the law in such case made and provided," is not equivalent to a conclusion "contrary to the statute in such cases made and provided." *Smith v. United States* (U. S.) 22 Fed. Cas. 694, 696.

Contract distinguished.

"There is a distinction," says Blackstone, "between a contract and a law. A

law is called a rule, to distinguish it from a contract or agreement." So it is held that a public law, the objects and purposes of which were of a public nature, is not a contract, so as to be beyond the future control of the legislative power. *Landon v. Town of Litchfield*, 11 Conn. 251, 286.

Corporate charter.

The charter of a private corporation, enacted by the Legislature of another state, is a law, within the meaning of Code Proc. § 426, which declares that "printed copies in volumes of statutes, codes, or other written law" of other states shall be admissible in evidence in courts of this state. *Persse & Brooks Paper Works v. Willett* (N. Y.) 19 Abb. Prac. 416.

Decisions.

The term "law," as used in section 34 of the federal judiciary act of 1789, refers to the acts of Legislatures or to established local customs having the force of law, and the decisions of state courts do not constitute law within the meaning of the act. They are merely evidence of what the laws are. *Phipps v. Harding* (U. S.) 70 Fed. 468, 473, 17 C. C. A. 203, 30 L. R. A. 513.

Within Code, § 291, providing that "existing provisions of law" not in conflict, etc., shall apply to executions, etc., includes the law as established by the courts, as well as that established by the Legislature. *Nelson v. Kerr* (N. Y.) 2 Thomp. & C. 299, 301.

The decisions of courts are not law, but only evidence of the law. In *Paul v. Davis*, 100 Ind. 422, the court said: "A judicial decision does not make unalterable law, nor is it the law in the sense that statutes are law." So, also, the case of *Yates v. Lansing*, 9 Johns. 395, 415, 6 Am. Dec. 290, holding that the decisions of courts are not the law, but only evidence of the law. In another case it was said: "I hope we shall consider what a decision really is, and treat it accordingly, not as the law, nor as giving the law, but simply evidence of the law, and not conclusive evidence, but only prima facie evidence, of what the law is." *Falconer v. Simmons*, 41 S. E. 193, 194, 51 W. Va. 172 (citing *Henry v. Bank of Salina* [N. Y.] 5 Hill, 523, 535).

The term "law" includes decisions of courts, as well as legislative acts. *Miller v. Dunn*, 14 Pac. 27, 29, 72 Cal. 462, 1 Am. St. Rep. 67.

Judiciary Act 1789, c. 20, § 34, provides that "the laws of the several states, except where the Constitution and treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, where they apply"; and it was claimed that this furnished a rule obligatory on the court in

all cases to which they apply. In order to maintain the argument, it is essential, therefore, to hold that the word "laws" in this section includes within the scope of its meaning decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are at most only evidence of what the laws are, and are not of themselves laws. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of this section limited its application to state laws strictly local; that is to say, to the positive statutes of the state and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply or was designed to apply to questions of a more general nature, not at all depending upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial laws, where the state tribunals are called upon to perform the like functions as ourselves; that is, to ascertain upon general reasoning and legal analogies what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. *Swift v. Tyson*, 41 U. S. (16 Pet.) 1, 18, 19, 10 L. Ed. 865; *Baltimore & O. R. Co. v. Baugh*, 13 Sup. Ct. 914, 915, 149 U. S. 368, 37 L. Ed. 772.

"The decisions of the highest court of a state are not the laws of that jurisdiction. As was said by Mr. Justice Story in the case of *Swift v. Tyson*, 41 U. S. (16 Pet.) 1, 10 L. Ed. 865: 'In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, ill-founded, or otherwise incorrect.'" *United States Savings & Loan Co. v. Harris* (U. S.) 113 Fed. 27, 35.

Act under delegated power.

A law is not a complete law, when it is nothing more than a delegated power attempted to be given by the Legislature to some other department of the government to make the law, so that the provisions of an act that the compensation of a clerk of the Court of Appeals shall be fixed by the court

is a violation of the constitutional provision that the compensation of such officer shall be fixed and provided by law. *Commonwealth v. Addams*, 26 S. W. 581, 582, 95 Ky. 588.

By Consolidation Act, § 83, as amended by St. 1865-66, p. 436, it is declared that the term "law," or "laws," as used in the act, shall not be understood as applicable to any regulation of the board of education or of the board of supervisors, but only applicable to the Constitution and the laws made or adopted by the Legislature in pursuance thereof. *City and County of San Francisco v. Broderick*, 111 Cal. 302, 307, 43 Pac. 960.

As domestic laws.

"Law," within the meaning of the rule that ignorance of law will not excuse, is limited to the laws of one's own country, and does not include foreign laws, which are to be treated as facts. *Marshall v. Coleman*, 58 N. E. 628, 637, 187 Ill. 556.

As used in the collateral inheritance tax act, which provides that certain named societies, exempted by law from taxation, should not be liable to the tax, "law" means the law of New York; and hence a legacy to an institution falling within those exempted, but located in and incorporated under the laws of another state, is subject to the tax. *In re McCoskey's Estate*, 1 N. Y. Supp. 782, 783, 6 Dem. Sur. 438.

"A law is a rule of conduct prescribed by the lawmaking power of the state. 1 Kent, Comm. 447. The term 'law' is confined to enactments of the Legislature of the state. *In re Burchard* (N. Y.) 27 Hun, 429, 436. When the Legislature speaks in general terms of the laws, or of things authorized by law, the expression must be understood as having exclusive reference to the laws of this state. *People v. Sturdevant* (N. Y.) 23 Wend. 418, 420." The term "law" in Pen. Code, § 96, making it perjury for any person to falsely swear that any certificate made by him as required by law is true, is limited to certificates required by the law of the state, and therefore an officer of a foreign corporation making a false oath before a notary public as to the amount of the capital stock, as required by the laws of a foreign state, but not by the state of New York, is not guilty of perjury. *People v. Martin*, 76 N. Y. Supp. 953, 954, 38 Misc. Rep. 67.

Fact distinguished.

See "Fact."

Future law.

As used in the bond of a collector of customs, conditioned that he should faithfully discharge the duties of his office according to law, any law is meant that was on the

statute books at the date of the bond, or that might be passed during the collector's term, prescribing the powers and duties of his office. *United States v. Gausson* (U. S.) 25 Fed. Cas. 1267.

The term "law and equity," as used in the federal Constitution relating to the judicial power of the United States, though intended to mark and fix the distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, does not restrict the jurisdiction to the rights and remedies then recognized. *Ellis v. Davis*, 3 Sup. Ct. 327, 334, 109 U. S. 485, 27 L. Ed. 1006.

It has often been deemed that the term "law and equity," as used in the Constitution, giving to the courts of the United States jurisdiction in cases in law and equity, although intended to mark and fix the distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, does not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embraces as well not only rights newly created by statutes of the states, as in cases of action for the loss occasioned to survivors by the death of a person caused by the wrongful act, neglect, or default of another, but new forms of remedies to be administered in the courts of the United States according to the nature of the case, so as to save to suitors the right of trial by jury in cases in which they are entitled to it according to courts and analogy of the common law. *Ellis v. Davis*, 3 Sup. Ct. 327, 334, 109 U. S. 485, 27 L. Ed. 1006.

As general law.

As used in Gen. St. Minn. 1894, § 2400, requiring each surveyor general to survey all logs and timber running out of any boom chartered by law in his district, the term "chartered by law" does not refer simply to corporations incorporated under special acts, but includes also corporations organized under the general law, with authority to maintain booms. They are as much chartered by law as those organized under special acts. *Lindsay & Phelps Co. v. Mullen*, 20 Sup. Ct. 325, 329, 176 U. S. 126, 44 L. Ed. 400.

The term "law," when used without restriction or qualification, refers not to a special charter or private act, but to the public law of the state or sovereignty. *McMurray v. Wright* (Colo. App.) 73 Pac. 257, 261; *Alchele v. Chamberlain*, Id.

As general mass of jurisprudence.

The term "law," as used in its popular sense and in its common acceptation by those for whom laws are made, includes the whole body or system of rules of conduct, including the decisions of courts, as well as legis-

lative acts. It is not confined to those rules which are constitutional and technically perfect. It is so used under Const. art. 4, § 32, which forbids the Legislature to pay claims against the state under an agreement made without express authority of law. *Miller v. Dunn*, 14 Pac. 27, 29, 72 Cal. 462, 1 Am. St. Rep. 67.

As used in Rev. St. c. 37, § 24, providing that no deed of trust or mortgage shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration, except from the registration of such deed, does not "mean simply that it shall be held invalid in a court of law only, but invalid in all courts. 'At law' is not an expression which in a statute signifies merely a legal tribunal, as distinguished from the equitable jurisdiction, but generally our system of jurisprudence, whether legal or equitable." *Fleming v. Burgin*, 37 N. C. 584, 589; *Hooker v. Nichols*, 21 S. E. 207, 208, 116 N. C. 157.

The term "law," as used in the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, embraces all legal and equitable rules defining human rights and duties and providing for their enforcement, not only as between man and man, but also between the state and its citizens. *Jenkins v. Ballantyne*, 30 Pac. 760, 8 Utah, 245, 16 L. R. A. 689.

Comp. Laws 1884, providing that the jurisdiction of the probate court shall be "as limited by law," refers not only to laws to be thereafter made by the territorial Legislature, but includes also the general history of jurisprudence and the organic act itself. *Perea v. Barela*, 23 Pac. 766, 770, 5 N. M. 458.

The phrase "as limited by law," in the organic act (10 Stat. 172), creating the territorial probate courts, and providing that their jurisdiction should be "as limited by law," was construed in *Ferris v. Higley*, 87 U. S. (20 Wall.) 375, 22 L. Ed. 383, to mean that the territorial probate courts should have such jurisdiction as the history of England and American jurisprudence shows to have been conferred upon courts organized for the establishment of wills and the administration of the estates of decedents, with such functions as have been added by statute concerning the guardianship of infants, allotment of dower, and others relating more or less to the same general subject. In that case a statute which had attempted to make the probate courts of Utah courts of general jurisdiction co-ordinate to the district court was held invalid; it being argued that the word "law," in the phrase "as limited by law," meant the acts of the territorial Legislature, in the absence of congressional enactment. But this position was denied, al-

though the court said that it was not prepared to say that no law made by the Legislature of the territory was embraced in the word "law" as used in the phrase. It was held in the case at bar that the provision of the statutes of Washington authorizing probate courts to construe wills was not in conflict with the organic act. *Webster v. Seattle Trust Co.*, 35 Pac. 1082, 1083, 7 Wash. 642.

Within the meaning of Const. Minn. art. 6, § 7, providing for the office of clerk of a probate court and that his duties shall be prescribed by law, the word "law" is not used as synonymous with "statute," but in the broader sense includes both statutory and common law. Hence, when a Legislature provided that the clerk should perform such duties assigned to him by law and by such judge, and that before entering on the duties of the office such clerk shall take the oath required by law and execute a bond, it is fairly implied that, when such clerk acts in a manner to indicate that he is the custodian of the records and the keeper of its seal, he is exercising the functions of a clerk of a judicial tribunal, and a certificate to a decree of distribution authenticated by the clerk is sufficient. *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 90 N. W. 378, 381, 86 Minn. 140.

Justice distinguished.

See "Justice."

As law of insurrectionary state.

"Law," as used in a bond given by a guardian, conditioned that, if the said guardian well and truly performed all the duties which might be by law required of him as guardian, then the obligation shall be void, the bond being executed on the 16th day of April, 1861, in the state of Alabama, is construed to mean the law of the insurgent government of Alabama. *Van Epps v. Walsh* (U. S.) 28 Fed. Cas. 986.

As law of the case.

The words "according to law," as used in a judgment of the appellate court remanding a cause to the trial court for further proceedings according to law, mean according to the opinion of the court filed upon that appeal; for, without regard to the merit or demerit of that opinion, it necessarily became the law of the case. *Winner v. Hoyt*, 32 N. W. 128, 130, 68 Wis. 278.

As legal obligations.

"Law," as used in Rev. St. § 753 [U. S. Comp. St. 1901, p. 592], providing that a party seeking the benefit of a writ of habeas corpus must show that he is in custody for an act done or omitted in pursuance of a law of the United States, includes any obligation fairly and properly inferable from the Constitution of the United States

or any duty of a United States marshal to be derived from the general scope of his duties under the laws of the United States. An act done by a United States marshal to protect the person of a United States judge from injury is an act done pursuant to a law of the United States. *Cunningham v. Neagle*, 10 Sup. Ct. 658, 666, 135 U. S. 1, 34 L. Ed. 55.

As legal proceedings.

"Benefit of law," as used in St. 1818, c. 113, requiring a physician to be licensed or graduated to entitle him to the benefit of law for the recovery of compensation, is to be construed as equivalent to the phrase "benefit of legal proceedings," and to include "all modes in which payment of a debt may be obtained by process of law or other legal proceedings, such as set-off, claim before commissioners of insolvency, and the like." *Hewitt v. Wilcox*, 42 Mass. (1 Metc.) 154, 155.

Municipal ordinance.

"Law," as used in Const. art. 10, § 7, prohibiting the Legislature from passing any local or civil law regulating the affairs of towns or boroughs, cannot be construed to include an ordinance of a borough. *Klinger v. Bickel*, 11 Atl. 555, 557, 117 Pa. 326.

"Law of this state," as used in Pen. Code, § 435, providing that every person carrying on any business, trade, profession, or calling for which a license is required by any law of this state, without taking out or procuring such license, is guilty of a misdemeanor, should be construed to include a city ordinance requiring a person to pay a tax carrying on business as a liquor dealer. *Ex parte Lawrence*, 11 Pac. 217, 218, 69 Cal. 608; *Ex parte Christenson*, 24 Pac. 747, 748, 85 Cal. 208.

Const. art. 6, § 7, provided that the judges of the Court of Appeals, etc., should severally receive for their services the compensation to be established by law. By an act passed shortly after the adoption of the Constitution the Legislature fixed the salary of such judges at a certain amount. By Act April 16, 1852, the board of supervisors of the county of New York were authorized to raise by tax upon said county, and pay to the justices of the Supreme Court, resident in the First District, such additional annual compensation as they may deem proper. It was held that the additional compensation fixed by the board of supervisors, pursuant to the statute, was established by "law" within the meaning of the Constitution. In the course of this opinion, the court said: "A general law can be enacted only by the state Legislature. A special law, however, may be passed by the board of supervisors of the county, where the requisite power has been conferred upon it by the sovereign legislative authority. In the case under consideration,

the power was expressly conferred. If the resolution of the board of supervisors has not all the attributes of the local law, it may yet be valid as an exercise of the power conferred by the Legislature. The Constitution does not require that the amount of compensation shall be specified in any general statute. It calls for legislative action. That is the basis required, but the superstructure may be fashioned pursuant to such provisions as may be established by the Legislature. An act is as essentially accomplished by law, when performed pursuant to the statute, as if consummated by the statute itself. The power of determining whether an expenditure shall be met by general or local taxation is vested solely in the state Legislature." *People v. Edmonds* (N. Y.) 15 Barb. 529, 533.

"Laws," as used in a city charter authorizing the common council to pass all proper and necessary laws, is to be construed as meaning ordinances. The terms "laws" and "ordinances," when applied to municipal corporations, are synonymous terms. *Pimental v. City of San Francisco*, 21 Cal. 351, 361.

Order.

See "Order (In Parliamentary Law)."

As part of an act.

"Laws," as used in Act 1882, relating to distribution of the revenue from all sources, except the poll tax, and its disposition, and providing that "all laws and parts of laws in conflict herewith are hereby repealed," does not include a provision of a prior act applying a poll tax to the county school fund. A law is a rule of action prescribed by the Legislature. A complicated revenue act, prescribing the modes of assessment, collection, paying over, and distribution of taxes by the various officers designated by law for the purpose, contains several separate and distinct rules of action, and in that sense the revenue act may be regarded as containing several separate and distinct laws. There is one law for the assessment of the property tax, another for the assessment of the poll tax, several for the assessment of the various license taxes, another for the collection of taxes, others for the distribution of the tax moneys, and still others for the payment of the same to the respective county and territorial treasurers. Repealing the laws or rules of action in regard to the various modes of raising revenue, which relate alone to the assessment and collection of taxes, does not of itself necessarily repeal the law or rule of action as to the distribution of the revenue after it has been raised. *Territory v. Luna*, 3 Pac. 241, 244, 3 N. M. 146.

As practice of law.

In the Century Dictionary "law" is described as "a lucrative science, a professional science," and with it are included medicine

and theology. *United States v. Massachusetts General Hospital* (U. S.) 100 Fed. 932, 938.

Private act.

A joint resolution of the General Assembly, authorizing a particular suit to be brought against the state in a certain county, was held in *Commonwealth v. Haly*, 51 S. W. 430, 108 Ky. 716, not to be a law, within Const. Ky. § 231, providing that "the General Assembly may by law direct in what manner and in what courts suits may be brought against the commonwealth." Our Legislature is clothed with the simple power to enact laws and do some other things expressly authorized by the Constitution. Beyond this the Legislature has no power at all. To grant a divorce is not to enact a law. An expression of the will of the lawmaking power that the marriage relation is dissolved is no law. It is a decree, an order, a judgment, and not a law. A law is a rule, something permanent, uniform, and universal. A divorce begins with the parties, and ends with the parties. It is a single act, and begins and expires with the performance of a single function. *Bingham v. Miller*, 17 Ohio, 445, 448, 49 Am. Dec. 471.

The expression of the will of the lawmaking power that a marriage relation is dissolved is no law. It is a decree, a sentence, an order, a judgment, but not a law. A law is a rule; something permanent. To grant a divorce is not to enact a law. *Bryson v. Bryson*, 17 Mo. 590, 594 (citing *Bingham v. Miller*, 17 Ohio, 445, 448, 49 Am. Dec. 471).

Resolution.

"Law," as used in Const. art. 4, § 81, which declares that no money shall be drawn from the treasurer but in pursuance of an appropriation made by law, does not include a resolution of the state Senate requiring its president and secretary to certify the accounts of its duly elected and appointed officers for their per diem compensation during the recess. *Reynolds v. Blue*, 47 Ala. 711.

A resolution is not a law, but merely the form in which the legislative body expresses an opinion. *Chicago & N. P. R. Co. v. City of Chicago*, 51 N. E. 596, 598, 174 Ill. 439; *Village of Altamont v. Baltimore & O. S. W. R. Co.*, 56 N. E. 840, 841, 184 Ill. 47.

State Constitutions.

The Constitution of a state is a "law" of that state, within the meaning of the Constitution of the United States prohibiting states from passing laws impairing obligations of contracts. *Bier v. McGehee*, 18 Sup. Ct. 580, 581, 148 U. S. 137, 37 L. Ed. 397; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 6 Sup. Ct.

252, 115 U. S. 650, 29 L. Ed. 516; *Pacific R. Co. v. Maguire*, 87 U. S. (20 Wall.) 36, 22 L. Ed. 282; *Mississippi & M. R. R. Co. v. McClure*, 77 U. S. (10 Wall.) 511, 515, 19 L. Ed. 997; *Gunn v. Barry*, 82 U. S. (15 Wall.) 610, 623, 21 L. Ed. 212; *Lehigh Val. R. Co. v. McFarlan*, 31 N. J. Eq. (4 Stew.) 706, 723; *Pennsylvania R. Co. v. Jersey City*, 9 Atl. 782, 784, 49 N. J. Law (20 Vroom) 540, 60 Am. Rep. 648.

"Law," as used in Const. art. 4, § 23, providing that no money shall be drawn from the treasury but in consequence of appropriations made by "law," should be construed to include the Constitution, when it declares that certain officers shall receive a certain sum as compensation. *State v. Hickman*, 23 Pac. 740, 743, 9 Mont. 370, 8 L. R. A. 403.

Under a constitutional provision that no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, it is held that another constitutional provision fixing the salary of an officer and providing that the auditor shall draw warrants of the state quarterly therefor, which shall be paid out of any other fund not otherwise appropriated, is an appropriation made by law within the meaning of the provision first quoted; the Constitution being the supreme law of the state. *State v. Weston*, 4 Neb. 216, 218.

As used in the clause of the federal Constitution prohibiting the states from passing any law impairing the obligation of a contract, the term "law" includes a provision in a state Constitution which impairs such contracts, as well as a statute. *Flak v. Jefferson Police Jury*, 6 Sup. Ct. 329, 330, 116 U. S. 131, 29 L. Ed. 587.

"Laws now in force," in a constitutional provision that all laws now in force which are not in conflict or inconsistent with this Constitution shall continue in force until amended or repealed by the General Assembly, means statutes passed by the Legislature, and not constitutional provisions, which cannot be amended or repealed by the Legislature. *Evans v. Clark*, 40 S. W. 771, 773, 1 Ind. T. 216.

As statute.

"Law," as used in a statute relating to things "exempt from attachment by law," means exempt by statute. In *re Keene*, 3 Atl. 418, 419, 15 R. I. 294.

Const. art. 3, § 18, providing that no "law" shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment, has a fixed and definite meaning, and applies only to acts of the Legislature. *McCormick v. Fayette County*, 24 Atl. 667, 668, 150 Pa. 190.

"The term 'law,' as defined by the elementary writers, emanates from the sovereignty, and not from its creatures. The legislative power of the state is vested in the state Legislature, and their enactments are the only instruments that can in any proper sense be called laws." *People v. Common Council of Bay City*, 36 Mich. 188, 190.

"Law," as used in Const. art. 4, § 7, par. 4, providing that no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of the act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act, means an enactment of the Legislature, and not every rule of civil conduct, and does not include the by-laws of game protective societies. *Allen v. Wyckoff*, 2 Atl. 659, 661, 48 N. J. Law (19 Vroom) 90, 57 Am. Rep. 548.

Every bill which has been passed by the Legislature, as provided by the Constitution and statutes, and been approved and signed by the Governor, or which he shall not have returned with objections within the prescribed period, or, if returned with objections, should be agreed to by the requisite number of each house, thereupon becomes a law within the meaning of that word as used in Code, § 426. *Persse & Brooks Paper Works v. Willett*, 24 N. Y. Super. Ct. (1 Rob.) 131, 145.

Acts 1885, No. 232, § 17, provides that any corporation organized under its provisions may amend its articles of association in any manner not inconsistent with the act, and such amendment shall have the same force and effect as though such amendment had been included in the original articles. Section 33 provides that any corporation organized under this act, whose corporate existence is about to "terminate by limitation of law," may by resolution continue its corporate existence for a further term, not exceeding 30 years. Const. art. 15, § 10, provides that no corporation shall be created for a longer period than 30 years. Held, that the words "terminate by limitation of law," in section 33, Act 1885, apply only to the statutory or constitutional limitation of 30 years, and not to the limitation expressed in the articles of association, and a corporation created under Act 1885, whose corporate existence is fixed by its by-laws at less than 30 years, may extend such corporate existence by amending its by-laws under section 17. *Ovid Elevator Co. v. Secretary of State*, 51 N. W. 536, 90 Mich. 466.

Expressions in statutes, such as "required by law," "prescribed by law," "regulated by law," etc., refer to statutory provisions only; and so it is held that the expression "liability created by law," in Code

Civ. Proc. § 394, providing that that chapter shall not affect an action against a director or stockholder of a moneyed corporation to recover a penalty or forfeiture, or to enforce a liability "created by law," refers to a statute of the state, and not to the general law recognized therein. *Brinckerhoff v. Bostwick*, 1 N. E. 663, 665, 99 N. Y. 185.

Const. art. 7, § 20, declares that the Governor and certain other officers shall receive for their services a compensation as fixed by law, which shall not be diminished or increased, so as to affect the salary of any officer during his term, and that the compensation of the officers named, until otherwise provided by law, is fixed as follows, etc. A statute was passed during relator's incumbency as Governor, fixing the salaries of such officers, which raised the Governor's salary from \$2,000, as fixed by the Constitution, to \$4,000, and at the same session an appropriation was made for the salaries of such officers for the current and succeeding years at the sums fixed. It was held that the word "law," used in a constitutional provision that the compensation of the officers named, until otherwise provided by law, is as follows, meant statutory law, which excluded the Constitution itself, so that the salaries named in the statute were the salaries provided by law, and the statute did not constitute an increase of the salary provided by law, within the prohibition of the Constitution. In reaching this conclusion the court cites various other sections of the statute in which the term "law" is obviously used in the sense of "statutory law," and bases its holding largely on the rule that, where a word is repeatedly used in the statute, it will be presumed to bear the same meaning throughout the statute, unless there is something to show that another meaning is intended. *State v. Tingey*, 67 Pac. 33, 34, 24 Utah, 225.

The word "laws," in Rev. St. U. S. § 5197 [U. S. Comp. St. 1901, p. 3493], providing that national banks may charge and receive interest at the rate allowed by the laws of the state or territory where the bank is located, is to be construed to mean statute laws. *Daggs v. Phoenix Nat. Bank (Ariz.)* 53 Pac. 201, 204.

As used in the national banking act, authorizing national banks to charge and receive interest at the rate allowed by the "laws of the state or territory", where the bank is located, and declaring that when no rate is fixed by the laws of the state or territory they are allowed a certain rate, means the statute law. *Hinds v. Marmolejo*, 60 Cal. 229, 231.

"Law," as used in Rev. St. U. S. § 2319 [U. S. Comp. St. 1901, p. 1424], providing that all valuable mineral deposits in lands belonging to the United States are free and

open to exploration and purchase "under regulations prescribed by law," etc., includes not only the laws of Congress, but also the laws of the territory in which they are located. *O'Donnell v. Glenn*, 19 Pac. 302, 306, 8 Mont. 248.

As statute of distribution.

"Laws of New Jersey," in a will directing testator's property to pass to his next of kin according to the laws of New Jersey, is to be construed as meaning the statute of distributions. *Duffy v. Hargan*, 50 Atl. 678, 679, 62 N. J. Eq. 588.

Unconstitutional act.

A legislative act, which takes or undertakes to authorize the taking of private property for a private object, either by taxation, or by the exercise of the power of eminent domain, or by any other means, is not a law, but an arbitrary decree, whereby the property of one citizen may be transferred to another, and is without legal force or effect. *Dodge v. Mission Tp.* (U. S.) 107 Fed. 827, 829, 46 C. C. A. 661, 54 L. R. A. 242.

The statutory provision that no money shall be paid out of the state treasury, except in pursuance of the appropriation "by law," does not mean that the power to appropriate money out of the state treasury is unlimited. It can only be so appropriated by law, and that means a valid law. *State v. Davidson*, 90 N. W. 1067, 1068, 114 Wis. 563, 58 L. R. A. 739.

An act passed with all the formalities requisite under the Constitution, though unconstitutional, was nevertheless a law in the sense that it would support an appropriation to pay for the work done under color of its apparent grant of authority and before its invalidity had been declared by the courts. *Mullan v. State*, 46 Pac. 670, 672, 114 Cal. 578, 34 L. R. A. 262.

The term "law" is not confined to those rules which are constitutional and technically perfect. *Miller v. Dunn*, 14 Pac. 27, 29, 72 Cal. 462, 1 Am. St. Rep. 67.

It is useless to apply ironclad rules of interpretation to any phrase or word used in the Constitution. Especially is this true of a word which has a technical, as well as a popular, meaning. There is no word in the language which in its popular and technical application takes a wider or more diversified signification than the word "law." Its use in both regards is illimitable. The term as used in its popular sense, and in its common acceptance, by "those for whom laws are made," it may be admitted, includes the whole body or system of rules of conduct, including the decisions of courts, as well as legislative acts; but it certainly

does not include that refined, technical, and astute idea which recognizes nothing within the meaning of the term which is not constitutionally and technically perfect. So an act to appropriate money to pay indebtedness incurred by the state of California under an act to promote drainage, which was afterwards declared unconstitutional, was not itself unconstitutional, under Const. art. 4, § 32, forbidding the Legislature to pay claims against the state under an agreement made without express authority of law. *Miller v. Dunn*, 72 Cal. 462, 14 Pac. 27, 28, 1 Am. St. Rep. 67.

LAW ACTION.

See "Action—Action at Law."

LAW CHARGES.

"Law charges" are such as are occasioned by the prosecution of a suit before the courts. But this name applies more particularly to the costs, which the party cast has to pay to the party gaining the cause. It is in favor of these only that the law grants the privilege. *Civ. Code La.* 1900, art. 3195.

LAW DAY.

At law a tender of payment, in order to defeat the estate of the mortgagee, had to be made at or before the "law day," as the day for payment is called. *Ward v. Lord*, 28 S. E. 446, 447, 100 Ga. 407.

"The 'law day' means the exact time specified for paying money under a contract." *Moore v. Norman*, 45 N. W. 857, 858, 43 Minn. 428, 9 L. R. A. 55, 19 Am. St. Rep. 247.

"Law day" was the appointed day for the payment of money to secure which a mortgage was given, which became known in legal parlance as the "law day." *Kortright v. Cady*, 21 N. Y. 843, 845, 78 Am. Dec. 145.

LAW DIRECTS.

See "As the Law Directs."

LAW MERCHANT.

See "Commercial Law."

The "law merchant" is merely a vaguely defined portion of the common law, or, in its widest interpretation, of the law of all European countries having the Roman and Frankish law for its parents. *Aslanian v. Dostumian*, 54 N. E. 845, 846, 174 Mass. 328, 47 L. R. A. 495, 75 Am. St. Rep. 348.

The "law merchant" is part of the common law of England, and as such is adopted by our Constitution as our law also. In-

deed, it is the law of the whole mercantile world. It is to be taken notice of by the judges as such, and to be understood and declared by them in the same way as all other parts of the law are to be interpreted and declared. When it becomes a question what the law merchant is in any particular case in forensic discussion, the question must be answered by the judges, and not by the jury; for this law merchant cannot, no more than any other part of the common law, be proved before a jury by witnesses as a matter of fact, and so be subjected to them to determine what it is. *Ferris v. Saxton*, 4 N. J. Law (1 Southard) 1, 18.

LAW OF THE CASE.

Where a court has once declared the law in a case, such declaration continues to be the law of that case, even on a subsequent appeal. *Terre Haute & I. R. Co. v. Baker*, 4 Ind. App. 68, 68, 30 N. E. 431; *Morgan County Com'rs v. Pritchett*, 85 Ind. 68, 69; *Richmond St. R. Co. v. Reed*, 83 Ind. 9; *Howe v. Fleming*, 123 Ind. 262, 263, 24 N. E. 238; *Anderson v. Kramer*, 93 Ind. 170, 172; *Jones v. Castor*, 96 Ind. 307, 309; *Braden v. Graves*, 85 Ind. 92, 96.

The law of the case consists, not in the reasoning of the court or in the illustrations given, but in the propositions of law actually decided and applicable to the facts in judgment. *Heidt v. Minor*, 45 Pac. 700, 701, 113 Cal. 385.

A rule once made in a case by an appellate court, while it may be overruled in other cases, is binding both upon the inferior court and upon the appellate court itself. In a subsequent proceeding neither the lower court nor the court making the rule can depart from such ruling. A ruling so made is said to be the law of the case. *City of Hastings v. Foxworthy*, 63 N. W. 955, 957, 45 Neb. 676, 34 L. R. A. 321.

The decision of an appellate court on a question arising in a case is not only binding on the trial court, but is the law of the case in the appellate court itself on a subsequent writ of error or appeal. *Standard Sewing Mach. Co. v. Leslie* (U. S.) 118 Fed. 557, 550, 55 C. C. A. 323.

The rule of the law of the case has been confined to questions of law determined between the same parties at former hearings in this court, but has never extended to questions of fact, except when essentially the same questions were presented for a second review. *Phelps County Farmers' Mut. Ins. Co. v. Johnston* (Neb.) 92 N. W. 576, 577 (citing *Missouri Pac. R. Co. v. Fox*, 60 Neb. 538, 83 N. W. 774; *State v. Board of Commissioners of Cass County*, 60 Neb. 566, 567, 83 N. W. 733).

Where the judgment announced in a case appealed to the Supreme Court could

not have been reached without expressly or impliedly deciding the questions presented on a second appeal, the judgment will be conclusive as the law of the case, and such questions will not be again considered. *Forgeron v. Smith*, 104 Ind. 246, 247, 3 N. E. 806.

Questions which were open to dispute, and were either expressly or by implication decided on a first appeal, are not open for review on a second appeal; the former appeal having become the law of the case. *McKinney v. State*, 117 Ind. 26, 27, 19 N. E. 613.

When a judgment of the Supreme Court reverses a judgment of the court below as to all the parties against whom the judgment was rendered, and directs a new trial as to the whole case, the new trial operates on all the parties to the record, and the decision that the complaint stated a good cause of action against all the defendants remains the law of the case through all its subsequent stages. *Mason v. Burk*, 120 Ind. 404, 412, 22 N. E. 119.

The rule of law applied by the Supreme Court in the decision of a cause is the law of the case, and remains such throughout such subsequent proceedings therein. *Continental Life Ins. Co. v. Houser*, 111 Ind. 266, 268, 12 N. E. 479.

Where a judgment has been reversed, and the cause remanded to the court below, and from the proceedings a second appeal is taken, that appeal brings before the Supreme Court nothing but the proceedings subsequent to the reversal; the former decision having become law of the case as to all of the questions presented and decided on the first appeal. *Willson v. Binford*, 81 Ind. 588, 591.

When the Supreme Court on appeal holds a complaint to be good, and reverses the judgment and remands the cause, the question is irreversibly settled for that suit, and becomes the law of the case in all its subsequent stages. *Armstrong v. Harshman*, 93 Ind. 216 218.

LAW OF EVIDENCE.

The "law of evidence" is a collection of general rules established by law (1) for declaring what is to be taken as true without proof; (2) for declaring the presumption of law, both those which are disputable and those which are conclusive; (3) for the production of legal evidence; (4) for the exclusion of whatever is not legal; (5) for determining in certain cases the value and effect of evidence. *Ann. Codes & St. Or.* 1901, § 678.

LAW OF THE FLAG.

Under what is called in international law "the law of the flag," a shipowner who sends his vessel into a foreign port gives

notice by his flag to all who enter into contracts with the shipmaster that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation or not contract with him or his agent at all. *Ruhstrat v. People*, 57 N. E. 41, 45, 185 Ill. 133, 49 L. R. A. 181, 76 Am. St. Rep. 30 (citing 1 Bouv. Law Dict. [Rawle's Rev.] 799, 800).

LAW OF THE LAND.

See "Due Process of Law."
Treaty as, see "Treaty."

LAW OF NATIONS.

See "International Law."

LAW OF NATURE.

The law of nature "is those fit and just rules of conduct which the Creator has prescribed to man as a dependent and social being, and which are to be ascertained from the deductions of right reason, though they may be more precisely known and more explicitly declared by divine revelation." *Wightman v. Wightman* (N. Y.) 4 Johns. Ch. 343, 349.

LAWS OF OLERON.

The laws of Oleron were introduced into England by King Richard, the crusader, and are to a large extent the basis of the maritime law of that country, as well as of the United States, and the principle of this particular article is observed by maritime courts in all countries. It is contended that the English merchants' shipping act has superseded the general maritime law on this subject, by providing that the expenses incidental to the cure of sick and disabled seamen shall be paid by the owners of the vessel, and that this provision exempts the ship from liability. It appears, however, by the provisions of that act itself, that there was no intention to deprive seamen of a remedy by proceedings against the ship; for it expressly provided that if a seaman or apprentice, becoming ill, has through the neglect of the master or owner of the ship not been provided with proper provisions and water, and with such medicines and medical stores as are required by said act, then the owner or master shall be liable to pay all expenses, not exceeding three months' wages, properly and necessarily incurred either by the seaman himself or by the crown; "but this provision shall not affect any further liability of the master or the owner for the neglect, or any other remedies possessed by the seaman or apprentice." *The Troop* (U. S.) 118 Fed. 769, 771.

LAW OF REMEDY.

In its most comprehensive sense, the law of remedy includes all lawful methods of

redressing violations of legal rights, but as more commonly used it covers only the forms of redress which may be had through the agency of courts of justice. *Clark v. Eddy*, 10 Ohio Dec. 539, 542.

LAW OF THE ROAD.

"In *Shear. & R. Neg.* § 649, it is said that it is the universal custom in America for travelers, vehicles, and animals under the charge of man to take the right hand of the road, meeting each other, if it is reasonably practicable to do so." *Riepe v. Elting*, 56 N. W. 235, 286, 89 Iowa, 82, 26 L. R. A. 769, 48 Am. St. Rep. 356.

The "law of the road" is found in *Hornor's Rev. St.* 1897, § 5087, wherein it is provided that people driving vehicles shall pass to the right. *City of Decatur v. Stoops*, 52 N. E. 623, 624, 21 Ind. App. 397.

LAW SHEEP.

See "Sheep."

LAW OF THE STATE.

A state insolvency law, although its operation upon insolvents is suspended during the existence of the national bankruptcy law, remains a "law of the state," within the meaning of *Bankr. Act*, § 64b (5), giving priority of payment to debts entitled to priority under the "law of the state," and hence, where a law of the state makes a debt due to a county a preferred claim, it will be entitled to priority in bankruptcy. In *re Wright* (U. S.) 95 Fed. 807, 810.

The expression "laws of the state" includes the Constitution of the state and the Constitution of the United States, and treaties and laws made in pursuance thereof. *Code W. Va.* 1899, p. 134, c. 13, § 17.

LAWFUL.

See, also, "Legal."

As peaceable or quiet.

"Lawful," as used in *Rev.* 1833, p. 280, providing that a complainant in an action of forcible entry and detainer shall not be compelled to make further proof of forcible entry and detainer than that he was lawfully possessed of the premises and that the defendant unlawfully entered into and detained the same, "is not a very definite phrase, and in common parlance has a very different meaning from that which the strictness and accuracy of legal phraseology has annexed to it. I take it that nothing more is meant by the term 'lawful' in this section than peaceable or quiet possession, contradistinguished from possession which is not merely constructively tortious, but actually so." *Michau v. Walsh*, 6 Mo. 346.

As legally enforceable.

"Lawful," as used in a Minnesota statute providing that every conveyance of an estate or interest in lands, made with intent to hinder or defraud creditors or other persons of their lawful suits, damages forfeitures, debts, or demands, shall be void as against the person so hindered or defrauded, means enforceable in a court of justice. *Bruggerman v. Hoerr*, 7 Minn. 337, 345 (Gil. 264, 271), 82 Am. Dec. 97.

Legal distinguished.

The word "legal," when used as a qualifying adverb, is synonymous with "lawful." *State v. Bulling*, 15 S. W. 367, 371, 105 Mo. 204.

"Of the meaning and force of the word 'lawful,' Anderson in his Dictionary (page 610) says: "'Legal' looks more to the letter, and 'lawful' to the spirit, of the law. 'Legal' is more appropriate for conformity to positive rules of law; 'lawful' for accord with ethical principals. 'Legal' imports rather that the forms of law are observed, that the proceeding is correct in method, and that rules prescribed have been obeyed; 'lawful' that the act is rightful in substance, that moral quality is secured.'" *State v. Whealey*, 59 N. W. 211, 212, 5 S. D. 427.

LAWFUL ACT.

A lawful act is one not forbidden by the penal law, and which would give no just occasion for a civil action. *Pen. Code Tex.* 1895, art. 685.

LAWFUL AGE.

"Lawful age," as used in a will providing that \$1,000 should be paid to each of the testator's grandchildren if they should attain a lawful age, means that the legacy should be paid to a female grandchild when she arrived at the age of 18 years, where such age was the time at which a female infant was capable of receiving an estate. *McKim v. Handy*, 4 Md. Ch. 228, 237.

LAWFUL AUTHORITIES.

"Lawful authorities," as used in the eighth article of the treaty with Spain, whereby the United States acquired the territory and sovereignty of the Floridas, means those persons who exercised a granting power by the authority of the crown. *Mitchell v. United States*, 34 U. S. (9 Pet.) 711, 734.

LAWFUL AUTHORITY.

"Lawful authority," as used in a fire policy, providing that the company shall not be liable for damage by fire caused by any

persons engaged in resistance of lawful authority, includes a mutinous resistance of the convicts of a state prison to the authority of the guards and warden. *Straus v. Imperial Fire Ins. Co.*, 6 S. W. 698, 94 Mo. 182, 4 Am. St. Rep. 368.

In an affidavit of defense filed to a scire facias sur mortgage, setting out that one acting as attorney in fact, for and with due and lawful authority from the assignee of the mortgage, executed under seal an agreement not to sue the mortgagor, the term "due and lawful authority" implies an instrument under seal. *May v. Forbes* (Del.) 43 Atl. 839, 2 Pennewill, 194.

Where an indictment for an illegal sale of intoxicating liquors charged that defendant was a common seller of intoxicating liquors, without any lawful authority, etc., the words "lawful authority" should be construed to mean "without appointment," where the only authority prescribed by law for the sale of intoxicating liquors was an appointment in each city or town of some suitable person as the agent of the town to sell intoxicating liquors to be used therein for medicinal and mechanical purposes. *Act June 2, 1851, § 2. State v. Keen*, 34 Me. 500, 505.

LAWFUL BUSINESS.

Other lawful business, see "Other."

The test of the lawfulness of a business is not based upon its inherent lawfulness, in an action brought to abate it as a nuisance, but its lawfulness in one locality and its unlawfulness in the other, measured by its effect on the plaintiff's property right. No court, apart from the legislative declaration, would pronounce any useful industry or manufacturing enterprise unlawful under all circumstances, irrespective of the locality and surroundings; but in certain localities or surroundings the common experience of mankind, of which the courts take judicial notice, has found certain pursuits to be universally injurious to health and damaging to property, no matter how carefully conducted. Hence in such neighborhoods those pursuits are declared to be nuisances per se. Such businesses in such localities are prima facie unlawful, because prima facie nuisances to near-by property holders; and others are prima facie lawful, because not necessarily attended with such results. *Evans v. Reading Chemical Fertilizing Co.*, 28 Atl. 702, 708, 160 Pa. 209.

LAWFUL CAPTURE.

A lawful capture is one made by a declared enemy lawfully commissioned and according to the laws of war. *Mauran v. Alliance Ins. Co.*, 73 U. S. (6 Wall.) 1, 10, 18 L. Ed. 836.

LAWFUL CHARGES.

"Lawful charges," which a judgment debtor, seeking to redeem, is required to pay, include any claim or demand held by the purchaser, except such as may be in the nature of a lien or incumbrance on the land. *Richardson v. Dunn*, 79 Ala. 167.

LAWFUL CITIZEN.

An allegation that a justice of the peace is a lawful citizen and inhabitant of a town cannot be construed as an allegation that he is liable to pay taxes therein. *Pierce v. Butler*, 16 Vt. 101, 105.

LAWFUL CLAIM OR DEMAND.

"Lawful claim or demand," as used in a covenant in a deed by which a grantor covenanted to warrant and defend the title to the premises to the grantee against the lawful claims and demands of all persons, etc., meant not only legal claims and demands, but included as well an equitable claim or demand; such a claim being a lawful claim to the same extent as if it were a legal one. *Kramer v. Carter*, 136 Mass. 504, 507.

"Lawful claim," as used in Pre-emption Act July 26, 1866 (14 Stat. 251), declaring that all the lands granted by the act, or any act to which the act was an amendment, did not defeat or impair any pre-emption, homestead, swamp-land, or any lawful claim, nor include any government reservation or mineral lands, meant a pre-existing right of possession, constituting a valid claim to the continued use of the land, either then established or a new one. *Lux v. Haggin*, 10 Pac. 674, 726, 69 Cal. 255.

The term "lawful claims," in a covenant to warrant and defend the title to property against the lawful claims of all persons, contemplates merely lawful claims to the title conveyed, and not to mere charges against the property, which may or may not be established as liens thereon, and hence does not include a charge for a street improvement which has been made, but the lien of which has not attached. *Cemansky v. Fitch*, 96 N. W. 754, 756, 121 Iowa, 186.

LAWFUL CURRENCY.

"Lawful currency of the United States" includes the silver coin of the United States, as it is recognized by the Constitution of the United States as lawful currency of that government, and is made thereby a legal tender in payment of debts. *Blount v. State*, 76 Ga. 17, 18.

Where the price to be paid for land sold by a contract under seal was to be paid in lawful currency of New Jersey, such clause

was satisfied by a tender of bank bills which at the time of the contract were called "money," were received as such, and were convertible into gold and silver coin; they being the universal, and almost the only, currency in New Jersey. *M'Eowen v. Rose*, 5 N. J. Law (2 Southard) 582, 583.

Where a bond was conditioned for payment in 1782 of a certain sum "in lawful current money of Pennsylvania," such words should be construed to mean the paper money issued under authority of Congress. *Wharton v. Morris* (Pa.) 1 Dall. 125, 126, 1 L. Ed. 65.

The phrase "lawful currency of the United States" is held in *Spencer v. State* (Tex.) 55 S. W. 58, to sufficiently describe the property alleged to have been stolen in an indictment for larceny.

LAWFUL DEED.

"Lawful deed of conveyance," as used in articles of agreement for the conveyance of land, means a deed conveying a good or lawful title. *Dearth v. Williamson* (Pa.) 2 Serg. & R. 498, 499, 7 Am. Dec. 522.

LAWFUL DEFENSE.

"Lawful defense," as used in Pen. Code, § 205, providing that homicide shall be justifiable when committed in lawful defense of the wife, means in defending her against the danger of a felony or of great personal injury. *People v. Downs*, 8 N. Y. Supp. 521, 524, 56 Hun, 5.

LAWFUL DISOBEDIENCE.

"Lawful disobedience," sufficient to authorize the discharge of a servant before the expiration of a contract of employment, "means something more than a conscious failure to obey. It involves a wrongful or perverse disposition, such as to render the conduct unreasonable and inconsistent with proper subordination. We are not prepared to hold that, even in what is known as menial service, every act of disobedience may be lawfully punished by the penalty of dismissal, and the serious consequences which it entails upon the servant put out of place." *Schaver v. Ingham*, 28 N. W. 162, 165, 58 Mich. 649, 55 Am. Rep. 712.

LAWFUL FENCE.

See "Good and Lawful Fence"; "Legal Fence."

Under Revision 1860, § 1544, specifying what shall be a lawful fence, and that such other construction as in the opinion of the viewers would be of equal strength may be considered lawful, a bluff, a hedge, a trench, a wall, a tressel, or the like, if found in fact

to be of equal security with the defined lawful fence, may be a lawful fence. *Hilliard v. Chicago & N. W. Ry. Co.*, 37 Iowa, 442, 445.

The term "lawful fence," in a statute making a railroad company liable for stock killed by its trains, but providing that the section shall not apply to any accident occurring on any part of said road that may be inclosed by a lawful fence, means a fence as defined by the statute, and is not satisfied by the erection of a fence which the law does not prohibit, but which is not of the kind fixed by statute. The word "lawful," in the connection found, applies merely to the quality of the fence, its height, material, etc. *Russell v. Hannibal & St. J. R. Co.*, 83 Mo. 507, 511.

A post and plank fence $4\frac{1}{2}$ feet high is a lawful fence, within Wag. St. c. 37, art. 2, § 43, requiring a railway to erect lawful fences along its right of way, and to maintain the cattle guards. *King v. Chicago, R. I. & P. Ry. Co.*, 79 Mo. 328.

"Lawful fence," as used in Act 1885, § 2, prescribing the mode of construction of lawful fences, when of wire, post and rail, and various other material, providing that any fence, which by reliable evidence shall be declared as strong, substantial, and well suited to the protection of inclosures as either of those described, shall be a lawful fence, should be construed to include a fence which forms a perfect inclosure, and is sufficient to turn stock, which is good, strong, and substantial, and built of stone. The ultimate object of a lawful fence is to so inclose land as to prevent the ingress and egress of such domestic animals as are usually nurtured and confined thereon, and to protect the premises inclosed from unlawful encroachment. Lawful fences may consist, either of the specific structures enumerated, or of any other barrier, which by reliable evidence shall be declared as strong, substantial, and well suited to the protection of inclosures as those described. *Meade v. Watson*, 8 Pac. 311, 312, 67 Cal. 591.

Under an act providing that, if any horse, etc., shall break into any grounds inclosed by a lawful fence, the owner shall be liable, etc., it is held, in the absence of any statutory definition, that the term "lawful fence" implies that the fence must be high enough, and sufficient in other respects, to prevent ordinary stock from breaking into the inclosure. *Chase v. Chase*, 15 Nev. 259, 264.

A fence made of three rails of good, substantial material, or three boards not less than six inches wide and three-quarters of an inch thick, such rails or boards to be fastened in or to good, substantial posts, not more than ten feet apart where rails

are used, and not more than eight feet apart where boards are used, where either wholly or in part, substantially built and kept in good repair, or any other kind of fence which, in the opinion of the fence viewers, shall be equivalent thereto, shall be declared a lawful fence: provided, that the lowest or bottom rail, wire, or board shall not be more than twenty or less than sixteen inches from the ground, and that such fence shall be fifty-four inches in height, except that a barb-wire fence may consist of three barb wires, or four wires, two of which shall be barbed, the wires to be firmly fastened to the posts not more than two rods apart, with two stays between the posts, or with posts not more than one rod apart without such stays, the top wire to be not less than fifty-four, nor more than fifty-eight inches in height, and the bottom wire to be not more than twenty nor less than sixteen inches from the ground. *Rev. St. Okl. 1903, § 72.*

The word "inclosed," as used in St. Mont. c. 373, § 1, declaring that, if any cattle shall break into any ground inclosed by a lawful fence, the owner of the animal shall be liable to the owner of such inclosed premises for all damages sustained by such trespass, is held to require a substantial compliance with the statute; an immaterial variation in the height of the fence from a lawful fence not being sufficient to prevent the fence from being a lawful one, nor to render the ground uninclosed, while a fence not entirely surrounding the premises does not render them inclosed within the meaning of the statute. *Smith v. Williams*, 2 Mont. 195, 201.

A lawful fence is defined by Cod. St. 373, 476, as $4\frac{1}{2}$ feet in height, whether constructed of poles, rails, or boards. *Smith v. Williams*, 2 Mont. 195, 201.

LAWFUL FREEHOLDERS.

In an officer's return of a levy on real estate, that the appraisers were good and lawful freeholders of the vicinity imports that the appraisers had all the qualifications required by statute, and hence imports that they were disinterested. *Day v. Roberts*, 8 Vt. 413, 417.

LAWFUL FUNDS.

"Lawful funds," as used in a promissory note payable in lawful funds of the United States or its equivalent, means gold or silver, which is the only lawful tender of the United States. *Ogden v. Slade*, 1 Tex. 13.

LAWFUL GOODS.

"Lawful goods," as used in a marine policy on lawful goods, means "goods not prohibited by the laws of the country to which

the vessel belongs. Articles contraband of war are lawful goods," within the meaning of the term as so used. *Juhel v. Rhinelander* (N. Y.) 2 Johns. Cas. 120; *Skidmore v. Desdouty*, Id. 77; *Seton v. Low* (N. Y.) 1 Johns. Cas. 1, 12.

LAWFUL HEIRS.

"Lawful heirs," as used by a testator in providing that, if either of his sons "should happen to die without any lawful heirs of their own," then the share of him who may first de cease shall accrue to the other survivor or his heirs, means lineal descendants or issue. *Abbott v. Essex Co.*, 59 U. S. (18 How.) 202, 215, 15 L. Ed. 352.

The words "heirs," or "lawful heirs," used in a will, must be construed in their legal and ordinary sense, unless other provisions of the will show that the testator meant other persons than those who would be heirs in the legal sense. *Crockett v. Robinson*, 46 N. H. 454.

Where a testator devised lands to his only son, and provided that, in case of the death of such son without any lawful heir, the lands should go to the testator's brother on the expiration of the widowhood of testator's wife, the phrase "any lawful heir" should be construed to mean "issue," although such may not be its strict technical sense. *Rollins v. Keel*, 20 S. E. 209, 115 N. C. 68.

A devise of lands to C. during his lifetime, provided he will live on and occupy the same, and, on his refusal to occupy, then to the said C.'s lawful heirs, created a vested estate in remainder in the children of C.; the term "lawful heirs," as so used, signifying "children." *Conger v. Lowe*, 24 N. E. 889, 891, 124 Ind. 368, 9 L. R. A. 165.

Where property was devised for life, with remainder to the testator's "lawful heirs," the words "lawful heirs" were held to have reference to those persons who were the lawful heirs of the testator at the time of his death. *In re Tucker's Will*, 63 Vt. 104, 21 Atl. 272, 25 Am. St. Rep. 743.

The phrase "lawful heirs," as used in a will whereby the testator devised to his son L. "and to his lawful heirs, but, in case the said L. should die without any lawful heirs, then the property to revert back and be equally divided" among the testator's children who might survive him, except the one-third part, which should belong to his widow so long as she should continue as such, means lineal descendants. *Moody v. Snell*, 81 Pa. (31 P. F. Smith) 359, 362.

LAWFUL HOLDER.

In speaking of the "lawful holder" of negotiable paper, that term may include one

who holds the paper merely as trustee for the real owner, for the purpose of collecting the same in his own name for the benefit of such real owner. *Thompson v. Cartwright*, 1 Tex. 87, 46 Am. Dec. 95.

The words "lawful holder" in Code, § 894, providing for notice to the lawful holders of tax-sale certificates, mean the person who in law is the owner of the certificate and entitled to the rights and benefits which may accrue under it. *Territory v. Perea*, 30 Pac. 928, 931, 6 N. M. 531. See, also, *Swan v. Whaley*, 35 N. W. 440, 442, 75 Iowa, 623.

LAWFUL INTEREST.

"Lawful interest," in Code, § 2054, providing that all judgments in the state bear "lawful interest" on the principal amount recovered, means interest at 7 per cent., if the contract stipulates no other rate; but they mean the contract rate, if stipulated and within the lawful limit. In a case where no rate is agreed on, 7 per cent. is the lawful interest. *Daniel v. Gibson*, 72 Ga. 367, 369, 53 Am. Rep. 845.

LAWFUL ISSUE.

As children.

"Lawful issue," as used in a will devising \$20,000 to the testatrix's executors, to be divided into as many shares as there shall be "lawful issue" of a certain person, was intended to have no greater significance than the word "children," and the testatrix must have had in mind the children of such person. *Palmer v. Horn* (N. Y.) 20 Hun, 70, 72.

In *Morrow v. McMahon*, 35 Misc. Rep. 348, 71 N. Y. Supp. 961, 964, a devise to "lawful issue" was construed not to have been used in its strict technical meaning, as including all descendants, lineal or collateral, to the remotest degree, but to be confined to children living at the testator's death and surviving at the death of testator's wife. Such construction was based upon the intention of the testator, as appeared from the entire will, and it was held any other construction would have been unreasonable.

As children born in wedlock.

In 1886 the words "lawful issue" had a clear, distinct, and well-settled meaning and meant issue born in wedlock. At that time illegitimate children, or those born out of wedlock, were incapable of taking; so that, when a testator bequeathed certain property to his son for life, with remainder over to his lawful issue, the lawfully begotten children of such son must have been understood, and the fact that by Laws 1896, c. 272, it was provided that illegitimate children whose parents have intermarried should have all the rights of legitimate offspring would not

affect an illegitimate child of the son born prior to the making of the will, though thereafter his parents intermarried. *United States Trust Co. v. Maxwell*, 57 N. Y. Supp. 53, 56, 26 Misc. Rep. 276.

As descendants.

"Lawful issue," as used in a will giving property to testator's adopted daughter, providing that, in case the daughter died without lawful issue surviving, she should have power and authority to devise or appoint the property to testator's sister, or to all or any or either of the lawful issue of testator's sister, means descendants, and not children, and therefore includes grandchildren of the testator's sister. *Drake v. Drake*, 3 N. Y. Supp. 760, 762.

The words "lawful issue," when used in a domestic will, ordinarily and generally mean descendants. *Palmer v. Horn*, 84 N. Y. 516, 519; *Chwatal v. Schreiner*, 148 N. Y. 653, 43 N. E. 166; *Johnson v. Brasington*, 156 N. Y. 181, 50 N. E. 859. Where there is nothing to the contrary to be found in the context of the instrument, or in extraneous facts proper to be considered, that is the sense in which they are presumed to be used in the will. Thus testatrix, whose domicile was in New York in 1853, went to live with a married daughter in Saxony, where she executed her will in 1878, bequeathing a portion of her estate on her daughter's death to her daughter's "then living lawful issue," if any; otherwise to testatrix's grandchildren. No reference was otherwise made to an adopted child of her daughter, who was then 40 years of age, and had no living issue. This child had been legally adopted in 1873 by the daughter and her husband under the laws of Saxony, and after her mother's death claimed under the will, as "lawful heir." Held, that such term referred alone to her daughter's offspring, and hence did not include children by adoption. *New York Life Ins. & Trust Co. v. Viele*, 55 N. E. 311, 314, 161 N. Y. 11, 76 Am. St. Rep. 238.

As words of limitation.

Where testator devised property to certain devisees and their lawful issue, as tenants in common, and, if they should die without having lawful issue, then over, the words "lawful issue," as so used, should be construed as words of limitation creating a fee-tail, which was converted into a fee simple by statutory enactment (Act April 27, 1855). *Reinoehl v. Shirk*, 12 Atl. 806, 808, 119 Pa. 108.

As words of purchase.

A devise by codicil to testator's daughter, and to her heirs and assigns, for her sole use, she to receive the profits thereof, and after her death the same to vest in her lawful issue, except that her husband, sur-

living her, should after her death enjoy a third of the profits for life, he to control no part of the property during her life, is a life estate only to the daughter, and not an estate in tail; the words "lawful issue" being words of purchase. *Shalters v. Ladd*, 30 Atl. 283, 284, 163 Pa. 509.

In a deed to a person for the term of his natural life, and at his death to his lawful issue forever, the words "lawful issue" are words of purchase, and not of limitation. *Hancock v. Butler*, 21 Tex. 804, 807.

Where a will stated that the purpose of one of its provisions was to secure to testator's daughter certain property for her sole use and that of her lawful issue during her life, not in any wise to be subject to the control of her husband, and that upon her dying without child or children, or issue thereof, the estate to go over to testator's mother, sisters, and brothers, the words clearly indicated that by "lawful issue" the testator meant such child or children of his daughter as she might have living at her death, and not an indefinite line of descendants, and were words of purchase, and not of limitation. *Gaboury v. McGovern*, 74 Ga. 133, 143.

LAWFUL JURORS.

A venire facias directing the sheriff to summon good and lawful men to serve as jurors is sufficient, without specifying the particular qualifications necessary to constitute them good and lawful jurors; the court observing that the word lawful includes everything that the law requires in order to constitute a party a competent juror. *State v. Alderson*, 18 Tenn. (10 Yerg.) 523, 524.

LAWFUL MANNER.

The test whether a thing is done in a lawful manner or not is the probability of injury to others, and that, of course, depends on circumstances. "It is quite manifest that injury or mischief, whether it be to life, limb, or property, would or would not be probable, not simply according to the act done, but according to the time at which it was done, and the locality where the occurrence took place." *The Europa*, 2 U. S. Month. Law Mag. 497, 499.

"Lawful manner," in Code 1873, § 3483, providing that it is not permissible to question the action of the grand jury in finding a bill of indictment, or of the trial jury in the trial of a cause, nor of a court or judge when acting within their legitimate province and in a lawful manner, has reference "to the method or mode of acting, more than to the degree of perfection or correctness in the conclusion or results arrived at. The statute seems to have a reference to the methods or means of obtaining results, and, if a court observes such methods or means, it may be

said to be acting in a lawful manner, though it may err in the application of legal principles to such an extent as to involve reversible error. It is not, of course, to be understood that a court has acted in a lawful manner when the judgment it pronounces is absolutely void, for such a judgment has no support in the law." *Elsner v. Shirgley*, 45 N. W. 393, 394, 80 Iowa, 30; *In re McDonald*, 33 Pac. 18, 22, 4 Wyo. 150.

LAWFUL MEN.

See "Good and Lawful Men."

LAWFUL MERCHANDISE.

"Lawful merchandise," as used in the stipulation of a charter party to take a cargo of lawful merchandise, necessarily implies that the articles composing the cargo should be in such condition, and be put up in such form, that they could be stored and carried without one part damaging the other. *Boyd v. Moses*, 74 U. S. (7 Wall.) 316, 318, 19 L. Ed. 192.

LAWFUL MONEY.

Lawful money is any currency usually and lawfully employed in buying and selling, and hence, where an indictment charged that defendant received on deposit lawful money of the United States, and the proof showed that it was any national currency, greenbacks, or silver certificates, there was no variance. *State v. Boomer*, 72 N. W. 424, 426, 103 Iowa, 106.

"Lawful money," as used in a promissory note given by and to a citizen of the state of Connecticut in Wyoming in 1778, payable in lawful money, means lawful money of Connecticut. The term "lawful money" is almost peculiar to the people of that state, and the import of the words is thoroughly ascertained there. *Dorrance v. Stewart* (Pac.) 1 Yeates, 349.

"Lawful money," in an indictment charging that the defendant did unlawfully demand and receive \$2.45, of lawful money of the state of Tennessee, etc., does not include bank notes. Hence proof that the defendant received bank notes will not sustain the indictment. *Garner v. State*, 13 Tenn. (5 Yerg.) 160, 162.

"Lawful money," within the meaning of a contract to pay in lawful money, means such currency as shall be lawful at the time of its actual fulfillment. The contract is therefore made by the act of the parties to depend, as to the medium by which it may be discharged, upon the laws which shall subsist at the time of payment. *O'Neill v. McKewn*, 1 S. C. (1 Rich.) 147, 148.

The words "lawful money," in the legal tender acts, providing that the various issues

of the treasury notes of the United States shall be lawful money, and a legal tender in payment of all debts, etc., except duties on imports, fix their legal character, and draw them within the terms of contracts calling for payment in lawful money. *O'Neill v. McKewn*, 1 S. C. (1 Rich.) 147, 148.

"Lawful money of the United States" means coin or treasury notes made a legal tender by act of Congress, and silver certificates or national bank notes are not included in the phrase. *Perry v. State*, 61 S. W. 400, 42 Tex. Cr. R. 540.

"Lawful money of the United States" includes only gold and silver coin, or that which by law is made its equivalent, so as to be exchangeable therefor at par and on demand, and does not include a currency note which, though nominally exchangeable for coin at its face value, is not redeemable on demand. *Bronson v. Rodes*, 74 U. S. (7 Wall.) 229, 247, 19 L. Ed. 141.

"Lawful money of the United States," as used in a judgment for lawful money of the United States, is equivalent to lawful money of Virginia, as used in an agreement for the payment of lawful money of Virginia. Lawful money of the United States is lawful money of Virginia, or any other state or territory. *Cocke v. Kendall* (U. S.) 5 Fed. Cas. 1149, 1150.

"Lawful money of the United States," as used in an indictment charging the larceny of \$75 of the "lawful money of the United States," cannot be construed to include the notes of national banks. Lawful money of the United States might consist of gold or silver coin or United States treasury notes and fractional currency. *Hamilton v. State*, 60 Ind. 193, 194, 28 Am. Rep. 653.

In an action on a contract made in South Carolina during the Civil War, calling for payment in dollars or lawful money, the term "dollars" must in the first instance be construed to refer to the established legal currency of the United States, and it is for defendant to show that the parties looked to Confederate currency as a means of payment. *Neely v. McFadden*, 2 S. C. (2 Rich.) 169, 173, 175.

Where a sheriff was only authorized to receive current gold and silver coin of the United States and certain county orders in payment of taxes, and, in a prosecution against him for embezzlement of money so received, it was proved that he collected as taxes while in office, and paid over to the county treasurer, certain sums, leaving a balance unaccounted for, and that he and his deputies received for taxes gold, silver, and treasury notes, national bank notes, silver certificates, checks, money orders, and county warrants, the evidence sufficiently supported an allegation in the indictment that

the money converted by defendant was lawful money of the United States, though the particular coins converted were not identified; the jury being warranted in finding that defendant converted the checks, drafts, money orders, etc., into money before he embezzled the same. *State v. Neilon*, 73 Pac. 321, 322, 43 Or. 168.

LAWFUL ORDERS.

"Lawful order," as used in a statute defining contempt of court to be the disobedience or resistance of a lawful order of a court or judge, does not mean an order which is not erroneous, but an erroneous order or judgment, though unlawful and liable to be reversed on appeal, is obligatory until reversed, and disobedience of it is contempt. *Ex parte Cohen*, 5 Cal. 494, 495.

"Lawful orders and decrees," as used in Acts 1870, c. 359, § 1, which provides that the surrogate of the county of New York shall have power and jurisdiction to issue all lawful processes upon allegations duly verified, and to make and enter all lawful orders and decrees in proceedings in the surrogate's court of said county, and the objection of want of jurisdiction shall not be taken to such orders and decrees, except, etc., meant such orders and decrees as a surrogate's court was by law empowered to make, or, in other words, orders and decrees made in cases where the court had jurisdiction of the subject-matter. *Bearns v. Gould*, 77 N. Y. 455, 458 (cited and approved in *Harrison v. Clark*, 87 N. Y. 577).

LAWFUL POSSESSION.

One is in lawful possession of property, so as to be able to rely on the 30-years non-possession and nonpayment of taxes, under Rev. St. 1889, § 6770, as a defense to an action to recover the property, where he entered, not a mere trespasser, but in good faith, claiming to be the owner, notwithstanding he has not a perfect title. *Collins v. Pease*, 47 S. W. 925, 146 Mo. 135.

The term "lawful possession" is not convertible with "innocent possession," in legal terminology. Intent does not enter into whether an act is unlawful or tortious, though it does as to whether it is innocent or criminal. A defendant in an action of conversion, who contends that his possession of the property is innocent, must set out such fact by a defense, as it cannot be proven under a general denial, which only raises the issue whether the possession was lawful. *Milligan v. Brooklyn Warehouse & Storage Co.*, 68 N. Y. Supp. 744, 749, 34 Misc. Rep. 55.

LAWFUL PROCESS.

"Lawful process" in any action or proceeding manifestly refers to process emanat-

ing from court, or by the authority of a court, and cannot be understood to refer to such acts or notices in pais between private parties as derive no authority from a court, but simply serve to create a right of action. *Healey v. Geo. F. Blake Mfg. Co.*, 62 N. E. 270, 271, 180 Mass. 270.

LAWFUL PROVOCATION.

"Lawful provocation" is synonymous with "legal, adequate, and reasonable provocation," and means an assault or personal violence. *State v. Bulling*, 15 S. W. 367, 371, 105 Mo. 204.

LAWFUL PURPOSE.

It is not unlawful for a citizen to keep in his possession liquors lawfully purchased and for a lawful purpose—and by lawful purpose is meant their personal use or family use, or for purposes of hospitality, social purposes, or medicinal use, or the like—and he may keep liquors in any quantity if he purchases them in a lawful manner; and he has a right, in law, to make a legal purchase outside of the state, and import liquors in the state for legal or lawful use, for personal use or medicinally. *State v. Robison*, 39 S. E. 247, 61 S. C. 106.

LAWFUL REASON.

See "Good and Lawful Reasons."

LAWFUL REPRESENTATIVES.

A will giving money in trust, the income payable to M. for life, and, on her death, to divide the principal among her children, "and to their lawful representatives forever," the issue of any child then dead to take his parent's share, uses "lawful representatives" in the sense of executors, and not to signify the persons who are substituted as takers of the gift. *Clark v. Cammann*, 43 N. Y. Supp. 575, 578, 14 App. Div. 127.

LAWFUL SILVER MONEY.

A provision in a mortgage for the payment of \$5,000 in lawful silver money is to be construed as only requiring the payment of such a sum in any silver money which is lawful at the time of payment, and therefore such a contract cannot be construed to require a payment in silver dollars. *Parrish v. Kohler (Pa.)* 11 Phila. 340, 347.

LAWFUL SIZE.

In Pub. Acts 1897, No. 151, § 2, making it unlawful to possess or market fish under the prescribed size, excepting fish taken in gill nets of lawful size, gill nets having meshes of the size prescribed in the act are intended.

Osborn v. Charlevoix Circuit Judge, 72 N. W. 962, 983, 114 Mich. 655.

LAWFUL STRUCTURE.

"Lawful structure," as used in Act Cong. Feb. 27, 1865, declaring that a certain bridge already built over a river which divides two states shall be a lawful structure, etc., means that the bridge as built, with its abutments, piers, superstructures, draw, and height, should have the sanction of law, and be maintained and used in that state and condition until the law was altered. *The Clinton Bridge*, 77 U. S. (10 Wall.) 454, 462, 19 L. Ed. 969.

LAWFUL SUM IN MONEY.

The terms "lawful sum in money" and "legal tender" are not synonymous, but have different meanings. A tender, to be good in law, must be made in legal tender notes or coin of the United States. National bank notes and gold and silver certificates are lawful money, and so recognized in the commercial exchanges of the United States, but they are not legal tender. *Martin v. Bott*, 46 N. E. 151, 153, 17 Ind. App. 444.

LAWFUL TITLE

"Lawful title," as used in a bond requiring the obligor to give a lawful title to certain property to be conveyed by him, should be construed to mean a perfect title, with a general covenant of warranty. *Clark v. Redmen* (Ind.) 1 Blackf. 379, 380.

LAWFUL TRADE.

"Lawful trade," in a policy insuring a ship in any lawful trade, means the trade in which the ship is sent by the owners, so that the insurer is entitled to recover where he sends the ship on a lawful voyage, though, owing to the misconduct of the master taking on board certain commodities, which subjected the ship to seizure, it is lost. *Have-lock v. Hancill*, 3 Term R. 277, 278.

LAWFULLY.

The word "lawfully" means in pursuance of or according to law. *People v. Martin*, 76 N. Y. Supp. 953, 955, 38 Misc. Rep. 67.

"Lawfully," as used in a pleading, without a statement of the special facts on which it is predicated, has, in general, no effect, for the term is not only indefinite, but affirms matters of law instead of fact. *Hanson v. Langan*, 9 N. Y. Supp. 625.

LAWFULLY ADMINISTERED OATH.

"Lawfully administered oath," as used in Pen. Code, § 87, declaring that prosecu-

tions for perjury may be based upon false testimony given under oath in proceedings in which an oath may be lawfully administered, means an oath that is administered pursuant to, or is required or authorized by, some law. It is not enough that the officer administering the oath had general authority so to do, nor that his administering the particular oath was not unlawful in the sense of incurring a penalty by administering it. A mere gratuitous oath, which the law does not recognize as of any force, and to which it gives no more effect than if the statement were not sworn to, is not a lawfully administered oath, within the statute. An oath administered by a justice of the peace to a person making certain statements of fact in an application for a loan of money is not required or authorized by any statute, or necessary for the prosecution of crime or to further the ends of public justice, and is not a lawfully administered oath, so as to be made the basis of a prosecution for perjury. *State v. McCarthy*, 42 N. W. 599, 600, 41 Minn. 59.

LAWFULLY AND PEACEABLY.

In construing Gould's Dig. c. 72, § 3, providing "that when any person shall lawfully and peaceably hold over any lands," etc., "after the termination of the time for which they were demised or let to him," etc., "or shall lawfully and peaceably obtain possession, or shall hold the same unlawfully and by force, and after demand made in writing for possession thereof by the person having a right to such possession, his agent or attorney, and shall refuse or neglect to quit such possession, such person shall be deemed guilty of an unlawful detainer," the phrase "lawfully and peaceably obtain possession" held not intended to apply alone to cases where a defendant entered under a lease from the owner, or by his express consent, but also to cases where the entry is such as to negative the idea of forcible intrusion in the first instance, though not by the express consent. *Keller v. Henry*, 24 Ark. 575, 580.

LAWFULLY BEGOTTEN.

"Lawfully begotten," as used in a deed of trust describing the ultimate beneficiaries of the fee as lawfully begotten children or grandchildren of a certain person, does not mean children that had a legal status, that they may have inheritable blood from their father, or that they may be his heirs or his lawful issue. Unless they are lawfully begotten, they do not fill the essential requirements of the deed of trust. *Appeal of Edwards*, 108 Pa. 283, 289.

A. conveyed property to B. in trust for C. during his life, and then for his "lawfully begotten children." C. had an illegitimate son, who was legitimated by an act of the

Legislature. Held, that the words "lawfully begotten children" should not be construed to include such illegitimate son, since the words were used to define a fact, and not to define a legal status so as to include all who held the status. *Appeal of Edwards*, 108 Pa. 283, 289.

The words, "lawfully begotten heir," as used in a will devising property to a person and his lawfully begotten heir, operate to create an estate tail, and are equivalent to "lawfully begotten heir of his body." *Ewan v. Cox*, 9 N. Y. Law (4 Halst.) 10 (cited and approved in *Weart v. Crusier*, 13 Atl. 36, 37, 49 N. J. Law [20 Vroom] 475).

"Lawfully begotten heirs of their bodies," as used in a will giving "the remaining two-thirds of my estate to my three daughters for life, and then to the lawfully begotten heirs of their bodies," should be construed to mean children. *Loving v. Hunter*, 16 Tenn. (8 Yerg.) 4, 29.

As used in a deed of trust which provided that in case the grantee should die, leaving lawfully begotten children to survive him, the trustee should hold the same for such children, etc., was employed strictly, and hence a legitimated child of a grantee did not take on the latter's decease. *Appeal of Edwards*, 108 Pa. 283, 289.

Where testator devised his lands to his wife for life, and provided that upon her death the property should be divided among "my lawfully begotten heirs," the words were not used in their technical sense, but were used in the sense of "children." *Watson v. Williamson*, 30 South. 281, 283, 129 Ala. 362.

LAWFULLY CONVEY.

"Lawfully convey," as used in a statute providing that a deed of quitclaim and release, of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by deed or bargain and sale, limits the estate conveyed to such as the grantor has the legal right to convey, and therefore he cannot lawfully convey land which he has already conveyed to another; but he may release any real or fancied interest remaining in him, and convey his actual interest, whatever it may be, at the time of the conveyance. Therefore, when the person relies on a mere quit-claim of the interest which a party may have in the property he does so at his peril, and must see to it that there is an interest to convey. He is presumed to know what he is purchasing, and takes his own risk. *Martin v. Brown*, 4 Minn. 282, 292 (Gil. 201).

LAWFULLY DEMANDED.

When limitation has run against a right of action against a corporation for a tax

and penalties, neither can be lawfully demanded within Tax Law, § 195, providing that on an application to the State Comptroller for the revision and readjustment of an account of taxes, if it appear that any such account included taxes or other charges which could not have been lawfully demanded, he shall resettle the same, and charge or credit, as the case may require, the difference resulting from such revision or settlement, etc. *People v. Roberts*, 51 N. E. 437, 438, 157 N. Y. 70.

LAWFULLY DISCHARGED.

"Lawfully discharged," as used in a bail bond conditioned that the party would remain in the custody of the keeper of the prison, and within the limits thereof, until he should be lawfully discharged, without committing any manner of escape, the term "lawfully discharged" would extend to, and be satisfied by, any discharge obtained under the legislative authority of the state. *Mason v. Haile*, 25 U. S. (12 Wheat.) 370, 377, 6 L. Ed. 660.

A bond for the liberty of the prison yard provided that the obligor should remain "a true prisoner until lawfully discharged," etc. Held, that the term "lawfully discharged" includes a discharge under the Rhode Island statutes for the relief of poor prisoners for debt, though obtained by fraud and perjury. *Ammidon v. Smith*, 14 U. S. (1 Wheat.) 447, 459, 4 L. Ed. 132.

LAWFULLY DIVIDED.

"Lawfully divided," as used in a will in which the testator, after giving his son, son-in-law, and grandson \$1 each, declared, "It is my wish that all the property I may possess at my death be lawfully divided between my wife and my two youngest children," referred not to the mode of division, but to the estate of the devisees; that is, the property is to be divided between the wife and the two youngest children as if the testator had died intestate, without other heirs. *Miller v. Miller*, 62 Ky. (1 Duv.) 8, 10.

LAWFULLY IMPRISONED.

"Lawfully imprisoned," as used in Gen. St. c. 178, § 46, prescribing a punishment for every one who while lawfully imprisoned in any place of confinement established by law, other than the State Prison, breaks therefrom and escapes, indicates the intention to punish every violation of custody by those who are properly held in any place of confinement established by law, other than the State Prison. Breaking jail, and an escape therefrom, even by a prisoner confined therein on mesne process, could not be otherwise than an outrage to its discipline, and a resistance to the lawful authority by which be

was detained. A person arrested on meane process, admitted to bail, and afterwards surrendered by his bail to the keeper of a jail, is lawfully imprisoned. *Commonwealth v. Barker*, 133 Mass. 309, 400.

LAWFULLY POSSESSED.

Lawfully possessed, as used in Gen. St. 1865, c. 187, § 3, providing for an action of forcible entry and detainer by one lawfully possessed of the premises, who has been wrongfully dispossessed, does not involve an inquiry into the lawfulness of the possession as regards title, but only in regard to the mode of obtaining it, and is equivalent to "peaceably possessed." *McCartney's Adm'r v. Alderson*, 45 Mo. 35, 38.

LAWFULLY SUMMONED.

"Lawfully summoned," as used in Act Cong. July 8, 1838, § 8, relating to the allowance of fees to jurors and witnesses "lawfully summoned" to testify at a coroner's inquest, means that they are regularly served with a coroner's summons by a lawful officer. The jurors and witnesses are compelled, when thus summoned, to obey the writ. They have no right to consider whether the summons issued on a proper state of facts as they might appear to the coroner, nor the means of deciding it if they had the right. *Levy Court v. Woodward*, 69 U. S. (2 Wall.) 501, 510, 17 L. Ed. 851.

LAWLESS.

"Lawless" is defined by the Century Dictionary as "not subject or submissive to law; uncontrolled by law, whether natural, human, or divine." *State of Arkansas v. Kansas & T. Coal Co.* (U. S.) 96 Fed. 353, 362.

LAWS IN FORCE.

In the construction of statutes, the term "laws now in force," and words of similar import, shall mean the laws in force at the time the act containing the words shall take effect. *Hurd's Rev. St. Ill.* 1901, p. 1720, c. 181, § 1, subd. 18.

LAWS OF THE SEVERAL STATES.

The expression "laws of the several states," as used in the thirty-fourth section of the judiciary act of 1789 (1 Stat. 92; section 721, Rev. St.), providing that the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply, includes the decisions of the state courts construing

the laws. The general rule as to when decisions of the state courts, under the above-quoted section, are binding on the federal courts, is well stated in *Swift v. Tyson*, 41 U. S. (16 Pet.) 1, 10 L. Ed. 865, where the court said "that the true interpretation of the thirty-fourth section limited its application to state laws strictly local; that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It has never been supposed that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent on local statutes or local usages of a fixed or permanent operation—for example, to the construction of ordinary contracts or other written instruments; especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves." *Hambly v. Bancroft* (U. S.) 83 Fed. 444, 446.

LAWS OF THE TERRITORY.

In the organic act, providing that each of the district courts shall have and exercise the same jurisdiction in all cases arising under the Constitution of the United States "and the laws of said territory" as is vested in the Circuit and District Courts of the United States, etc., the quoted phrase means such laws as have an operative force in the territory at the time of the passage of the organic act. *Nickels v. Griffin*, 1 Wash. T. 374, 382.

The phrase "laws of the territory," in the organic act conferring jurisdiction upon district courts, means not only the regulations and customs having the force of law in this territory, but the laws which the territory of Washington, considered as a political power subordinate to the general government, has authority to administer, as emanating from itself. *Phelps v. The City of Panama*, 1 Wash. T. 518, 524.

LAWSUITS.

Where, to induce an agent to continue to act as such, the principal entered into an agreement to indemnify the agent against lawsuits, brought or to be brought, relating to the business of the agency, and an arbitration was then pending relating to such business, the agreement reached and included such arbitration. *Packard v. Hill* (N. Y.) 7 Cow. 434, 441.

An agreement by a principal with his agents to indemnify them for any sums of money which they or their agents would be liable to pay in consequence of any lawsuit or lawsuits which are or may be brought

against them on account of the business of the agency includes and covers an arbitration then pending relating to such business. *Hill v. Packard* (N. Y.) 5 Wend. 375, 386.

LAWYER.

See, also, "Attorney at Law."
As laborer, see "Laborer."

One who earns a part of his living by legal work for others in his office, though he combines it with other business, and does not advertise as a lawyer, nor appear in court on the trial of cases, is a lawyer, within Code, § 3072, exempting the proper tools, instruments, or books of a debtor, if a lawyer. *Equitable Life Assur. Soc. v. Goode*, 70 N. W. 113, 114, 101 Iowa, 160, 35 L. R. A. 690, 63 Am. St. Rep. 378.

LAY—LAID.

As construct and maintain.

A grant to a railroad company, in its charter, of the power of "laying, building, and making" a road, includes the power of maintaining and sustaining it, which has reference to keeping it in repair, supplying it with machinery, and such like acts, but does not extend to projects for extending its business by schemes and enterprises not contemplated and expressed in clear, unambiguous terms. *Central R. Co. v. Collins*, 40 Ga. 582, 624.

The laying of a sewer or drain, for which an assessment can be made on property owners, includes its location, grade, etc., and the easement taken for its construction. *Boyden v. Village of Brattleboro*, 27 Atl. 164, 165, 65 Vt. 504.

As delivered.

A contract for the sale of so many barrels of whiskey "laid in L. direct from the distillery" means that the goods are to be delivered in L. within a reasonable time after the making of the contract. *Ullman v. Babcock*, 63 Tex. 68, 70.

As offered.

A record stating that the defendants identified a certain book of accounts as the account book kept by a certain person, and as being wholly in his handwriting, and "laid the same in evidence," means no more than that the book, identified as such person's account book, kept in his handwriting, was now before the court, ready for use, as the material source of such entries therein as should be subsequently offered in evidence. It meant no more, in effect, than is meant in everyday practice when a writing to be offered in evidence subsequently is identified and marked as an exhibit in ad-

vance of its being so offered. *Peck v. Pierce*, 28 Atl. 524, 527, 63 Conn. 310.

As risk by lottery ticket.

Money paid for lottery tickets is money laid, staked, or bet, within the meaning of Code 1873, § 4029, providing that all promises, agreements, notes, etc., when the whole or any part of the consideration thereof is for money or other valuable thing won or lost, "laid, staked, or bet," at or upon any game of any kind or in any wager, are absolutely void and of no effect. One of the definitions of the word "lay" is to risk, and money paid for lottery tickets is risked on the chances of success at the drawing. To stake money is to put it at hazard on the issue of competition or upon a future contingency, and money paid for lottery tickets is staked on a game of chance. *Koster v. Seney*, 68 N. W. 824, 825, 99 Iowa, 584.

As share of proceeds of voyage.

The term "lay" is sometimes used to designate the share of the proceeds of a voyage, which is to be the compensation for the services of a seaman on a whaling or similar voyage. "This lay or share does not, according to law, create any partnership in the profits of the voyage, as has been sometimes erroneously supposed, but it is in the nature of wages for seamen in the common merchant service, and is governed by the same rules." *Coffin v. Jenkins* (U. S.) 5 Fed. Cas. 1188, 1190.

"Lay," as used in an agreement by the owner of a vessel with a mariner that the latter shall sail the vessel on a lay, means that the mariner is to take the command of her as master, to victual and to man her, and to pay half the port charges; the owner to keep the vessel in repair, and the freight and earnings to be equally divided between them. Under a contract of this kind, the vessel, during its continuance, is under the exclusive control of the master, as respects the voyage and employment. He alone has the right to determine what voyages he will undertake, what cargo he will carry, upon what terms, and to what port he will sail in search of freight. His share of the earnings of the vessel are his wages, and he receives no other compensation for his services as master. *Thomas v. Osborn*, 60 U. S. (19 How.) 22, 33, 15 L. Ed. 534.

LAID DOWN.

In the peculiar phraseology of the Society of Friends, a meeting is said to have been "set up" when it has been organized according to the usages of the society, and to have been "laid down" when it has formally dissolved. *White Lick Quarterly Meeting of Friends by Hadley v. White Lick Quarterly Meeting of Friends by Mendenhall*, 89 Ind. 136, 142.

LAID OFF.

In the case of *United States v. Brooks*, 51 U. S. (10 How.) 442, 13 L. Ed. 489, it was held that the expression "shall be laid off," used in relation to land, gave the reservees a fee-simple title to the land, as fully as any patent from the government could do. *Meehan v. Jones* (U. S.) 70 Fed. 453, 455.

LAID OPEN.

Rev. St. p. 133, § 47, providing that all petitions for reassessment of damages awarded by a committee appointed by the county court to lay out a highway shall be commenced "previous to the expiration of sixty days after such highway shall be laid open to be worked," refers to the time when work on the road actually begins, and not to the time when it is ordered to be open. *Myers v. Town of Pownal*, 16 Vt. 415, 416.

LAY DAYS.

See "Working Lay Days."

LAY OUT—LAID OUT.

See "Legally Laid Out"; "Regularly Laid Out."

In St. 1896, c. 516, authorizing a union station in Boston, providing that the board of street commissioners of the city shall lay out, and the city shall construct, suitable approaches thereto, the words "lay out" are not used in their technical sense of laying out a way, but in the more general sense of making it the duty of the street commissioners to prescribe any changes that might be necessary in the public streets to connect the private property of the railroad with the streets of Boston, including what would ordinarily be done by laying out a new way, or altering, relocating, or directing specific repairs upon an existing way. *Peabody v. Boston & P. R. Co.*, 62 N. E. 1047, 1048, 181 Mass. 76.

The laying out of a highway over land by public authority is simply imposing a public easement upon the land. The public acquires only the right of passage, with the incidental right of facilitating that passage by constructing and keeping in repair a road within the lines of the location. The exercise of this right by the public does not ordinarily require the continual and exclusive occupation of the entire width of the location; hence the landowner retains such rights of possession as the public does not need. *Wright v. Woodcock*, 29 Atl. 953, 954, 86 Me. 113, 25 L. R. A. 499.

"Laid out," as used in St. 1874, c. 275, § 2, providing "that every highway or town-way hereafter laid out" shall be deemed to

be laid out under the provisions of chapter 42 of the General Statutes, and the amendments thereof, unless the order laying out the same expressly declares the same to be laid out under the provisions of the law authorizing the assessment of betterments, should not be limited to an original laying out, in the strictest sense, but should include every order of the municipal authorities by which private property is taken or injured for the purpose of a public way. *Fuller v. Mayor and Aldermen of Springfield*, 123 Mass. 289, 291.

"'Laying out' is, and has been from the earliest time, the appropriate expression for locating and establishing a new highway." *Foster v. City of Boston Park Com'rs*, 133 Mass. 321, 329.

The term "laying out," as applied to towns, is descriptive of legal steps for the creation of a town. *Mattheisen & Hegeler Zinc Co. v. City of La Salle*, 8 N. E. 81, 83, 117 Ill. 411.

In Rev. St. c. 19, §§ 103-106, prescribing a penalty for encroaching upon a highway which has been "laid out" and opened, the term "laid out" is sufficiently comprehensive to include any act or process by which the public obtains the right of way on lands, whether it be by act of the Legislature, by order of the board of county supervisors or town supervisors, by grant, by dedication, or otherwise. The most narrow signification that can reasonably be given to the term is to restrict it to highways laid out by order of the public authorities. *State v. Babcock*, 42 Wis. 138-148.

All necessary steps included.

The phrase "laying out," as used in the statutes relating to highways, includes not only the initiatory act of laying out the road by the selectmen, but also the acceptance of the survey by the town, and the recording thereof. The term is comprehensive, and includes all the steps necessary to constitute the way a highway for the public use. *Town of Wolcott v. Pond*, 19 Conn. 596, 601.

"Lay out," as used in a statute authorizing commissioners to lay out a certain highway, means the making of a survey thereof, and its adoption by the commissioners. *Gaines v. Hudson Co. Avenue Com'rs*, 37 N. J. Law (8 Vroom) 12, 14.

"To lay out a highway" means to locate the highway and to define its limits, which is accomplished by a survey and particular description of the highway. *Hough v. City of Bridgeport*, 18 Atl. 102, 104, 57 Conn. 290.

"Laid out," as used in Rev. St. 1881, providing that every public highway already laid out, and which should not be opened and used within a certain time, should cease to

be a highway, means established; surveyed; declared a road. *Decker v. Washburn*, 35 N. E. 1111, 1112, 8 Ind. App. 673.

The phrase "laid out according to law," when applied to a public highway, has a well-known meaning, under the statutes, and means the doing of those things by the proper legal officers which are essential to create a public highway, and to authorize it to be worked and traveled—especially the surveying, marking the course or boundaries, and ordering it established as a highway. *Chicago Anderson Pressed Brick Co. v. City of Chicago*, 28 N. E. 756, 757, 138 Ill. 628.

Streets cannot be said to be "laid out and opened," within the meaning of a city charter giving the city power of taxation for municipal purposes to a distance of 240 feet back from the line of such streets as the corporate authorities had laid out and opened, until there has been a formal acceptance of them by the authorities of the town according to law, though they may have been, since an alleged dedication, used as streets by the owners of property, and may have been generally considered streets of the town. *Valentine v. City of Hagerstown*, 86 Md. 486, 38 A. 931 (cited in *Sindall v. City of Baltimore*, 49 Atl. 645, 647, 93 Md. 526).

"Laid out," as used in Rev. St. c. 19, § 103, providing a penalty for encroaching upon a highway which has been laid out and opened, means the making of an order therefor by the proper officers, together with the recording of the same as required by law. *State v. Huck*, 29 Wis. 202, 207.

"Laid out," as used in Rev. St. 1857, c. 18, § 13, providing that, when a way is laid out over lands, the county commissioners shall decide whether any tract or part thereof will thereby be enhanced in value, etc., does not imply that a location has been made by any written report. *Mansur v. County Com'rs*, 22 Atl. 358, 359. 83 Me. 514.

In St. 1871, c. 382, which provides that at any time within two years after any street or highway or other way is laid out, altered, widened, graded, or discontinued, an assessment may be made, etc., and also in section 5 of the same act, which provides that the owner of any real estate which may abut on any street which may be laid out, graded, etc., may, at any time before the estimated damages are made, give notice of his objection to the assessment, etc., "laid out" refers to an order to lay out. *Hitchcock v. Board of Aldermen of Springfield*, 121 Mass. 382, 385.

"Laid out," as used in reference to a highway, has a well-known meaning, under our statutes, and plainly includes the doing of those things by the proper local officers which are essential in creating a public highway, to authorize it to be worked and travel-

ed, and especially the surveying, marking the course or boundaries, and ordering it to be established as a highway. The affirmative action of the public authorities is indispensable in such case." *Chicago Anderson Pressed Brick Co. v. City of Chicago*, 28 N. E. 756, 757, 138 Ill. 628.

As construct or improve.

"Lay out," as used in St. 1875, c. 185, § 3, authorizing a board of park commissioners to lay out, improve, govern, and regulate any public parks located within the city, is used in the same sense as when used in reference to highways, in which it is the appropriate expression for locating and establishing a new highway, and is not to be construed as meaning something analogous to "improve." *Foster v. City of Boston Park Com'rs*, 133 Mass. 321, 332.

There is a sense in which to "lay out and establish" a public park may be held to be an erection or construction. To construct a thing is to put together its several parts in their proper place and order; and to erect is to found and form, as well as to build or raise and set up. A park is made up in part of walks and roads, which are new constructions, and of ornamentation, with shrubbery and trees, which are set up in the places in which they are planted, and of booths and summerhouses which are erected or built. *City Sewage Utilization Co. v. Davis (Pa.)* 8 Phila. 625-627.

As locate.

The terms "lay out the road" and "lay off the road," in the statute concerning roads, declaring that "all roads to be hereafter laid out shall be laid out by a jury of freeholders," and that "all roads laid off under the provisions of this act shall be deemed public roads, and shall be at least twenty feet wide," import that the jury shall not only fix the course of the road as passing particular points, but also designate it after the manner of a survey, by its lines—in other words, lay down the whole ground covered by the road, or specify its width. *Smith v. Eason*, 33 N. C. 94, 97.

Within the meaning of Act June 21, 1849, amending the charter of the city of Hartford, and providing that, whenever the common council of the city shall lay out a drain or common sewer in the city in whole or in part through or across the lands of individuals or corporations, they shall appraise and pay to the owners of such lands the damages thereto caused by taking the right of way, etc., and that notice shall be given to the owners of the laying out and of the damages allowed means only the designation by the common council of the locality of the sewer or drain, and its dimensions and mode of construction, and does not have the technical meaning which is attached to it in statutes

relating to the laying out and construction of highways, where it embraces all that series of acts which are made necessary to the complete establishment of the highway. *Cone v. City of Hartford*, 28 Conn. 363, 365.

"Laying out," as used in Rev. St. c. 39, § 56, providing that a railroad corporation is liable to pay all damages occasioned by laying out and making and maintaining its road, means the filing of the location of the road as required by the statute, and not the making of the road, for the filing of the location of the road is equivalent to the laying out of highways and turnpike roads by the county commissioners. It was by that act that the corporation acquired a right of way over the land. They thereby took a title, and thus they took the land. *Charlestown Branch R. v. Middlesex County Com'rs*, 48 Mass. (7 Metc.) 78, 83.

As opening.

The words "laying out" and "opening," as used in the road laws in reference to the laying out or opening of roads, "are constantly used as equivalent expressions." In *re Opening of Twenty-Eighth St.*, 102 Pa. 140, 146.

"Laying out," as the term is used in speaking of the laying out of a street or public highway, is sometimes used as synonymous with "laying open to common or public use." In *re Magnolia Ave.*, 11 Atl. 405, 408, 117 Pa. 58.

In Laws 1874, c. 604, entitled "An act to provide for the surveying, laying out, and monumenting certain portions of the streets in the state and county of New York, and to provide means therefor," should be construed in a broad and liberal sense, and not restricted to a technical construction. The words "laying out," as so used in the title, include not merely the surveying and mapping, but also the opening of the streets, since the opening is absolutely essential before the completion of the work. In *re Department of Public Parks*, 86 N. Y. 437, 439.

"Lay out," as used in a statute authorizing the filing of a petition to the selectmen to lay out a street, etc., is equivalent to the word "open," as used in a petition to the selectmen, under the statutes, requesting them to open a street, and hence the petition is sufficient. *Winwooski Lumber & Water Power Co. v. Town of Colchester*, 57 Vt. 538, 541.

As surveyed or platted.

"Laid out," as used on the face of a map as laid out by a certain person, is equivalent to "as surveyed" by him, and embraces a reference to the monuments placed on the land by the surveyor. *Flint v. Long*, 41 Pac. 49, 50, 12 Wash. 342.

5 Wds. & P.—8

Gen. St. 1878, c. 68, § 1, limits the homestead exemption to a quantity of land, not exceeding 80 acres, not included in the "laid out or platted portion of any incorporated town, city, or village," or a quantity of land not exceeding in amount one lot, if within the "laid out or platted portion of any incorporated town, city or village" of not over 5,000 inhabitants, or one-half acre if in a town, city, or village of less than 5,000 inhabitants. Held, that the "laid out or platted portion of an incorporated town, city, or village," as used in the statute, refers only to that part which is already laid out and platted for city or urban purposes, and not to land divided into large out or farm lots for rural or agricultural purposes. In *re Smith's Estate*, 53 N. W. 711, 51 Minn. 316.

LAY UP—LAID UP.

In a contract whereby a person agreed to deliver a certain proportion of ice laid up, he at the time having ice houses at two places in which the purchase was made, "laid up" did not apply to ice procured at distant points, and which would cost several times the contract price. *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45, 46.

Ship.

"Laid up," when spoken of a vessel, means that she has reached a port of safety, with the intention of remaining there, and, as used in a policy of marine insurance insuring a vessel while laid up for the winter, includes a vessel while lying in the harbor, whose men are busy in fitting her for winter quarters at that point, and all intention of proceeding further on the voyage or leaving this port of safety had been abandoned. *Clarkson v. Western Assur. Co.*, 37 N. Y. Supp. 53, 57, 92 Hun, 527.

The expression "lay up for overhauling at time charterers designate" was meant, in a contract of charter, to give the charterers the right to designate the time when the vessel should be off pay, so as to suit the exigencies of their business; and the charterers had a right to count on the overhauling at such time as they should designate, and upon a cessation of pay during this period. *The Ceres* (U. S.) 61 Fed. 701, 704.

"Laid up," as used in a policy of insurance on a ship for a year, in which the underwriter stipulated to return a part of the premium if sold or laid up, means a permanent laying up—similar to that which would take place if the ship had been sold; that is, such a laying up as would put a final end to the policy. *Hunter v. Wright*, 10 Barn. & C. 714.

LAYING AT A WHARF.

A vessel is "laying at a wharf," within the meaning of the act fixing the rate of

wharfage on ships for each day that a vessel shall lay at any wharf, when floating in the dock of the wharf, though moored to a different wharf. *Deweese v. Adger* (S. C.) 2 McCord, 105.

LAYING STOCK.

The mechanic's lien law of 1885, giving a mechanic a lien from the time of "laying stock," meant the commencement of labor or placing materials on the premises. *Dunwell v. Bidwell*, 8 Minn. 34, 39 (Gil. 18); (citing *Farmers' Bank v. Winslow*, 3 Minn. 86 [Gil. 43], 74 Am. Dec. 740).

LEAD.

Nix. Dig. 188, § 66 (Rev. p. 250, § 132), provides that if any person shall steal or break, etc., with intent to steal any lead or iron bar, iron rail, etc., or any lock fixed to any building of another, he shall be deemed guilty of a misdemeanor, includes the stealing of a lead water pipe fixed to a paper mill. The word "lead" was used as a noun, and not as an adjective qualifying the word "bar." *State v. Stone*, 30 N. J. Law (1 Vroom) 299, 300.

LEAD MINE.

Under the act of Congress authorizing the President to lease lead mines, he is authorized to execute a lease for smelting lead ores. Digging the ore and smelting it may be included in the same lease, or these operations may be the subject of distinct leases. In every case the lease is within the law, as it is literally a lease of a lead mine, requiring the lessee to carry on all the operations of mining, or one of its important branches or any of them, as shall be deemed best under all the circumstances of the case. *United States v. Gratiot* (U. S.) 26 Fed. Cas. 12, 13.

LEAD.

In a grant conferring a right to "lead" manure, the term is to be construed according to the usual mode of leading; that is, by drawing in a cart. Leading implies drawing in a carriage. *Brunton v. Hall*, 1 Q. B. 792, 795.

LEADING.

In statutes relative to elections, the term "two leading political parties" shall apply to the political parties who cast the highest and next highest number of votes for Governor at the preceding annual election. *Rev. Laws Mass. 1902*, p. 105, c. 11, § 1.

A municipal ordinance providing that certain bonds should not be issued to a rail-

road company until the railroad should be completed to a point of junction with some other railroad leading to Milwaukee and Chicago, includes not only a railroad whose line reaches Milwaukee and Chicago, or terminates at those places, but a railroad connecting either directly, or by way of another railroad, whose line reaches Milwaukee and Chicago, and terminates at those places. *State v. City of Hastings*, 24 Minn. 78, 85.

LEADING QUESTION.

A "leading question" has been defined as one which may be answered "Yes" or "No." This is the most usual definition, although not one most exactly fixing the meaning of the term. The proper significance of the expression is a suggestive question—one which suggests or puts the desired answer in the mouth of the witness. A question addressed to a witness on examination is not necessarily leading because it may be answered "Yes" or "No." A leading question is one that points out the desired answer, and not merely calls for a simple affirmative or negative; and an interrogatory which merely asks a witness if he has any idea as to a fact which is in dispute between the parties, and directs him, if he has such knowledge, to state the extent thereof, is not objectionable on the ground of being a leading question. *Coogler v. Rhodes*, 21 South. 109, 111, 38 Fla. 240, 56 Am. St. Rep. 170; *People v. Mather* (N. Y.) 4 Wend. 229, 247, 21 Am. Dec. 122.

A leading question is one which suggests to the witness the answer which the party desires, or which is so put as to embody a material fact, and to admit of an answer by a simple negative or affirmative, though neither the one nor the other is directly suggested. Such questions are prohibited, because the witness is supposed to be, and often is, favorable to the party who calls him. Under certain peculiar circumstances the rule may be relaxed or altogether abandoned at the discretion of the presiding judge, and from the exercise of his discretion there is ordinarily no right of appeal. One of the circumstances under which a departure from the general rule is allowable is when it becomes important to contradict a witness who has been examined by the opposite party. *Gunter v. Watson*, 49 N. C. 455, 456.

"Ordinarily a leading question is one that by its terms suggests to the witness the answer he is expected to make, and leads him to make such answer." *Harvey v. Osborn*, 55 Ind. 535, 544.

A leading question, says Greenleaf on Evidence, is one which, embodying material facts, admits of an answer by a simple negative or affirmative. Volume 1, § 434. *Best*.

Ev. § 641, says: "It is sometimes said that the test of a leading question is whether an answer to it by 'Yes' or 'No' would be conclusive on the matter in issue, but, although such questions undoubtedly come within the rule, it is by no means limited to them." An interrogatory which can be answered directly in the affirmative or negative enables a witness to answer in the language of the question, and places it in the power of counsel to give an undue effect to the testimony by putting words in the mouth of his witness. Such a question is leading. *Long v. McCauley* (Tex.) 3 S. W. 689, 692. See, also, *Willis v. Quimby*, 31 N. H. 485, 488.

A leading question is usually defined as one which admits of the answer simply in the affirmative or negative, or which, embodying a material fact, suggests the desired answer. It may be gravely doubted whether or not the definition be accurate in either form. Probably there may be questions which admit of an answer either in the affirmative or negative which do not indicate to the witness the expected answer. On the other hand, to an intelligent witness almost any material question contains something in the way of suggestion as to the desired response. But where a question contains a series or group of facts, and admits of a complete answer by a bare affirmation or negation, it is clearly leading. It enables the witness to echo back the language of the examiner, and enables the examiner to lead even an honest witness in such manner as to give to the testimony a false color, and, it may be, to grossly distort it. *San Antonio & A. P. Ry. Co. v. Hammon*, 50 S. W. 123, 124, 92 Tex. 509.

A leading or suggestive question is defined by statute as one which suggests to the witness the answer which the examining party desires. *Idaho Mercantile Co. v. Kallanquin* (Idaho) 66 Pac. 933.

A leading question has been defined to be one which directly suggests the answer which is desired, or which embodies a material fact, and admits of an answer by a simple negative or affirmative, though neither the one nor the other be directly suggested. But if the examination of a witness be to direct his mind with the more expedition to what is material, and if the question propounded relate merely to introductory matter, it should not be excluded, although in form it be leading. *Stringfellow v. State*, 26 Miss. (4 Cushm.) 157, 159, 59 Am. Dec. 247.

A leading question has been defined to be one which directly suggests the answer expected—one which suggests to the witness the answer desired, or which, by embodying a material fact, admits of a conclusive answer by a simple negative or affirmative. In *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18, it was held that an interrogatory

which assumed material facts in controversy was manifestly objectionable, as leading. The court says: "This sort of assumption is one of the most pernicious forms in which the vice of leading questions can make its appearance; its tendency being to induce the witness to adopt the theory of the facts propounded by the examiner, and shape his testimony in a way to lend support to that theory. Even an honest and well-meaning witness will sometimes be drawn by this device into coloring the letter, if not the spirit, of his evidence more highly than the exact truth, so far as his knowledge extends, will warrant." *Franks v. Gress Lumber Co.*, 36 S. E. 314, 111 Ga. 87.

Questions are objectionable, as leading, not only when they directly suggest the answer which is desired, but also when they embody a material fact, and admit of an answer by a simple negative or affirmative, though neither the one nor the other is directly suggested. 2 Phil. Ev. 745. Mr. Greenleaf, after defining leading questions as those which suggest the answer desired, says: "Questions are also objectionable which, embodying a material fact, admit of an answer by a simple negative or affirmative." 1 Greenl. Ev. § 434. See, also, *Rap. Wit. § 241*. In *Nichols v. Dowding*, 1 Starkie 81, Lord Ellenborough says: "If questions are asked to which the answer 'Yes' or 'No' would be conclusive, they would certainly be objectionable." *International & G. N. R. Co. v. Dalwigh*, 51 S. W. 500, 501, 92 Tex. 655.

A leading question is one which suggests to a witness the answer which he is to make. A witness may, however, be examined as to an introductory matter so as to lead his mind to the subject. Hence it is often difficult to decide whether a question propounded is objectionable in law. *Turney v. State*, 16 Miss. (8 Smedes & M.) 104, 117, 47 Am. Dec. 74.

A question which suggests to the witness the answer which the examining party desires is denominated a leading or suggestive question. *Ann. Codes & Sts. Or. 1901, § 847*; *Code Civ. Proc. Cal. 1903, § 2046*.

LEAF TOBACCO.

The term "leaf tobacco," in the trade, is applied to any tobacco that is on the stem, or in its original form with the stem taken out. *United States v. Schroeder* (U. S.) 93 Fed. 448, 450, 35 C. C. A. 376.

LEAGUE.

See "Marine League"; "Mexican League"; "Square League."

A league of land, as used in Texas land grants, contains 4,428 acres. *Hunter v. Morse's Heirs*, 49 Tex. 219, 220.

The term "leagues," as used in a grant of four leagues of land in the province of Texas December 27, 1795, means Spanish leagues, and not American or English leagues. The old legal league, by the laws of Spain, and which was adopted in Mexico, consisted of 5,000 varas; and a vara, in Texas, is equivalent to $33\frac{1}{4}$ English inches; making the league equal to a little more than 2.63 miles, and the square league equal to 4,428.4 acres. *United States v. Perot*, 98 U. S. 428, 429, 25 L. Ed. 251.

LEAKAGE.

As peril of the sea, see "Peril of the Sea."

Stipulations in a bill of lading against liability for damage through dangers of the sea or leakage do not exempt the owner from liability for injury caused by sea water which enters through the deck by reason of its defective condition. *The Nellie Floyd* (U. S.) 116 Fed. 80-82.

A bill of lading stipulating that oil casks should be wet twice a week, and that the carrier should not be accountable for leakage, renders the carrier liable for loss of oil by leakage caused by the casks not being properly wet; the intent being that the wetting should prevent any leakage by shrinking of the casks. *Hunnewell v. Taber* (U. S.) 12 Fed. Cas. 895, 896.

Leakage, as used in a clause in a policy of insurance which provided that the insurers should not be liable for leakage, unless occasioned by stranding or collision, exempts them from liability for all leakage, ordinary or extraordinary, from whatever cause, whether gradual or violent in its operation, except that specified as not within the exemption. *Cory v. Boylston Fire & Marine Ins. Co.*, 107 Mass. 140, 144, 9 Am. Rep. 14.

"Leakage," as used in a bill of lading stating that the carriers were not accountable for leakage on a shipment of brandies in casks, would not exempt them from liability for the breaking of the casks by unskillful stowage, so that the whole wine was lost. The ordinary signification of the word "leakage" is a loss of a part, but not of the whole. *Thomas v. The Morning Glory*, 13 La. Ann. 269, 271, 71 Am. Dec. 509.

The term "leakage," in a bill of lading of a cask of wine, exempting the carrier from liability for leakage, does not free him from loss, other than that resulting from ordinary leakage, and the carrier is liable if the entire contents are so lost. *Brauer v. The Almoner*, 18 La. Ann. 266.

LEAP.

The expression "leap," in an action for injuries to a passenger, in an instruction that

the passenger may not set his life or limbs on the hazard of a leap from a running train, denotes a higher effort and less consideration on the part of the traveler than merely attempting to board a car under way. In the former the jury might discover negligence; in the latter they might not, in view of the circumstances, discover any. *Johnson v. West Chester & P. R. Co.*, 70 Pa. 357, 365.

LEARNED.

"Learned," as used in an allegation that defendant ceased to make certain payments under a contract when it learned that complainant had long before violated its covenants, etc., should be construed to mean when the defendant received information, and not as necessarily importing that degree of certainty which is implied in the assertion of a fact. It means on the receipt of creditable information. *Selbert Cylinder Oil Cup Co. v. Manning* (U. S.) 84 Fed. 538, 540.

In discussing testimony in which a witness stated that, from a certain conversation, he learned that three parties had entered into a partnership, the court says that the testimony was properly stricken out, as not purporting to be the witness' recollection of the conversation, but a conclusion from it. Though the use of the word "learned" might not of itself be decisive, the further language shows that the witness is not trying to give the language of the various parties, but is simply giving the results as he understood them. *Shepard v. Pratt*, 16 Kan. 209, 211.

LEARNED IN THE LAW.

The phrase "learned in the law," as used in Const. art. 5, §§ 10, 25, providing that no person shall be eligible to the office of judge unless he shall be "learned in the law," means that the candidate must be an attorney or a counselor at law. It clearly indicates an intention to prescribe some sort of an educational qualification, and should be given some practical effect; and therefore no one is eligible as a judge who is not, when elected, either admitted or entitled to be admitted, without examination, to practice as an attorney at law. In other words, the fact that the candidate is learned in the law must have been ascertained by a competent tribunal prior to the election. *Jamleson v. Wiggin*, 80 N. W. 137, 138, 12 S. D. 16, 46 L. R. A. 317, 76 Am. St. Rep. 585 (approved in *Howard v. Burns*, 85 N. W. 920, 921).

It is held that an agreement for arbitration, providing that the parties shall each select one arbitrator learned in the law, is not ambiguous or uncertain, and means simply an ordinary arbitration. *State v. Ward*, 58 Tenn. (9 Heisk.) 100, 110; *Nance's Lessee v. Thompson*, 33 Tenn. (1 Sneed) 321, 326.

The use of the phrase "learned in the law," in connection with an instruction as

to probable cause, in an action for malicious prosecution, is held to be error. On this subject the court says: "Though with us it is presumed that one admitted to the practice is learned in the law, yet, as it is not a practical requirement of the rule under consideration, it would be taking a step too far to require a party to insure that his selection was of an attorney learned in the law, and the phrase 'reputable practicing attorney' should be substituted, since the advice of such an attorney will protect the prosecutor, whether in fact he is learned in the law or not." *O'Neal v. McKinna*, 116 Ala. 606, 620, 22 South. 905.

LEARNED PROFESSIONS.

"We speak of the professions of medicine, law, and divinity as learned professions, and also the profession of arms. So, also, the term has come to be applied to other occupations and callings, all of which require learning and special preparation in the acquirement of scientific knowledge and skill necessary to the proper understanding and successful management of such occupations. As an illustration, it is not unusual now to regard the occupation of a civil or mining engineer or an electrician as a professional occupation, because scientific learning and knowledge are essential to the proper understanding of such a calling; but we do not speak of or understand the business of a merchant or blacksmith or carpenter or tailor as falling properly within the designation of professional occupations, or of those who achieved success beyond their fellows of such calling as professional men." *Commonwealth v. Fidler*, 23 Atl. 568, 569, 147 Pa. 288, 15 L. R. A. 205.

Act Cong. March 3, 1903, c. 1012, § 4, 32 Stat. 1214 [U. S. Comp. St. Supp. 1903, p. 173], provides for the deportation of aliens, and declares that the inhibition against the importation of aliens to perform labor or service of any kind, skilled or unskilled, shall not apply to persons belonging to any recognized learned profession. Held, that aliens imported under contract, who were expert accountants, were not members of a recognized learned profession, within the terms of the exception, and were therefore not entitled to entry. *In re Ellis* (U. S.) 124 Fed. 637, 638.

LEASE.

See "Coal Lease"; "Concurrent Lease"; "Gas Lease"; "Mining Lease"; "Oil Lease"; "Parol Lease"; "Running Lease"; "Under Lease"; "Within Lease."

Mineral lease, see "Mining Lease."

"To lease is to let; to farm out; to rent." *Atlanta & C. Air Line Ry. Co. v. Harrison*, 76 Ga. 757, 759.

A grant for use and possession, in consideration of something to be rendered, constitutes a lease of the thing to be possessed. *O'Donnell v. Luskin* (Pa.) 12 Montg. Co. Law Rep'r, 109, 110.

A lease is a contract for the possession and profits of lands and tenements, either for life or a certain term of years, or during the pleasure of the parties. *Edwards v. Noel*, 88 Mo. App. 434, 440.

A lease is a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own, in consideration of a certain annual or stated rent or other recompense. *Gray v. Lafayette County*, 27 N. W. 311, 312, 65 Wis. 567.

A lease imports a thing let, and a subject-matter susceptible of grant, no less than capable parties, is indispensable to a demise. *Sommer v. Bavarian Star Brewing Co.*, 28 N. Y. Supp. 571, 8 Misc. Rep. 268.

A lease is defined to be a contract for the possession and profits of lands and tenements on one side, and a recompense of rent or other income on the other. *Sawyer v. Hansen*, 24 Me. (11 Shep.) 542, 545; *Becker v. Becker*, 43 N. Y. Supp. 17, 22, 13 App. Div. 342; *Dolittle v. Eddy* (N. Y.) 7 Barb. 74, 78; *Voorhees v. Presbyterian Church* (N. Y.) 5 How. Prac. 58, 71. A "lease" is a species of contract for the possession and profits of lands and tenements either for life, or for a certain term of years, or during the pleasure of the parties. *Paul v. Cragmaz*, 59 Pac. 857, 859, 25 Nev. 293, 47 L. R. A. 540; *Pelton v. Minah Con. Min. Co.*, 28 Pac. 310, 311, 11 Mont. 281; *Heywood v. Fulmer*, 32 N. E. 574, 575, 158 Ind. 658, 18 L. R. A. 491; *Mack v. Patchin* (N. Y.) 1 Sheld. 67, 72; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 78, 25 L. Ed. 950; *United States v. Gratiot*, 39 U. S. (14 Pet.) 526, 538, 10 L. Ed. 573; *Kunkle v. Philadelphia Rifle Club* (Pa.) 10 Phila. 52, 53.

A lease is defined by Rev. Civ. Code La. art. 2669 (2639) to be a contract by which one party gives to the other the enjoyment of a thing at a fixed price. *Viterbo v. Friedlander*, 7 Sup. Ct. 962, 967, 120 U. S. 707, 30 L. Ed. 776.

When one grants to another an estate for years out of his own estate, with reversion to himself, it is usually termed a "lease." It may be confined to a particular interest in lands, such as mining or agriculture, in which event no other interest passes. Civ. Code Ga. 1895, § 3114.

A lease is defined by the Code as "a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to another the enjoyment of a thing at a fixed price." The contract embodies in itself reciprocal rights and obligations—

the right of enjoyment and the obligation of paying the rent—which, so far as governed by the contract alone, coexist and adhere to each other. Hence it has been repeatedly decided that the sale of the unexpired term of a lease, without qualification, is a sale of the lease for such term, as an entirety, including its obligations as well as its rights, or, in the language of the court, that the “bid for the lease in such a case is a premium which the bidder is willing to give for the transfer of the lease to himself, with all its obligations, as well as all the rights there-to attached, from the moment of the adjudication.” *Walker v. Dohan*, 2 South. 381, 382, 39 La. Ann. 743.

A lease is a contract for the possession and profits of land and tenements, on the one side, and a recompense of rent or other income on the other, or it is a conveyance to a person for life or years or at will, in consideration of the return of rent or other recompense. The person selling the land is called the “landlord,” and the party to whom the lease is made, the “tenant.” *Jackson v. Harson* (N. Y.) 7 Cow. 323, 326, 17 Am. Dec. 517; *Branch v. Doane*, 17 Conn. 402, 411.

A lease is a contract by which one person divests himself, and another takes the possession of, lands or chattels for a term, whether long or short. *Wood, Landl. & Ten.* § 203. A lease at the common law is a grant of assurance of a present or future interest for life or for years or at will in lands or other property of a demisable nature, a reversion being left in the party from whom the grant of assurance proceeds. *Platt, Leas.* 1. A lease is a species of contract for the possession of profits in lands and tenements either for life, or for a certain number of years, or during the pleasure of the parties. No particular form of expression or technical words are necessary to constitute a lease, but whatever expressions explain the intention of the parties to be that one shall divest himself of the possession of his property, and the other shall take it, for a certain space of time, are sufficient, and will amount to a lease for years as effectually as if the most proper and permanent form of words had been made use of for that purpose. *Lacey v. Newcomb*, 63 N. W. 704, 707, 95 Iowa, 287; *Sawyer v. Hanson*, 24 Me. (11 Shep.) 542, 545.

A lease is defined to be a species of contract for the possession and profits of lands and tenements either for life, or during the pleasure of the parties; a contract by which one person divests himself of, and another takes possession of, lands or chattels for a term, whether long or short; a conveyance of any lands or tenements made for life, for years, or at will, but always for a less time than the lessor has in the

premises. *Badger Lumber Co. v. Malone*, 54 Pac. 692, 693, 8 Kan. App. 121.

Where a conveyance of an estate in land subordinate to that of grantor is made upon a valid consideration and for a definite term, the instrument making the conveyance is a lease. In consideration of \$400 paid by a railroad company, a landowner granted it the right to construct and maintain for one year a Y on his land. The agreement provided that, if the company desired to permanently maintain the Y, it could at any time before the end of the year commence condemnation proceedings, and have the damages assessed as at the date of the agreement, and that the \$400 should be deducted therefrom. The company left the track on the land three months beyond the year, using it occasionally for storing cars, and then removed it, with the consent of the landowner. The land was uninclosed timber land, of little value. Held, that the agreement was a lease, and that by holding over the company became bound to pay as rent for the second year the same rent as for the first year. *New York, C. & S. L. Ry. Co. v. Randall*, 26 N. E. 122, 123, 102 Ind. 453.

A lease, when we mean thereby the instrument, is, in legal language, an indenture of lease or a deed, and therefore authors treat of leases under the common or general title of deeds. But in common parlance, where it is said “a man has a lease for property,” nothing more is meant than that he has a term or an estate for years in the premises, which may be by deed or a writing not under seal. The former is of itself a lease; the latter, only written evidence of one; and this distinction will be found in several of the cases where the question has been whether the instrument did or did not require a stamp. *Mayberry v. Johnson*, 15 N. J. Law (3 J. S. Green) 116, 121.

The term “lease” is used in Rev. St. § 4106, which required a lease of any estate or interest in other property to be signed by the lessor, in its legal sense of an instrument demising real property for a limited period upon a reserved rental, executed in conformity with the general law of the subject. *Langmede v. Weaver*, 60 N. E. 992, 995, 65 Ohio St. 17.

As more than annual rental.

The word “lease,” as used in Code, c. 58, § 37, authorizing the committee of an insane person, if necessary, to lease his property to the extent necessary for his support, does not refer to the annual rental which is included in the general powers of the committee, but to some act extending to and affecting the corpus of the property, such as mining for coal or other minerals, cutting timber, or doing other acts which if done

without authority would be considered waste or destruction of the freehold. *Johnson v. Chapman*, 28 S. E. 744, 746, 43 W. Va. 639.

Assignment distinguished.

See "Assignment."

A lease is properly a conveyance of any land or tenement, made for life or years or at will, but always for a less time than the lessor hath in the premises, for, if it be for the whole interest, it is more properly an assignment than a lease. *McKee v. Howe*, 17 Colo. 538, 541, 81 Pac. 115, 116, (citing 1 Bl. Comm. 316).

A lease is defined to be a conveyance by way of a demise awarded for a less term than the party conveying has in the premises. Mr. Taylor says it is essential to the lease that some reversionary interest in the lease be left in the lessor, for, if by an instrument purporting to be a demise he parts with the whole term, it amounts to an assignment. *Craig v. Summers*, 49 N. W. 742, 743, 47 Minn. 189, 15 L. R. A. 236.

As bailment for use.

The word "lease" has by common use come to be applied to certain kinds of contracts, sometimes amounting to a conditional sale, and at other times to a bailment for use, under which goods are delivered by one person to another. We naturally infer from a record which speaks of goods leased—there being no other explanatory averment—that the bailee has the right to possession until the completion of the term specified in the contract, or until the happening of the contingency which by the terms of the contract entitles the bailor to take possession. *Cadwallader v. Wagner* (Pa.) 7 Kulp, 463, 466.

As chattel mortgage.

See "Chattel Mortgage."

Consolidation.

The term "lease," as used in connection with a transaction between one railroad and another, whether for a longer or a shorter period, implies the continued existence of the lessor, with all its powers and functions, and all the rights incident to its creation, and it would be a gross misapplication of terms to hold that a lease or contract for use by one railroad with another is a merger or consolidation of the two roads. *State v. Montana R. Co.*, 53 Pac. 623, 631, 21 Mont. 221, 45 L. R. A. 271.

As conveyance.

A lease is a conveyance of real estate. *State v. Morrison*, 52 Pac. 228, 18 Wash. 664; *Shimer v. Inhabitants of Town of Phillipsburg*, 83 Atl. 852, 58 N. J. Law (28 Vroom) 506; *Crouse v. Mitchell*, 90 N. W. 32, 33, 130 Mich. 347, 97 Am. St. Rep. 479.

Contra, see *In re Tuohy's Estate*, 58 Pac. 722, 724, 23 Mont. 305; *Clark v. Hyatt*, 55 N. Y. Super. Ct. (23 Jones & S.) 98, 105.

A lease is a sale and conveyance of the property leased, which only differs from what is commonly called a "deed" in being limited to a term certain, and leaving a reversionary interest in the grantor. *Wien v. Simpson* (Pa.) 2 Phila. 158.

A lease is personal property. It bargains away a temporary possession, and does not dispose of any fee or title. A lease is held, therefore, not to be a conveyance of property within a statute prohibiting conveyances of realty by a married woman without the joinder of her husband as grantor. *Perkins v. Morse*, 2 Atl. 130, 131, 78 Me. 17, 57 Am. Rep. 780; *Heal v. Niagara Oil Co.*, 50 N. E. 482, 150 Ind. 483.

A lease from a married woman is a grant or instrument, within the meaning of Civ. Code, § 1093, providing that no estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in a certain manner. *Carlton v. Williams*, 19 Pac. 185, 186, 77 Cal. 80, 11 Am. St. Rep. 243.

An instrument by which, for a consideration received, all at one time, the grantors leased certain land to the grantee, mentioning no time during which the estate is to continue, and reserving, "so long as this lease shall continue, the right to any logs or pipes in the same leased premises, and certain other rights connected therewith, to have and to hold the same to the grantee, his heirs and assigns, under the restrictions and reservations aforesaid, so long as grantor shall keep pipes in his land as aforesaid, and no longer," conveys a base fee. *Jamalca Pond Aqueduct Corp. v. Chandler*, 91 Mass. (9 Allen) 159, 168.

A lease is a contract or agreement for the possession and profits of lands and tenements. Strictly speaking, it is not a term applicable to chattels which are not attached to or issue out of realty. A lease is a conveyance or grant. The use of the word in an instrument by which the grantor leased to the grantee all pine timber growing on certain lands was held to render the agreement operative to convey growing timber, as growing timber is a part of the realty, and cannot be sold or conveyed to another except by an instrument in writing. *Milliken v. Faulk*, 20 South. 594, 595, 111 Ala. 658.

A lease is a contract for the possession and profits of land by the lessee, and recompense of rent or increase to the lessor, and is a grant of an estate in the land.

Stinson v. Hardy, 41 Pac. 116, 118, 27 Or. 684.

A lease is a conveyance by way of demise always for a less term than the party conveying has in the premises. It is essential to a lease that some reversionary interest be left in the lessor, for if, by an instrument purporting to be a demise, he parts with the whole term, it will amount to an assignment of the term. *Craig v. Summers*, 49 N. W. 742, 743, 47 Minn. 189, 15 L. R. A. 236.

As a deed.

See "Deed."

Demise distinguished.

The general signification of the word "demise" is that it is a conveyance in fee for life or for years. It denotes something more than a mere letting or a lease—as, for instance, a grant. It would seem that it means more to the lessee than a mere letting by the landlord, or the mere taking by the lessee, generally embraced in the mere terms "to lease" or "to let." These latter words, it would appear, can have relation only to the mere term. A "demise" embraces a fee, and it seems particularly designed for use to import to the agreement between a landlord and tenant implied covenants on the part of the lessor of good right and title to make the lease, and an implied covenant of quiet enjoyment. *Mershon v. Williams*, 44 Atl. 211, 214, 63 N. J. Law, 398.

As affected by designation.

A contract by the municipal authorities of a town that, if a party will erect a market house for the town, he shall, as compensation therefor, have the occupancy thereof for 12 years, with the exclusive right to keep the same as a town market, was not a lease, and was not made such by being referred to subsequently in writing by the parties as a lease. *City of Brookhaven v. Bagget*, 61 Miss. 383, 384.

The mere use of technical words or phrases which have a definite legal signification cannot be allowed to defeat the contrary intention of the parties, if that intention be manifest from the whole contract. *Caldwell v. Fulton*, 31 Pa. (7 Casey) 475, 478, 72 Am. Dec. 760; *Funk v. Haldeman*, 53 Pa. (3 P. F. Smith) 229. So that the words "demise," "lease," "mine," "let," "lessors," and "lessees," and like words specially appropriate to a contract between the owner and a tenant for years, have no bearing if the contract is in fact not a lease. *Lehigh & Wilksbarre Coal Co. v. Wright*, 35 Atl. 919, 920, 177 Pa. 387. See, also, *Dela-ware, L. & W. R. Co. v. Sanderson*, 1 Atl. 394, 396, 109 Pa. 583, 58 Am. Rep. 743. The form of the instrument is not decisive of its

character as a lease. *Heywood v. Fulmer*, 32 N. E. 574, 575, 158 Ind. 658, 18 L. R. A. 491.

No particular words are necessary to create a lease, and whatever is sufficient to explain the intent of the parties that one shall divest himself of the possession, and the other come into it, for a determinate time, amounts to a lease. *Williams v. Miller*, 9 Pac. 166, 168, 68 Cal. 290.

As grant.

See "Grant."

As both granting and receiving estate.

The word "leased" "may be used in two senses. It is said that a landlord leased his lands to his tenant, and with almost equal propriety it may be said that the tenant leased an estate from his landlord." *Zink v. Grant*, 25 Ohio St. 352, 354.

"Leasing," as used in Rev. St. Ill. 1874, c. 114, § 34, providing that all railroad companies incorporated under the laws of the state were empowered to make contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof, includes making as well as taking leases thereof. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 12 Sup. Ct. 953, 955, 145 U. S. 393, 36 L. Ed. 748.

"Leasing," as used in Rev. St. § 1038, subd. 3, providing that the leasing of the parsonages of local churches or districts shall not render them liable to taxation, in its approved and legal signification, refers more especially to an act of the lessor. A lease is a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own, in consideration of a certain annual or stated rent or other recompense. It is hardly accurate to say that the act of leasing may be done by the lessee. It is not of the same meaning as "rented," for the word "rented" refers as well to the act of a lessee as to that of a lessor. The lessor rents land to the lessee. The lessee rents land of the lessor. *Gray v. Lafayette County*, 27 N. W. 311, 312, 65 Wis. 567.

Incorporeal hereditaments.

Anything corporeal or incorporeal lying in delivery or in grant may be the subject-matter of a lease, and therefore not only lands and houses, but commons, ways, fisheries, franchises, estovers, annuities, rent charges, and all other incorporeal hereditaments are included in the common-law rule. *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 78, 25 L. Ed. 950.

As incumbrance.

See "Incumbrance (On Title)."

License distinguished.

See, also, "License."

A mere license to occupy, use, or take the profits of land is in the nature of a lease. An executory contract for the purchase of land, giving to the purchaser a right to enter and possess until default in the payment of the purchase money, without any fixed period, and without any compensation being made for the use, is only a license, and not a lease. It does not have one essential quality of a lease, to wit, a stipulation for compensation to the owner. *Dolittle v. Eddy* (N. Y.) 7 Barb. 74, 78.

A written agreement by the owner of coal land, giving another the exclusive right to mine coal thereon for a term of years, is not a mere license, but a lease, which is assignable. *Consolidated Coal Co. v. Peers*, 37 N. E. 937, 938, 150 Ill. 344.

An instrument which conveys the exclusive right to enter upon lands, and to dig and mine phosphate, rocks, and other minerals, and to carry them away and sell for his own use, for a term of years, on certain royalty, is a lease, and not a license to mine. *Malcomson v. Wappoo Mills* (U. S.) 85 Fed. 907, 908.

A contract in writing for the use and possession of a tract of land, and the right to cut and remove a part of the timber growing thereon, is a lease, and not a license. *Crane v. Patton*, 21 S. W. 466, 57 Ark. 340.

Where the owner of land, for a valuable consideration, grants the land described to the other party to the contract for the purpose and with the exclusive right of drilling and operating for oil and gas for a certain number of years, the instrument is more than a mere license. It is a lease of the land for the purpose and period limited therein. *Harris v. Ohio Oil Co.*, 48 N. E. 502, 506, 57 Ohio St. 118.

The owners of land granted to another the right to enter thereon to test and search for minerals and oil, and to mine and quarry thereon; the second party to have the right to erect buildings and machinery for work in mining, and to pay \$25 per year, if minerals were not mined, and to pay a royalty on all ores shipped. The instrument was termed therein a "lease," and was to continue for 99 years. Held, that it was a lease, and not a revocable license. *Young v. Ellis*, 91 Va. 297, 21 S. E. 480.

The form of the instrument is not decisive of its character as a lease. So it is held that a writing which recites the receipt of a certain sum "in payment of sand bar * * * [describing same] for the year 1890," and further reciting, "This is for the exclusive right to all gravel and sand for the year above named, and excluding all oth-

er parties from said premises," is a lease, and not a license. *Heywood v. Fulmer*, 32 N. E. 574, 575, 158 Ind. 658, 18 L. R. A. 491.

A license, pure and simple, is a mere personal privilege, extending only to the person to whom it was given, and it cannot be granted over even when money has been paid for it. It is revocable at law at pleasure of the licensor. The death of either of the parties will terminate it; and, when it affects land, a conveyance of them will revoke it. A license to work a mine simply confers a right of property in the minerals, while they have been severed from the freehold, while a lease is an actual interest in the thing demised. *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. (5 Stew.) 248, 253.

Mining license.

The term "leasehold interest," wherever used in the act relating to the selling of leasehold interests in lands on execution, shall be deemed to include mining licenses or mining ore or minerals. Tenancies at will shall not be subject to the provisions of the act. *Comp. Laws Mich.* 1897, § 9232.

Parol contract.

By statute the term "lease" includes a verbal letting. *People v. Chase*, 46 N. E. 454, 455, 165 Ill. 527, 36 L. R. A. 105.

As personal property.

See "Personal Property."

Implied covenant for quiet enjoyment.

Every lease contains an implied covenant of quiet enjoyment. *Ross v. Dysart*, 33 Pa. (9 Casey) 452, 453.

The use of the word "lease" in a demise for a term of years implies a covenant for quiet enjoyment during the term. *Maule v. Ashmead*, 20 Pa. (8 Harris) 482, 484.

The use of the word "lease" in an instrument of lease imports a covenant for quiet enjoyment, as well as the word "grant" or "demise." An implied covenant arises not from the use of particular or fixed terms, such as "demise," but from the word "lease," or, otherwise expressed, from the use of words of demise in a lease. *Hamilton v. Wright's Adm'r*, 28 Mo. 199, 206.

Rent.

A lease necessarily implies the relation of landlord and tenant. The reception of rent is the fundamental idea connected with the lease, and the relation of landlord and tenant must be established in order that the landlord may receive the rent, may enforce covenants, may re-enter for conditions broken, and grant new terms on default by the tenant in the payment of the rent. *Becker v. Becker*, 43 N. Y. Supp. 17, 22, 13 App. Div. 342.

A lease for years is a contract between the lessee and the lessor by which the lessor contracts to grant the possession and enjoyment of land or other hereditaments of a demisable nature for a period of years certain, and in most cases the lessee agrees to render to the lessor a rent in money or other kind of payment at the end of stated periods of a year or more during the term. Rent is not essential to the contract, because, from favor or for valuable consideration given to the lessor at the time of the making of the lease, a lease beneficial in its nature to the lessee may be made without reserving any rent. *State v. Page* (S. C.) 1 Speers, 408, 428, 40 Am. Dec. 608. But the lessee must enter into possession, to acquire an estate in the land. Until entry by the lessee, the lessor remains in possession, and cannot be said to have deprived the lessee of that which he never had. *Wilcox v. Bostick*, 35 S. E. 496, 497, 57 S. C. 151.

A written statement to the effect that the person signing it has taken possession of certain land, which he is to hold for S., free of rent, "until such time as he may want it," is a lease. *Allen v. Koepsel*, 14 S. W. 151, 77 Tex. 505.

Sale distinguished.

See, also, "Sale."

An agreement in which A. leases a certain tract of land to B., and agrees to give B. the exclusive right to mine and sell all of the coal in the tract—B. agreeing to open the mines, build chutes, etc., and to pay a royalty of a certain amount per ton—is not a lease, but is a sale of the coal. *Appeal of Duff* (Pa.) 14 Atl. 364, 367.

Leases are generally for a term of years. If for a long term, as a hundred years, though of greater value than if for the life of the grantee, the estate is still inferior. The entire body of coal under a tract of land may be embraced in a lease, and the term be so long that in all probability the lessee will mine the whole of the coal. Nevertheless the term of years is but a chattel or interest in the land. The lease of a mine for a term of years or for life involves the possibility, if not the probability, of a reversion. But where by the provisions of a contract the possession of a certain lease of a mine was to continue until all the coal was mined, and the money to be paid, though called by various terms, was in reality a certain price per ton, and the grantee agreed to remove all the coal beneath the surface, and to take no less than a named quantity each year, there was an actual sale of the coal, rather than a lease, though the operative word of the grant was "lease." *Delaware, L. & W. R. Co. v. Sanderson*, 1 Atl. 394, 396, 109 Pa. 583, 58 Am. Rep. 743.

An instrument relating to coal, the right to mine and take which is exclusively in the

grantor, and for which the grantee agrees either to mine all the coal, or to pay for it if not mined, is in legal effect a grant of the coal as land. Under the decisions of the courts of Pennsylvania, for the purposes of these rules, the word "lease" is deemed an apt word of conveyance. *Genet v. Delaware & H. Canal Co.*, 35 N. Y. Supp. 147, 154, 13 Misc. Rep. 409.

"Lease," as used in Act March 27, 1801, § 4, providing for the incorporation of religious societies, and authorizing their trustees to purchase and hold real and personal estate, and to demise, lease, and improve the same for the use of the congregation, has reference to a lease which is a contract for the possession and profits of lands and tenements, on the one side, and a recompense of rent and income, on the other, or a conveyance of lands to one for life or years or at will, in consideration of a rent or other recompense. The words of conveyance appropriate in a lease are "demise, lease, and farm let." These words are technical words, well understood, and are the most proper that can be used in making a lease. It means clearly a lease for years in consideration of rent, and does not include an absolute sale of a pew in a church. *Voorhees v. Presbyterian Church of Amsterdam* (N. Y.) 5 How. Prac. 58, 62.

A lease for years is a contract for the use of lands and tenements; and although it may be for a full consideration paid down, and reserve no rent to be paid in future, yet it contemplates a temporary use of the thing leased, whether it be a farm or a mine, and a return of the possession thereof to the owner or reversioner. *French v. Brewer* (U. S.) 9 Fed. Cas. 774, 776.

Sharing contract.

Letting land upon shares for a single crop does not amount to a lease of the land, and the owner alone can bring trespass. *Bradish v. Schenck* (N. Y.) 8 Johns. 151.

The term "lease" correctly describes an agreement by a landowner with another by which the latter is to enter and dig for ore, build houses, etc., and to pay as compensation therefor 50 cents a ton for every ton of ore. *Moore v. Miller*, 8 Pa. (8 Barr) 272, 283.

A contract to operate a mine and make certain repairs for one year, in consideration of receiving 80 per cent. of the net returns from the ore, was construed to be a mining lease. *Pelton v. Minah Con. Min. Co.*, 28 Pac. 310, 311, 11 Mont. 281.

An agreement whereby a party had the exclusive right to mine coal under certain land for 20 years, unless the coal sooner gave out, and to use in connection with the mines five acres of the surface of the land, to erect buildings thereon, and to build and

operate railroads and flow water thereover, for a certain royalty per ton of the coal mined, not to fall below a fixed amount per year, payable as rent for all privileges granted, was a lease, creating the relation of landlord and tenant, within Code, § 2017, giving the landlord a lien for rent; the royalty being equivalent to rent. *Lacey v. Newcomb*, 63 N. W. 704, 707, 95 Iowa, 287.

A lease is defined as a contract for the possession and profits of land, on one side, and the recompense or rent or other income, on the other. Or it is a conveyance of lands and tenements to a person for life, for years, or at will, in consideration of a return of rent or other recompense. An agreement in writing by which one party leases to another, for a specified term, certain land, and the second party agrees to cultivate and plant the land at his own expense, and deliver one-sixth of the crops to the first party, is a lease, and not a contract for the services of the second party. *Walls v. Preston*, 25 Cal. 59, 60, 66.

LEASEHOLD.

Rev. St. U. S. § 2116, prohibits the sale or negotiation, without the authority of the United States, of any Indian land, and, in another clause, prohibits the making of a contract for the "title or purchase of any land." Held, that a leasehold interest for grazing purposes, merely, could not be considered as a title, within such subsequent clause, since, in common parlance, the word "title" means the full and absolute title to land. *United States v. Hunter* (U. S.) 21 Fed. 615, 617.

When the owner of property makes a lease to a tenant, he conveys the estate in the property known as a leasehold estate, and such estate is, in law, entirely separate and distinct from the estate that the landlord retains. *Stubbings v. Village of Evanston*, 26 N. E. 577, 136 Ill. 37, 11 L. R. A. 839, 20 Am. St. Rep. 300.

Within the condition of a policy providing that if the interest be a leasehold interest, or other interest not absolute, it shall be stated, the term "leasehold," *ex vi termini*, embraced a qualified interest, or other interest not absolute, although not so particularly described by the general term used, and must be understood as referring to some similar qualified interest as the leasehold. The language employed in the condition recognized the distinction between leasehold interests as distinguished from those that are absolute or unlimited. The term "not absolute" cannot mean a fee-simple interest in the property. *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 438, 3 Am. Rep. 149.

The right to occupy land for the purpose of producing oil so long as the same is found in paying quantities is a leasehold estate.

Every estate which must expire at a period certain and prefixed is, in legal contemplation, an estate for years. It is not essential that the precise date of its termination should be predetermined. A lease of land, the words of which do not serve to fix its determination either by date, event, or subsequent circumstances, is an estate for life, and a freehold, as distinguished from the leasehold. The failure to find oil in paying quantities, whenever such failure occurs, is the event that marks the determination of the lease in question. *Harley v. O'Donnell*, 9 Pa. Co. Ct. R. 56, 57.

Leasehold interests are chattels real, and not mere chattels. So that a mortgage of a leasehold is a conveyance of a chattel real. *State Trust Co. v. Casino Co.*, 46 N. Y. Supp. 492, 493, 19 App. Div. 344.

A leasehold interest from year to year is not real estate, within the meaning of a statute providing how all the real estate of a debtor may be sold under execution for the payment of a judgment against him, but is a chattel real, to be sold as personal property. *Buhl v. Kenyon*, 11 Mich. 249, 251, 83 Am. Dec. 738.

As land or interest therein.

See "Interest (In Property)"; "Land."

As property.

See "Personal Property"; "Property"; "Real Property."

LEASING COMPANY.

"Leasing company," as used in Code, § 3369, authorizing the perfecting of service against a railroad company which has leased its line by sending a letter to the president of the leasing company, means "the company which has let, farmed out, or rented its property to another." *Atlanta & C. Air Line Ry. Co. v. Harrison*, 76 Ga. 757, 759.

LEAST.

See "At Least."

LEATHER.

See "Patent Leather."

Where a note is payable in leather on a certain day, and the maker turns out leather unsealed, which by law is required to be sealed before it is offered for sale, or if he turns out leather which has been sealed as bad leather, it is not a payment as required by the note; the holder having a right to require that it shall be of merchantable quality. *Elkins v. Parkhurst*, 17 Vt. 105, 106.

Pieces of leather cut uniformly 28 inches wide, and from 32 to 36 inches in length, hav-

ing on one side an embossed pattern in silver and other colors, and designed to be cut and used in making dress trimmings and other fancy articles, are dutiable, under Tariff Act 1894, par. 340, as leather, and not, under certain other paragraphs of the bill, as skins, as, in the absence of any evidence of commercial designation, it cannot be assumed that articles which have not only been tanned, dressed, and finished, but have also been changed from the distinctive shape which is suggestive of the skin of the animal from which they are taken, are to be classified as skins. *United States v. Naday* (U. S.) 98 Fed. 421, 422, 39 C. C. A. 124.

LEAVE.

See, also, "Left."

See "Absence without Leave"; "Ore Leave."

See "Die Leaving Issue"; "Die Leaving No Descendants"; "Die without Leaving Issue"; "Die without Leaving Children."

Absque hoc with leave, see "With Leave."

As commit.

One of the definitions of the word "leave" is to confine, commit, or revert. Cent. Dict. And hence, as used in a will stating that the testator made no selection of an executor, but leaves it to the judge of probate, the judge of probate has power to appoint an executor. *Brown v. Just*, 77 N. W. 263, 264, 118 Mich. 678.

As deliver.

The statute which requires that a summons be served by delivering a copy to the defendant is shown to have been complied with by a return showing that the service was made by leaving a copy of the summons with him. The two forms of expression are equivalent, and the return shows the required service by delivering a copy of the summons to defendant. *Buck v. Buck*, 60 Ill. 105, 106.

A declaration alleged that plaintiff, who was defendant's tenant, agreed to erect an engine on the leased premises, and leave the same thereon at the expiration of the term, in consideration of defendant's promise to buy it. Held, that defendant might treat the word "leave" as not including the delivery of possession of the premises at the expiration of the term, and hence a plea alleging that the promise to buy the engine was made in consideration of plaintiff's promise to surrender possession, and that possession had not been surrendered, was not an argumentative denial, but a plea in confession and avoidance. *Weedon v. Woodbridge*, 13 Adol. & El. 462, 467, 13 Jur. 627, 629.

As depart or remove.

"Leave the state," as used in Code Prac. § 212, which authorizes bail to be required when a debtor is about to leave the state, even for a limited time, etc., is synonymous with "remove from the state," as used in section 214 of the Code, which requires the creditor to swear that he verily believes that the defendant is about to remove from the state. *Flurance v. Camp*, 5 La. 280, 281.

Under Act 1852, concerning the arrest of persons in actions on contract (Laws 1852, No. 3, p. 4), in order to warrant the issue of a capias against a citizen of another of the United States it is not necessary that the affidavit filed by the plaintiff with the authority issuing the writ should set forth affiant's belief that such person is about to abscond or remove from this state, as it is sufficient if it alleges a belief that he is about to leave the state. "To leave the state" expresses exactly the common as well as the original legal idea of the open and public departure of a person whose residence is in some other state. When the Legislature used in the act of 1852 the word "abscond" or "remove" to express that same idea, we think the affidavit is not obnoxious to unfavorable criticism for using the very word that embraces the precise meaning of the Legislature without the aid of a judicial glossary. *McLeran v. Shearer*, 33 Vt. 230, 232.

Ky. St. § 2133, providing that, if a wife voluntarily leave her husband and live in adultery, she shall forfeit all interest in his estate, does not necessarily mean an actual departure from the husband's abode, or contemplate a change in the location of the habitat, but a wife living in adultery in the husband's home during his enforced absence is to be regarded as having left her husband, within the meaning of the statute. *McQuinn v. McQuinn*, 61 S. W. 358, 359, 110 Ky. 321.

Existence of thing left implied.

"Left a will," as used in a petition alleging that "said deceased, at the time of his death, left a will," is equivalent to saying that the will was in existence at that time, so that the petition is sufficient. *Harris v. Harris*, 39 Pac. 148, 149, 150, 10 Wash. 555.

As getting off a train.

A life policy providing that there should be no liability for deaths from injuries received while "entering, attempting to enter, leaving, or attempting to leave" a public conveyance, means the act of getting on or getting off the train, or attempting to do so, and in passing from one part of the conveyance to another. *Sawtelle v. Railway Pass. Assur. Co.* (U. S.) 21 Fed. Cas. 555, 556.

As give.

The words "leave" and "give," especially when used in a will, without qualifying or

restraining words, are interchangeable terms, and mean one and the same thing. *Carr v. Effinger*, 73 Va. 197, 203.

A will declaring that "I leave all my property in the hands of my wife to manage," etc., and "give her power to sell other land if necessary to pay debts," etc., should not be construed to mean that the testator gave, devised, and bequeathed unto his wife all his property or trust estate, but that upon the testator's death his estate vested in his heirs, subject to the power of the wife to manage it for the benefit of heirs and the children. *Allen v. McFarland*, 37 N. E. 1006, 1008, 150 Ill. 455.

"Leave," as used in a will providing, "I leave to my beloved wife," etc., means "give." *Campbell v. Beaumont*, 91 N. Y. 464, 467.

As giving power of disposal.

"Leave," as used in a will whereby testator devised his freehold estate to his wife during her natural life, "and also at her disposal afterwards to leave it to whom she pleases," gives such wife only the power to leave it by will, and therefore a disposition of it by feoffment in her lifetime was void. *Thorley v. Thorley*, 10 East, 438, 445.

A will giving the testator's wife an estate for life, and providing that it shall be at her disposal afterwards, to leave to whomsoever she pleases, should be construed to mean to dispose of it "by a testamentary disposition." *Wilks v. Burns*, 60 Md. 64, 73.

In construing a will in which testator devised and bequeathed the use of his real estate during life, and his personal estate absolutely, to his wife, stating his full confidence that she would leave the surplus to be divided at her decease justly among testator's children, it was said that the words "leave to be divided" give a clear right of disposal by will. Such is *Doe v. Thorley*, 10 East, 483, in which the words were "also at her disposal afterwards, to leave it to whom she pleased." The question there was on the construction of a power. Here it is on the existence of it. But the question would have been an immaterial one, had there been no power to be construed. In one aspect, that case is not to be reconciled to the anonymous case in 3 Leon. 71, and to one or two others; but in those, also, the existence of a power from a limitation for the life of the first taker, followed by the words, "after his death," or "then to be at his disposal," was taken for granted, the question having regard not to that, but to the instrument of execution. *Appeal of McKonkey*, 13 Pa. (1 Harris) 253, 258.

As have.

As used in a will giving a residuary estate to trustees to pay the dividends to A. for life, and, in case he should leave a child

or children, in trust for such child or children, with a devise over to third parties, the word "leave" was not to be construed as "have"; and A. having had one child, who died in the father's lifetime, leaving a widow and child surviving him, the devise did not go to the widow and child, but to those claiming under the gift over. *Bythesea v. Bythesea*, 27 Eng. Law & Eq. 402, 405.

The word "leave," in a will providing that testator gives, devises, and bequeaths his whole estate to the children whom his brother may leave, should be construed to mean "have." *Du Bois v. Ray*, 35 N. Y. 162, 165.

Testator's will declared: "In case I have no child or children living at the time of my death, or no child born after my death, or in case such child or children should die without lawful issue, and thus I should have no lineal descendants, I give, devise and bequeath my whole estate to the children whom my brother R. and sister K. may leave, or the child or children of any who may die before me, to be divided equally and in equal parts among such children per capita." Held, that the words "may leave" should be construed to mean "may have." *Du Bois v. Ray*, 35 N. Y. 162, 165.

As leave of court.

"Leave," as used in a criminal recognition that the defendant should not depart without leave, means leave of the court, and does not mean that the defendant will not escape from the custody of the sheriff. *Jackson v. State*, 34 Pac. 744, 745, 52 Kan. 249.

As owning.

"Leaving," as used in a petition for the sale of real estate of a decedent, stating that deceased died at a certain time, leaving as his estate certain real property, etc., should be construed as synonymous with the word "owning." *McNitt v. Turner*, 83 U. S. (16 Wall.) 352, 363, 21 L. Ed. 841.

Permanency indicated.

"Leaving the meeting house," as used in a deed of a church pew, conditioned that, on the grantee leaving the meeting house, he should give the treasurer of the society an opportunity to purchase the pew at a certain price, otherwise it should be forfeited, does not mean the mere temporary or occasional failure to resort to the meeting house as a place of public worship, but it means the ceasing without any apparent reason or explanation, any withdrawal or for a long time ceasing to worship, and manifesting no intention of returning, and habitually worshipping with and apparently attaching himself to another religious society in the same city. *Crocker v. Old South Soc.* in *Boston*, 106 Mass. 489, 497; *French v. Old South Soc.* in *Boston*, Id. 479, 487.

As permission, not a direction.

"Leave," as used in an order giving a party leave to file an amended pleading, is never held to be an order or direction to the party that he must file such pleading. *Ex parte Williams*, 48 Pac. 499, 500, 116 Cal. 512.

Personal service implied.

The phrase "left at his house," in the certificate of a notary of the giving of notice of an indorser, which states that the notice was left at his house, is sufficient to show a personal service of the notice by leaving it at the indorser's house. *Adams v. Wright*, 14 Wis. 408-414.

An ordinance authorizing the commissioner of highways to pave a street after 20 days' notice has been "left or placed on the premises" of an owner of abutting property who is unknown or cannot be found is not satisfied by concealing such notice under a stone on the premises. *City of Philadelphia v. Edwards*, 78 Pa. (28 P. F. Smith) 62, 64.

Power to use implied.

"Left," as used in a will giving testator's wife all his real and personal property, to hold and possess during the term of her natural life, for her own exclusive use and benefit, and providing that after her death the property and estate mentioned, and each or any part of the same then left by her, shall be divided among testator's children, implies a power to use some part of the principal or capital, if it should be found necessary, for the support of the widow and the maintenance and education of the children, so long as provision for such purpose should be reasonably necessary. *In re Oertle*, 24 N. W. 924, 925, 34 Minn. 173, 57 Am. Rep. 48.

"Left by her," as used in a will bequeathing all of testator's personal property to his wife for her own use and benefit during her natural life, and directing that his executors shall, immediately after her death, proceed to sell, collect, and settle up the personal property that may be left by her, and to divide the same among his children, should be construed as showing an intent on the part of the testator to use the corpus of the estate, as well as the income thereof, for her own personal use and benefit, and not to confine her estate to a mere life estate. *In re Williamson*, 9 N. Y. Supp. 476, 477, 1 Con. Sur. 139.

As quit.

"Leave," as used in a notice to a tenant to leave the premises, is synonymous with the word "quit," as used in Comp. Laws 1879, c. 55, § 7, requiring the giving in such cases of notice to quit. *Douglass v. Anderson*, 4 Pac. 257, 32 Kan. 350.

A contract between A., one of the directors of a corporation, and B., who was in the employ of the corporation, the contract stipulating that B. was to have a certain number of shares, and containing the following agreement: "It is agreed that if, between January 1, 1864, and January 1, 1871, said B. should die or leave the company, pro rata shares for the then expired term shall be considered as earned and due," etc., means if B. should resign, or voluntarily quit, or give up his employment, and does not refer to his expulsion by the act of the company without his consent and against his remonstrance. *Price v. Minot*, 107 Mass. 49, 60.

As set sail.

"Leave," as used in a charter party providing that a ship should "sail and proceed from Amsterdam with all convenient speed to Liverpool, to leave Amsterdam not later than all March," should not be construed to mean "should set sail and proceed from Amsterdam on such a time, but that she should quit Amsterdam before the end of March and proceed to Liverpool with all convenient dispatch," and hence the charter was fulfilled, though after leaving Amsterdam she stopped at a certain point to take in the remainder of her ballast. *Van Baggen v. Baines*, 25 Eng. Law & Eq. 530, 533, 9 Exch. 523, 530.

As submit.

An agreement made at sea between a disabled vessel and a freighting steamer providing that the latter should receive a certain compensation for towage services, but further agreeing to "leave it to the court to prove said agreement," means to submit the question as to the amount of compensation to the judgment or review of the court. *The Lelpsic* (U. S.) 5 Fed. 108, 112.

Where a vessel was injured at sea and was towed to port by another vessel, and the captains made a written agreement at sea providing that £3,000 should be paid for the services, but inserted a clause, "to be left to the court to prove said agreement," such clause must be construed to mean that the parties intended to submit the question as to the amount of compensation to the judgment or review of the court. *The Lelpsic* (U. S.) 5 Fed. 108, 112.

As suffer to remain.

St. 1774, providing that no Indian, negro, or mulatto slave shall be brought or imported into Connecticut by sea or land to be disposed of, sold, or "left within the state," means suffered to remain in the state, and does not mean abandoning, deserting, or departing from such slave. A slave may be considered as left in the state, though the owner does not intend to reside there permanently himself, or to suffer such slave

permanently to remain there. So long as he is a traveler, passing through the state, the owner cannot be said to have left a slave there; but when such owner and his family are residing in the state for years, and when he has suffered his slave to remain there for almost two years, he cannot claim the privilege of a traveler, even though he intended at some future time to return with his family to his former residence. *Jackson v. Bulloch*, 12 Conn. 38, 45.

An insurance policy on the household furniture contained in a frame building, providing that the premises were not to be "left unoccupied" any portion of the year, will not be construed as implying an abandonment or willful vacation of the premises, leaving them uncared for. The phrase "shall not be left unoccupied any portion of the year" is equivalent to saying "shall not be suffered to remain unoccupied during any part of the year." *Sonneborn v. Manufacturers' Ins. Co.* 44 N. J. Law (15 Vroom) 220, 224, 43 Am. Rep. 365.

An instruction that the city was responsible and liable for damages to any individual who suffered any special damages caused by the streets being left in an impassable condition, where by the use of ordinary prudence a person could not foresee and avoid the injury which occasioned the damage, implies that the street had been in a passable condition, but had been rendered impassable by some alteration, and so left without due precautions. The instruction refers, not to streets in their natural condition as they were dedicated, but to those actually in use and which were left in an impassable condition, so that ordinary prudence and attention could not foresee and avoid the danger. *City of Milwaukee v. Davis*, 6 Wis. 377, 389.

Partnership.

A party, upon forming a co-partnership with another, agreed to leave at the end of the term the place where the business was carried on. Held, that the word "leave" should be construed to exclude any claim of an interest in the good will of the business by the retiring partner. *VanDyke v. Jackson* (N. Y.) 1 E. D. Smith, 419, 422.

In will, as relating to time of death

Where a leasehold estate is given to a person and the heirs of his body, with limitation over if he dies, and the testator uses the words "and leaves no such heirs," the settled construction is that it means at his death. *Cooke v. DeVandes*, 9 Ves. 196, 204.

"Leaving," as used in a will devising property to testator's daughter, but, in case the daughter should die "leaving" no heirs, the property should pass to another, "is a participle of the present tense," and relates

to the time of the dying of the daughter. Per Lord Chancellor Hardwicke in *Read v. Snell*, 2 Atk. 642, 646.

A will providing that, on the death of either of "my said daughters I bequeath to such child or children as my said daughters so dying shall have or leave," etc., the remainder in the lands in which the daughters were given a life estate, should be construed to mean that on the death of each of his daughters the remainder should go to the children she might have or leave living and their heirs and assigns; that is to say, to the living children and to the heirs or assigns of those who might have died, as tenants in common. The clause, therefore, should read (as applied to the singular number) "to such child as my daughter so dying shall have or leave living at her decease, and to the heirs and assigns of such child." *Griswold v. Onondaga County Sav. Bank*, 93 N. Y. 301, 305.

A will providing that certain bequests are given to a daughter only during her natural life, and then to descend to her child or children, but, "if she shall leave no child," then to be equally divided among the testator's grandchildren, means not if she should die leaving no issue, looking toward an indefinite failure of issue, but, as the term naturally imports, leaving no issue; i. e., leaving no child to take the estate in remainder after the devise to the mother for life. *Wight v. Baury*, 61 Mass. (7 Cush.) 105, 107.

The words "if he leave any lawful issue," when not restricted by other words, are uniformly held to import a definite failure of issue, when found in a devise of real estate, though in a gift of personalty the word "leaving" is held to mean a failure at the death of the first legatee. The addition to the phrase of the words "after him" does not alter this construction. *Whitford v. Armstrong*, 9 R. I. 394, 395.

LEAVE OF COURT.

In explanation of the statement that a defendant by leave of court may plead several pleas, it is said that this leave is never asked in fact, but every additional plea is stated upon the record to have been put in by leave of the court first had and obtained. This is an indulgence granted to the pleader, and he ought never to put in a second or other plea, either in form or substance, that he does not believe the court would have permitted him to file, if it had been previously presented to the court and its permission asked. *Copperthwait v. Dummer*, 18 N. J. Law (3 Har.) 258, 260.

LEDGE.

A continuous bed of mineralized rock lying within any other well-defined bounda-

ries on the earth's surface and under it would constitute a "lode," and the term is used in the acts of Congress as applicable to any zone or bed of mineralized rock lying within boundaries clearly separating it from the neighboring rocks. It is a class of deposits of mineral matter coming from the same source, impressed with the same forms, and appearing to have been created by the same process. In general, it may be said that a lode or vein is a body of mineral, or mineral body of rock, within defined boundaries in the general mass of the mountain. The thinness or thickness of the matter in particular places does not affect its being a vein or lode, nor does the fact that it is occasionally found in the general course of this vein or shoot in pockets deeper down into the earth or higher up affect its character as a "vein, lode, or ledge." *Stevens v. Williams* (U. S.) 23 Fed. Cas. 40, 42; *Synnot v. Shaughnessy*, 7 Pac. 82, 84, 2 Idaho (Hasb.) 122.

LEFT.

See, also, "Leave."

Within the statute which provides that, whenever the widow or minor children of a deceased person shall be left in necessitous circumstances, they shall be entitled to a certain sum, the word "left" has been repeatedly held to mean that at the time of the death of the husband the wife must in point of fact and of truth be deprived by that death of a means of livelihood; that his death must have caused some sudden change in her condition and means of living. *Richard v. Lazard*, 32 South. 559, 562, 108 La. 540.

In construing a clause in a will providing that the period during which testator's trustees and their heirs and successors shall have the power and are required to lease certain property shall be as long as testator's children, or any children or descendants of them or any of them, left by them or any of them at the death of them or any of them, shall live, the court says that the word "left" could not be construed as indicating the intention of testator to appoint his own children and children or descendants of children living at the time of testator's own decease, but that the persons designated as left are the children or descendants of any of his children, and the time of being left is so plainly expressed that no doubt can well arise or be entertained, viz., at the death of any of his said children. *Barnum v. Barnum*, 26 Md. 119, 170, 90 Am. Dec. 88.

By a devise of a life estate, with the remainder of "what is left" to a certain person, testator should be held to have intended to include the entire property which should be in the hands of the life tenant at her death, whether it has been diminished by

losses or increased by profits, or whether it consisted of personal property or had been invested in real estate. *Bramell v. Adams*, 47 S. W. 931, 933, 146 Mo. 70.

LEFT OPEN.

A finding that a defendant willfully "left a gate open" at various times plainly implies that the gate was shut when the defendant came to it, and is equivalent to removing the gate, which is prohibited by Gen. St. c. 24, § 7, providing a penalty against removing gates or bars across pent roads. The gate, when shut, was a barrier restraining the cattle in the pasture from the crops in the field. When opened and "left open" by the defendant, it was as effectually removed as such barrier as though it had been taken from the hinges and carried away or thrown on the ground. *French v. Holt*, 53 Vt. 364, 367.

LEFT OUTSIDE.

"Left outside of levee," as used in Const. § 238, excluding compensation for damages to land because of its being left outside a levee, presents the idea of defenselessness as against the ravages of the river. The land cannot be regarded as left outside a levee, unless it is left unprotected by the levee; so, where a new levee is so constructed inside the old one as to obstruct the drainage of the land left between the two levees and cause it to be overflowed by rain water, which had been therefore carried off entirely by artificial channels, a recovery was not constitutionally precluded. *Duncan v. Board of Levee Com'rs*, 20 South. 838, 839, 74 Miss. 125.

LEGACY.

See "Conditional Legacy"; "Contingent Legacy"; "Demonstrative Legacy"; "General Legacy"; "Lapsed Legacy"; "Pecuniary Legacy"; "Residuary Legacy"; "Specific Legacy"; "Universal Legacy"; "Vested Legacy."

Other legacy, see "Other."

Substitutionary legacy, see "Substitutional—Substitutionary."

A legacy is a gift of personal estate by will. *Evans v. Price*, 8 N. E. 854, 857, 118 Ill. 593.

A legacy is a gift or bequest by testament. In re *Thompson* (N. Y.) 5 Dem. Sur. 393, 396; In re *Karr* (N. Y.) 2 How. Prac. (N. S.) 405, 409.

A legacy is a testamentary disposition of personal property. *Nye v. Grand Lodge A. O. U. W.*, 36 N. E. 429, 436, 9 Ind. App. 131.

A legacy is a bequest of goods and chattels by will or testament. *Probate Court v. Matthews*, 6 Vt. 269, 274.

The use of the terms "devise" and "devisee," "legacy" and "legatee," with technical exactness throughout an entire chapter of the statute relative to wills and distribution, is held to show an intention of the Legislature to employ those terms in their strictly technical sense as defined at common law. In construing this chapter, the court says that where clear, direct, and explicit terms are used by the Legislature, which have had a definite meaning since the beginning of common law terminology, there can be no room for discussion as to their meaning. In *re Ross' Estate*, 73 Pac. 976, 979, 140 Cal. 282.

A legacy is a gift or bequest of personal property. It includes any gift of personal property by will, as well those made in lieu of dower as those which are gratuitous. *Orton v. Orton* (N. Y.) 3 Abb. Dec. 411, 414.

The word "legacy," as it is usually understood and in its legal import, belongs especially to a gift of personalty. *Browne v. Cogswell*, 87 Mass. (5 Allen) 556, 557.

The term "legacy," when used in a will, will be restricted in its application to personal property, unless it clearly appears from the will itself that the testator used it in a different sense. In *re Karr* (N. Y.) 2 How. Prac. (N. S.) 405, 409.

Annuities.

The term "legacies" prima facie comprehends annuities. *Tichenor v. Tichenor*, 2 Atl. 778, 779, 41 N. J. Eq. (14 Stew.) 39.

The terms "legacy" and "annuity" are often used interchangeably. Thus a devise of real estate to a city, on condition that the city pay to the devisor's widow annually \$3,000, creates a legacy, an annuity, in her favor. *Budd v. Budd* (U. S.) 59 Fed. 735, 740.

Lord Eldon, in *Gibson v. Bott*, 7 Ves. 96, drew the distinction between an annuity and a legacy for life, which has been cited in every thoroughly considered case since. If an annuity is given, the first payment is payable at the end of the year from the death; but if a legacy for life is given, with the remainder over, no interest is due until the end of two years. It is only the interest of the legacy, and until the legacy is payable there is no fund to produce interest. *Bartlett v. Slater*, 22 Atl. 678, 679, 53 Conn. 102, 55 Am. Rep. 73.

Bequest synonymous.

In the construction of statutes the words "bequest" and "legacy" shall be held to mean the same thing, and to embrace and include either real or personal estate, or both. Ky. St. 1903, § 467.

As a chattel.

See "Chattel."

5 Wds. & P.—9

As credits, debts, or effects.

See "Credits"; "Debt"; "Effects."

Devise distinguished.

Every bequest of personal property is a legacy. The word "devise" is especially appropriate to a gift of lands, and the word "legacy" to a gift of chattels. In *re Karr* (N. Y.) 2 How. Prac. (N. S.) 405, 409.

Gift causa mortis distinguished.

See "Gift Causa Mortis."

Proceeds of compromise.

Where sums of money are received by claimants under a deceased person's will, under a compromise contract made by them with the executor of the will, sanctioned by a court having jurisdiction of the will and of the estate devised, the sums of money so received do not fall within the category of legacies or distributive shares in intestates' estates, which are subjected to an internal revenue tax by the United States. *Page v. Rives*, 1 Hughes, 305, Fed. Cas. No. 10,666.

Payment of debt.

An ordinary popular meaning of legacy in its legal signification is a gift or gratuity, not the payment of a debt or a provision to pay a debt. Where the meaning is uncertain, it is reasonable to infer that the popular and ordinary meaning is intended, unless there is something that requires a different construction. Hence it is held that the giving in a will to testator's wife money expressly stated to be in conformity to a marriage settlement does not make her a legatee, within a provision of the will giving the residuary estate to the legatees before mentioned in proportion to their legacies. In *re Pentz's Estate*, 49 Atl. 361, 364, 200 Pa. 2.

"Legacy" naturally implies bounty or benevolence. *Lockyer v. Simpson*, Mos. 300; *Clark v. Sewell*, 3 Atk. 98. A bequest in satisfaction of a debt has been held to be within the definition of a legacy. *Orton v. Orton* (N. Y.) 3 Abb. Dec. 411. So far as a legacy is applied to pay a debt, it is no legacy, but a payment. A gift and bequest to a creditor of "any and all benefit, so far as his interest may appear and be proved," is not a legacy, within Laws 1887, c. 713, entitled "An act to tax gifts, legacies, and collateral inheritances." In *re Rogers*, 10 N. Y. Supp. 22, 2 Con. Sur. 198.

As pecuniary legacy.

Where a will gave a chromo lithograph to one cousin and a hat stand to another, such gifts would not be considered legacies, within the meaning of the subsequent codicil, whereby each cousin not remembered by a legacy in the will and codicils was given \$2,500; the term "legacy" being construed to

mean pecuniary legacy. *White v. Massachusetts Inst. of Technology*, 50 N. E. 512, 514, 171 Mass. 84.

As principal and income.

A testator by his will gave the sum of \$1,000 to his grandson, and to his brother the sum of \$15,000, in trust to invest the same at his discretion, and to pay the income thereof to the testator's daughter A. for life, "the two preceding legacies to be raised by my executors as soon after the settlement of my estate as they shall think expedient," and gave to his wife during life, for her use and benefit, the income and profit of all his real and personal estate, and at the death of his wife one-third of the residue of his estate to each of his two daughters, and the remaining third to the children of his daughter A. and the survivor of them, and directed that, in estimating this third, "the \$15,000 given in trust for my daughter A. shall be taken as a portion thereof, but it is not to be paid over to her children till the capital shall fall in at her death." Held, that the word "legacies" included the principal sum of \$15,000, and not merely the income thereof, and that on the death of A., though in the lifetime of the testator's widow, A.'s children were entitled to that sum. *Griswold v. Heard*, 68 Mass. (2 Gray) 322, 324.

Provision in lieu of dower.

Every bequest of personal property is a legacy, including as well those made in lieu of dower and in satisfaction of an indebtedness as those which are wholly gratuitous. The circumstance whether gratuitous or not does not enter into consideration in the definition. It is the synonym of the word "bequest." The word "devise" is especially appropriated to a gift of lands, and "legacy" to a gift of chattels; and when it is said that a legacy is a gift of chattels, the word is not limited in its meaning to a gratuity, but has an extended signification, the primary one given by Worcester in his Dictionary—"a thing given, either as a gratuity or recompense." So, where the testator gave to his wife certain property in lieu of dower, and made certain other bequests, adding that, if his property should be insufficient, the legacies should be paid pro rata, and, if there should be an excess, such excess should be divided among the legatees in proportion to the sum given, the bequest made to the wife was a legacy, and she was entitled to her pro rata share of the excess of the property. *Orton v. Orton*, *42 N. Y. (3 Keyes) 486, 488.

Personalty or realty.

By statute in Kentucky the word "legacy" includes either real or personal estate. *Hurst v. Davidson*, 76 S. W. 37, 38, 25 Ky. Law Rep. 555.

"Legacies," as used in a codicil of a will, reciting that the testator, being desirous of

altering his will with respect to certain legacies, and giving to testator's son all of such legacies in trust, includes devises of realty. Although the term "legacy" is properly applied to personal property only, yet sometimes by force of the context it applies to realty as well. *Bacon v. Bacon*, 55 Vt. 243, 247.

"Legacies given," as used in Act April 13, 1843, subjecting all "legacies given and lands devised" to any person to attachment and levy, the terms "legacies given" and "lands devised" are artistic phrases meaning different things, and neither includes the other, so that an interest in goods and chattels is different from an interest in the lands. *Appeal of Roth*, 94 Pa. 186, 191.

"Legacy," in its technical sense, means a testamentary disposition of personalty, and is not accurately applied to a testamentary disposition of land. In *re Fetrow's Estate*, 58 Pa. (8 P. F. Smith) 424, 427.

The word "legacy" is properly applicable to bequests of personal property, but as used in wills it may be extended to embrace other species of property not technically within its import, in order to effectuate the intention of the testator. *Williams v. McComb*, 38 N. C. 450, 455.

"Legacy," as used in wills, may be applied to real estate, if this construction is necessary in order to effectuate the intention of the testator. *Lasher v. Lasher* (N. Y.) 13 Barb. 106, 110.

A gift of personalty in a will is called a "legacy," and a gift of land is called a "devise." The primary signification of the word "legacy" is a gift of personalty, and this word is never construed to include a gift of land in a will, unless there is something in the context which shows that the testator did use it in this latter sense. Hence it is held that in a statutory provision that, if any child should die in the lifetime of the father or mother having issue, any legacy given in the last will of such father or mother shall go to such issue, the word "legacy" should be construed in its technical sense, and not to include a devise of land. *Pratt v. McGhee*, 17 S. C. 428, 429.

The word "legacy" is more commonly applied to money or other personal property than to real estate, but the word in a popular sense applies to both real and personal property. The word "legacy," as used in testator's will, which gave all his property, real and personal, to his wife, to sell and dispose of as she should see fit, or to retain during her natural life for her own use, subject after her decease to the following legacies, followed by certain legacies of the income from stock and a life estate in a certain lot, with a devise over in fee, was used to include both personal and real property.

In re Stuart's Will, 91 N. W. 688, 690, 115 Wis. 294.

It would be more correct to use the word "legacy" only in relation to personal property, but most testators are unacquainted with that circumstance, and apply the word indiscriminately to both real and personal property, and it was so used in a will wherein testator disposed of both real estate and personalty, and provided that, in the case of death of any of his children without lawful issue before they could get possession of their respective legacies, the legacy bequeathed to such children should be divided between the survivors of them. *Homes v. Mitchell*, 6 N. C. 228, 230, 5 Am. Dec. 527.

Gift of residue distinguished.

In common parlance, as well as in any more precise use of language, a legacy is distinguishable from a gift of the residue or share in a residue. *White v. Ditson*, 4 N. E. 606, 612, 140 Mass. 351, 54 Am. Rep. 473; *Hard v. Davison*, 6 N. Y. Supp. 69, 72, 53 Hun, 112.

LEGACY TO PIOUS USES.

"Legacies to pious uses" are those which are designed to some work of piety or object of charity, and have their motive independent of the consideration which the merit of the legatees might procure to them. In this motive consists the distinction between these and ordinary legacies. *Williams v. Western Star Lodge*, 38 La. Ann. 620, 629 (citing 4 Domat, lib. 9, § 6, par. 2).

LEGACY UNDER A UNIVERSAL TITLE.

A "legacy under a universal title" is that by which a testator bequeaths a certain proportion of the effects of which the law permits him to dispose, as a half, a third, or all his movables, or all his immovables, or a fixed proportion of all his immovables, or of all his movables. Civ. Code La. 1900, art. 1612.

LEGAL.

See, also, "Lawful."

When legal proceedings of any sort are spoken of, the descriptive word "legal" is not usually understood to affirm their validity; for it is used indiscriminately, whether the proceedings be valid or void. So it is held that, where a deed was upon condition that no liquor should be sold upon a certain lot before the town in which the lot was located should be legally incorporated, there was no breach of the condition by sales made after the town was incorporated, although the corporation was subsequently dis-

solved, because embracing agricultural lands not a part of the town. *Jones v. McLain*, 41 S. W. 714, 715, 16 Tex. Civ. App. 305.

2 Rev. St. 1852, p. 464, § 71, provided that in actions of replevin before justices the complaint should state that the property sought to be replevied had not been taken by virtue of any execution or other writ against plaintiff. In an action of replevin before a justice, the complaint stated that the property had not been taken on any legal tax or execution, or other legal writ. Held, that the complaint was not obnoxious to a motion in arrest, because of the use of the word "legal." Hence it might be doubted whether the word "legal" added to or diminished from the substantial effect of the complaint. An execution or writ could hardly be designated as such, unless it were a legal execution or writ. *McPhelomy v. Solomon*, 15 Ind. 189, 190.

Lawful distinguished.

The word "legal," when used as an adjective qualifying "provocation," is synonymous with "lawful, adequate, and reasonable." *State v. Bulling*, 15 S. W. 367, 371, 105 Mo. 204.

In a statute requiring the sheriff to take all legal means to prevent injury from riots, etc., it is held that there is a clear distinction between the words "legal" and "lawful," and that the word "legal" imports a much more limited range of means than is implied by the word "lawful," and imposes a much less onerous duty upon the officer named. When the law requires an officer to take all legal means to effect an object, it intends that he shall take all such means as he may officially use, and he is not chargeable with neglect of duty if he adopts the means prescribed by the law for such occasions, though he omit other plain physical and moral means. These may be lawful, because not forbidden; but they are not legal, because not prescribed by law. *Curtis v. Alleghany County (Pa.)* 1 Phila. 237, 238.

LEGAL AGE.

The phrase "legal age to consent to marriage" means the age of consent to marriage at common law, to wit, 14 years in case of males and 12 years in case of females; and therefore Gen. Laws, c. 195, § 9, requiring a petition for divorce to be signed by the petitioner, if of legal age to consent to marriage, simply means age of consent at common law. *Capwell v. Capwell*, 41 Atl. 1005, 21 R. I. 101.

"Legal age," as used in a will devising the residue of testator's estate to executors in trust for the education and maintenance of two minor children, and directing that as and when they become of "legal age" their

share shall be turned over to them, means, in the absence of a statute providing otherwise, the age of 21 years. It means full, and not partial, legal age. By her marriage a devisee did not become of legal age, so as to be entitled to receive her portion of the estate; she not being at the time 21 years old. *Montoya de Antonio v. Miller*, 34 Pac. 40, 41, 7 N. M. 289, 21 L. R. A. 699.

LEGAL ARREST.

A legal arrest is to be distinguished from a military arrest or seizure. *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 78, 2 L. Ed. 554.

To constitute a legal arrest the officer must lay his hand on the defendant or otherwise take possession of his person. He must make him his prisoner in an unequivocal form. *Lawson v. Buzines* (Del.) 3 Har. 416, 418.

LEGAL ASSETS.

"Moneys arising from the sale of personal property are called 'legal assets' in the hands of an executor or administrator, out of which the creditors of the estate are paid according to the dignity of their demands." *Backhouse v. Patten*, 30 U. S. (5 Pet.) 160, 167, 8 L. Ed. 82.

Legal assets are such as constitute a fund for the payment of debts according to their legal priority. *Helman v. Fisher*, 11 Mo. App. 275, 280.

"Legal assets" of an estate are such as constitute the funds for the payment of debts according to their legal priority, as distinguished from "equitable assets," which are such as can be reached only by a court of equity. *Rutledge's Adm'r's v. Hazlehurst* (S. C.) 1 McCord, Eq. 466, 469.

Legal assets are subject to preferences among creditors, while equitable assets are distributable equally. *In re Nelson Place*, 7 N. Y. Leg. Obs. 217, 219.

In Virginia the moneys arising from the sale of personal property are called "legal assets" in the hands of an executor or administrator, and those which arise from the sale of real property are denominated "equitable assets." *Backhouse v. Patten*, 30 U. S. (5 Pet.) 160, 167, 8 L. Ed. 82.

"Legal assets" are such as are owned by a legal title by the testator. The words are used to distinguish such claims from equitable assets, which are mere rights to enforce equitable claims to property, the title to which is in another. Thus an equity of redemption is but an equitable asset, while a leasehold may be a legal asset. *Deg v. Deg*, 2 P. Wms. 412, 416.

The interest which a creditor has in the land of his debtor, fraudulently conveyed, is

a legal, nonequitable asset. *Pulliam v. Taylor*, 50 Miss. 551, 555. Consequently the provision of Comp. Laws, § 4628, that, in case of a levy upon an equitable interest of a judgment debtor, the judgment creditor shall within one year institute proceedings to ascertain and determine the interest of the judgment debtor, and to settle the right of the parties in interest therein, does not require that a judgment creditor, having become a purchaser at an execution sale, bring an action to set aside a prior fraudulent deed of his debtor within one year from the time of the execution sale. *Orendorf v. Budlong* (U. S.) 12 Fed. 24, 26.

A "legal asset" is an asset subject to levy by execution on a common-law judgment. Where creditors obtain judgments and make levies, and then bring suits to set aside fraudulent conveyances, which are void as to them all, their priorities in the property conveyed are in the order of their levies, without regard to the order in which they filed suits to set aside the conveyances; for the assets are legal assets. *Kilmouth v. White*, 48 Atl. 952, 953, 61 N. J. Eq. 358.

LEGAL ATTAINMENTS.

Act 1848, § 4, providing that in suits thereunder, in which arbitrators should be appointed by the Governor, two of the persons to be appointed shall be "men of legal attainments," does not mean judges, licensed lawyers, justices of the peace, or men of any particular class; for it requires no particular degree of legal attainment and almost every man in the country possesses some. *State v. McGinley*, 4 Ind. 7, 11.

LEGAL CAPACITY.

A demurrer to a complaint, assigning as cause that plaintiff has no legal capacity to sue, has reference to some legal disability of plaintiff, such as infancy, idiocy, or coverture, and not to a fact that the complaint fails to show a right of action in the plaintiff; and in an action by the guardian of an insane person to set aside and annul the marriage of his ward to the defendant, a demurrer on the ground that plaintiff has no legal capacity to sue does not raise the question of his right to maintain such action. *Pence v. Aughe*, 101 Ind. 317, 319; *Dewey v. State*, 91 Ind. 173, 182.

LEGAL CLAIM.

"A legal claim is one which the party asserting it may enforce by action or by some proceeding at law or in equity." *Cowan v. City of New York* (N. Y.) 8 Hun, 632, 633.

The term "legal claim," in Laws 1894, c. 317, § 5, providing that whenever the state's title to land granted under its authority fails,

and a legal claim for compensation therefor is preferred, the land commissioners shall direct the repayment of the original purchase money, means a claim which is good or valid in law, such a claim as would afford a remedy to a grantee in a deed from a private person. *People v. Woodruff*, 68 N. Y. Supp. 100, 108, 87 App. Div. 342.

LEGAL COMMITMENT.

"Legal commitment" means any act of committing of the person of a party which is justifiable by the law of the land. *People v. Nevins* (N. Y.) 1 Hill, 154, 171.

LEGAL COMPENSATION.

Legal compensation for land taken by eminent domain refers solely to the injury done to the property taken, and not to any collateral or consequential damages resulting to the owner by trespass. Loss of trade, destruction of credit, and failure of business prospects are collateral or consequential damages for which compensation cannot be awarded. *Watson v. Sutherland*, 72 U. S. (5 Wall.) 74, 78, 18 L. Ed. 580.

LEGAL CONCLUSION.

See "Conclusion of Law."

LEGAL CONSIDERATION.

A legal consideration is defined to be some act which is a benefit to the person contracting, or an injury or the foregoing of some advantage by the other party to the contract. *Sampson v. Swift*, 11 Vt. 315, 316, 317.

A legal consideration does not necessarily mean a pecuniary gain, and it is not essential to the validity of a contract that a benefit or gain of such a nature move to the person assuming an obligation. It is sufficient if any advantage or benefit result to him, or any detriment or injury to the other party, by his failure to keep his agreement. *Albert Lea College v. Brown*, 93 N. W. 672, 675, 88 Minn. 524, 60 L. R. A. 870.

LEGAL COSTS.

"Legal costs," as used in Pub. St. c. 112, § 100, relating to railroads, and providing that on the application for a jury to assess damages for land taken the prevailing party shall recover "legal costs," mean such costs as are usually recovered in civil actions, and include the travel and attendance of witnesses and the fees of the officer for summoning them, in addition to such costs as he may have incurred for the sheriff and jurors. *Chiles v. New Haven & N. Co.*, 135 Mass. 570, 572.

"Legal costs," in Gen. St. c. 15, art. 6, § 1, providing for payment out of the state treasury of legal costs in a suit in which the state is a party, means only such costs as the law requires the state to pay. *Davis v. Norman*, 42 S. W. 108, 101 Ky. 599.

"Legal costs" in a suit clearly include charges for travel and attendance and other items which inure to the benefit of the attorney, as well as clerks', officers', and attorneys' fees. *James v. Bligh*, 93 Mass. (11 Allen) 4, 5.

The phrase "legal costs," in St. 1794, c. 65, § 3, providing that trustees, appearing and denying that they have any effects of their principal, shall on their discharge be allowed their legal costs, means costs to be taxed according to the fee bill; and they cannot be allowed anything for counsel fees after preparing their answers. *Crocker v. Baker*, 35 Mass. (18 Pick.) 407, 414.

LEGAL CRUELTY.

See "Cruelty."

LEGAL DAMAGES.

Legal damages are such losses or detriments as the law compensates in consequence of a wrong committed. *Stuhr v. Curran*, 44 N. J. Law (15 Vroom) 181, 201, 43 Am. Rep. 353.

LEGAL DAY.

A "judicial day" is distinguished from a "legal day" in this: The former means a day in which the court is in session, while a legal day is one in which legal and judicial business can be transacted, as distinguished from "dies non." *Heffner v. Heffner*, 20 South. 281, 282, 48 La. Ann. 1088.

LEGAL DEBT.

Testator directed the trustees of a fund created by his will to pay over to each of his children a certain sum, but provided that "any legal debt due from any of the children should be first deducted from the share of such child." Held, that the phrase "legal debt" meant a debt which could be enforced in a court of law, and hence a married daughter was entitled to receive the whole sum so directed to be paid without deduction, although she had signed notes with her husband for moneys furnished him by her father, which the latter held at the time of the execution of the will and at his death. *Rogers v. Daniell*, 90 Mass. (8 Allen) 343, 348.

Under a will conveying land in trust, which land was covered with a mortgage, with a further provision that another par-

cel of land should be sold and the proceeds used to pay "her legal debts," there can be no question that the mortgage is embraced in the literal meaning of the words. *Guild v. Walter*, 65 N. E. 68, 182 Mass. 225.

LEGAL DEMAND.

A "legal demand" means a demand properly made, as to form, time, and place, by a person lawfully authorized, and may be made before or after judgment in the states in which property is attached and by an agent of the promisee duly authorized. The admission of a legal demand includes an admission that the demand was properly made at a suitable time and place, etc. *Foss v. Norris*, 70 Me. 117, 118.

LEGAL DEPOSITARY.

"Legal depositary," as used in Const. art. 11, § 16, providing that all moneys of any municipal corporation coming into the hands of any officer thereof shall immediately be deposited with the treasurer or "other legal depositary" to the credit of such corporation, should be construed as designating the custodian of the public money, who is a public officer, and usually designated "treasurer," and does not mean a private individual or corporation. *Yarnell v. City of Los Angeles*, 25 Pac. 767, 768, 87 Cal. 603.

LEGAL DISABILITY.

"Legal disability is defined to be a want of legal capacity to do a thing." Bouv. Law Dict. "The disability may relate to the power to contract or bring suit. It may arise out of a want of sufficient understanding, as idlacy, lunacy, infancy, or want of freedom of will, as in the case of married women and persons under duress, or out of the policy of the law, as alienage, when the alien is an enemy, or from outlawry, attainder, *præmunire*, and the like. The disability is something pertaining to the person of the party; a personal incapacity, and not to the cause of action or his relation to it. There must be a present right of action in the person, but some want of capacity to sue." *Meeks v. Vassault* (U. S.) 16 Fed. Cas. 1314, 1317.

"Legal disability," as used in Rev. St. c. 138, § 13, which prevented the statutes of limitations on actions for the recovery of real property from running in cases of infancy, insanity, imprisonment, and coverture until the removal of disability, should not be construed as meaning only an incapacity of action under the law or an incapacity to do a legal act, and applies to persons under the control and protection of other persons. Hence a statute giving a wife the absolute

control of her separate estate, the same as though she were unmarried, does not remove the disability of coverture; for it removes only one of the grounds of disability, the grounds of which are, as stated by Chancellor Kent (2 Comm. [11th Ed.] 137), that "the disability of the wife to contract so as to bind herself arises not from want of discretion, but because she has entered into an indissoluble connection by which she is placed under the power and protection of her husband, and because she has not the administration of property." She still remains under the control and protection of her husband, and he can lawfully control her domicile and her employment, leaving her in these particulars as she was at common law under a degree of duress. *Wiesner v. Zaum*, 39 Wis. 188, 206.

In *Lord de la Warre's Case*, 6 Coke, 1a, it was resolved by the justices that there was a difference between disability personal and temporary, with relation to the descent of estates, and a disability absolute and perpetual; as where one is attainted of treason and felony, that is an absolute and perpetual disability, by corruption of blood, for any of his posterity to claim any inheritance in fee simple, either as heir to him or to any ancestor above him, but when one is disabled by Parliament, without any attainder, to claim the dignity for his life, it is a personal disability for his life only, and his heir, after his death, may claim as heir to him or to any ancestor above him. This latter personal disability bears a close analogy to that imposed on persons whose property was confiscated during the War of the Rebellion by Confiscation Act July 17, 1862, and after the death of the person disabled his heirs took by descent the fee, and did not derive their title from the United States, or by virtue of the confiscation act. *Avegno v. Schmidt*, 5 Sup. Ct. 487, 490, 113 U. S. 293, 28 L. Ed. 976.

In construing Rev. St. 1881, § 1285, enacting that the phrase "under legal disability" shall include persons under the age of 21 years, or of unsound mind, or imprisoned in the state's prison, or out of the United States, it is held that, in view of the fact that the most notable respects with which the disability of coverture was felt at common law had been removed by statute, it could not be held that coverture was a legal disability, at least in ordinary cases. *Rosa v. Prather*, 2 N. E. 575, 577, 103 Ind. 191.

By Rev. St. 1894, § 1309, the Legislature defined the phrase "under legal disabilities" as including infants, persons of unsound mind, or those imprisoned in the state prison or out of the United States; but habitual drunkards are not included within the provision. *Makepeace v. Bronnenberg*, 45 N. E. 336, 337, 146 Ind. 243.

Civ. Code Prac. § 19, provides that, if a person entitled to bring an action be at the time the cause of action accrued under any legal disability, such person shall be entitled to bring such action within one year after such disability shall be removed (section 1, subd. 27), if the act relating to the construction of statutes provides that the phrase "under legal disability" includes persons imprisoned. The effect of these statutes is to prevent the running of limitations against the right of action of one who is imprisoned during the time of his imprisonment, but does not deprive him of the right to bring an action during the time of his imprisonment to restore him to his just rights and to set aside his conviction and sentence, provided, of course, that some friend would commence and conduct the proceeding for him. *State v. Calhoun*, 32 Pac. 38, 40, 50 Kan. 523, 18 L. R. A. 838, 34 Am. St. Rep. 141.

Under a provision that the statute of limitations begins to run as to persons under legal disability when the right of action accrues, it is held that the phrase "under legal disability" includes infancy. *King v. Carmichael*, 35 N. E. 509, 512, 136 Ind. 20, 43 Am. St. Rep. 303.

2 Gav. & H. St. p. 161, § 215, providing that a person "under legal disability" when a cause of action accrues may bring his action within two years after the disability is removed, refers to married women and persons under 21, or of unsound mind, or in prison, or out of the United States. *Bauman v. Grubbs*, 26 Ind. 419, 421.

The phrase "under legal disability" includes persons within the age of minority, or of unsound mind, or imprisoned. *Gen. St. Kan. 1901, § 7342, subd. 27.*

The phrase "under legal disability" includes married women, persons within the age of minority, or of unsound mind or imprisoned. *Rev. St. Mo. 1899, § 4160.*

The phrase "under legal disabilities" includes persons within the age of 21 years, or of unsound mind, or imprisoned in the state prison, or out of the United States. *Horner's Rev. St. Ind. 1901, § 1285.*

LEGAL DISBURSEMENTS.

Legal disbursement of the awards under Act Cong. March 3, 1891, relating to the French spoliation claims, for which the courts that granted administration were to require adequate security, means disbursements according to the law of the tribunal; and it was the duty of the orphans' court to ascertain the parties entitled to the distribution for the purpose of such legal disbursement. *In re Clement's Estate*, 28 Atl. 332, 333, 160 Pa. 391.

LEGAL DISCRETION.

See, also, "Discretion."

"A legal discretion is a discretion to be exercised within the limits which the law fixes." *Norton v. Kearney*, 10 Wis. 443, 450.

LEGAL DUTY.

"Legal duty" is an obligation arising from contract of the parties or the operation of law. Civ. Code, §§ 1920, 1921; *Riddell v. Peck-Williamson Heating & Ventilating Co.*, 69 Pac. 241, 243, 27 Mont. 44.

In his treatise on Negligence Dr. Wharton has defined a "legal duty" to be "that which the law requires to be done or forbore to a determinate person or to the public at large, and is correlative to a right vested in such determinate person or the public." The obligation involved is not a moral obligation, but is the obligation imposed on every member of society by law so to conduct himself and use his property as not to injure others. *Smith v. Clarke Hardware Co.*, 28 S. E. 73, 74, 100 Ga. 163, 39 L. R. A. 607; *Cleveland, C., C. & St. L. R. Co. v. Ballentine (U. S.)* 84 Fed. 935, 937, 28 C. C. A. 572; *Goodlander Mill Co. v. Standard Oil Co. (U. S.)* 63 Fed. 400, 402, 11 C. C. A. 253, 27 L. R. A. 583; *Emry v. Roanoke Navigation & Water-Power Co.*, 16 S. E. 18, 111 N. C. 94, 17 L. R. A. 699; *Western Maryland R. Co. v. Kehoe*, 35 Atl. 90, 94, 83 Md. 434; *Bragdon v. Perkins-Campbell Co. (U. S.)* 87 Fed. 109, 110, 30 C. C. A. 567.

"The duty itself arises out of various relationships of life, and varies in obligation under different circumstances. In one case the duty is high and imperative; in another it is of imperfect obligation. Thus it may be dependent on a mere license to another upon land or the bare obligation to avoid inflicting a willful injury upon a trespasser, while upon the other hand it may be a duty to care for the safety of a specially invited guest or of a passenger for hire." *Emry v. Roanoke Navigation & Water Power Co.*, 16 S. E. 18, 111 N. C. 94, 17 L. R. A. 699.

The "legal duty" the breach of which is negligence, has reference to and is measured by some correlative right of another with which it is coextensive. This breach can consist either in the failure to do that which ought to be done, or in doing that which ought not to be done. *Heaven v. Pender*, 11 Q. B. Div. 506. But the duty on the one side is only the correlative of the right on the other side, and hence the duty to act or to refrain from acting cannot be extended beyond the right to have the act done or refrained from. Beyond the limits or scope, therefore, of a particular right, as that right is defined, there is no corresponding legal duty due; and, if there be no duty due, there

can be no breach, and consequently no negligence. *Western Maryland R. Co. v. Kehoe*, 35 Atl. 90, 94, 83 Md. 434 (citing *Kahl v. Love*, 37 N. J. Law [8 Vroom] 5).

LEGAL ESTATE.

In law the "legal estate" is the whole estate, and the holder of the legal title is the sole owner. But this title may be held for the beneficial interest of another, which interest has come to be called an equitable estate. It is not, however, strictly speaking, an interest in the land itself, but a right which can be enforced in equity. In *re Qualifications of Electors*, 35 Atl. 213, 19 R. I. 387.

Formerly every estate was "legal" in the proper acceptation of that term, and in the contemplation of law there was and could be but one estate, which might properly be denominated the "legal estate." But the introduction of uses and the subsequent origination of trusts, where one party held the title, but upon some trust or confidence for another, early led the courts of chancery to take cognizance of the rights of the beneficiary, and thus there grew up a double ownership of lands thus situated; the interests which were cognizable only in a court of equity taking the name of "equitable estates," to distinguish them from legal estates. Tested by this rule, a purchaser of land under an executory contract acquires no legal estate in the premises, and therefore, in an action on a note given in payment for the real estate, such purchaser is not obliged to prove a tender of a deed conveying to the vendor any possible right the purchaser might have in the premises as a condition precedent to his right to rescind the contract. *Sayre v. Mohnney*, 47 Pac. 197, 198, 30 Or. 238.

An estate by curtesy consummate is a vested legal estate for life. While an equitable estate will merge into a legal estate, all other requisites being present, it is an axiom of law that a legal estate never merges into an equitable one. *Bassett v. O'Brien*, 51 S. W. 107, 108, 149 Mo. 381.

LEGAL ESTOPPEL.

Estoppel in pais distinguished, see "Estoppel in Pais."

LEGAL EVIDENCE.

Legal evidence is admissible evidence; if not legal, it is not admissible. Accordingly, under Gen. St. p. 440, § 34, providing that when any suit has been heard and determined by any justice of the peace, who thereafter neglected to make up a record of the same, his files and minutes thereof shall be admissible as evidence in all actions brought

on such judgment, after his decease or removal from the state, such minutes are "legal evidence," though they show that judgment was entered May 31st on a writ returnable May 29th; no adjournment appearing between the two dates. In such a case the court would presume a legal adjournment on the earlier date. *West v. Hayes*, 51 Conn. 533, 543.

"Legal evidence" is not confined to the human voice or oral testimony, but includes every tangible object capable of making a truthful statement; such evidence being roughly classified as "documentary evidence." In oral evidence the witness is the man who speaks; in documentary evidence the witness is the thing that speaks. In either case the witness must be competent—that is, must be deemed competent to make a truthful statement—and in either case the competency of the witness must be proved before the evidence is admitted; the difference being that in oral evidence the competency is proved by a legal presumption, and in documentary evidence the competency must be proved by actual testimony, and the further difference that in oral evidence the credit of the witness is tested by his own cross-examination, while in documentary evidence the credit of the witness is tested by the cross-examination of those who must be called to prove its competency. *Curtis v. Bradley*, 31 Atl. 591, 594, 65 Conn. 99, 28 L. R. A. 143, 48 Am. St. Rep. 177.

Legal evidence is not such as merely raises a suspicion, and leaves the matter in question to conjecture. It is such as, in some just and reasonable view of it, taking all the facts, whether they be many or few, will warrant a verdict of guilty. *Lewis v. Clyde S. S. Co.*, 44 S. E. 666, 669, 132 N. C. 904 (citing *State v. Powell*, 94 N. C. 965, 968).

LEGAL EXCUSE.

It is a "legal and just excuse," within the meaning of How. Ann. St. § 3224, providing a penalty against railroad companies for failing to stop at stations to let off passengers, except for a legal and just excuse, that it was after dark, the snow was deep and drifting, and that the engineer and conductor knew a freight train was close behind and the only place near the station where the passenger train could stop without danger of being stalled by the snow was on a bridge and elevated track. *Reed v. Duluth, S. S. & A. R. Co.*, 59 N. W. 144, 100 Mich. 507.

The legal excuse mentioned in Act 1869, § 3, providing for a penalty against a railroad refusing to furnish a statement for taxation without legal excuse, is to be considered only in criminal prosecutions under such law, and not before the board of equalization in de-

termining the assessment. *State v. Board of Equalization of Washoe County*, 7 Nev. 83, 97.

LEGAL FEES.

The phrase "legal fees," as used in Code Civ. Proc. § 1866, authorizing the taxation of legal fees paid stenographers per diem or for copies as disbursements, embraces such fees as are fixed by law, and does not authorize the taxation of disbursements not authorized by law, such as disbursements paid to private stenographers attending the trial of an action in the place of the official stenographer by consent. *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 70 Pac. 1114, 1127, 27 Mont. 288.

LEGAL FENCE.

See "Lawful Fence."

A legal fence, as used in the chapter relating to estrays, is a strong, substantial inclosure, ordinarily sufficient to turn animals; said inclosure to be not less than four feet in height, and to be constructed of posts and planks, posts, and wire, rails, poles, pickets, stones, adobe, or any other substantial material, or of one or more of the materials specified. *Comp. Laws N. M.* 1897, § 152.

A gate that would tumble down when used for the purpose for which it was built is not such a one as would constitute a part of a legal and sufficient fence. *Estes v. Atlantic & St. L. R. Co.*, 63 Me. 308, 310.

A fence made of barbed wire, protected by an upper rail or board of wood, may be a legal and sufficient fence, under *Rev. St. c.* 51, §§ 36, 37, requiring a railroad company to fence its tracks by such a fence, and that, properly built and kept in repair, it may be a full discharge of the obligation resting on a railroad company. The meaning of a fence is something to protect and restrain, and not to destroy. To be legal it must be a compliance with the law, but not necessarily a violation of the fundamental principle that each should use his own with due regard to the rights of others; and, as the statute does not specifically prescribe how the materials shall be put together, it is clear that, considering the object to be attained, while the fence must be so built as to be a reasonable restraint against all domestic animals of ordinary docility, it is not to be made unnecessarily dangerous to that class of animals, or permitted to become so by neglect; and where a colt is injured by becoming entangled in a barbed wire railroad fence, which had become dilapidated by the company's negligence and was likely to cause injury to a colt without misconduct on his part, the company was liable, though the fence

was sufficient to prevent the escape of animals. *Gould v. Bangor & P. R. Co.*, 82 Me. 122, 19 Atl. 84, 85.

LEGAL FIREBREAK.

A legal firebreak shall consist of a strip of land 200 feet wide, plowed on either side and burned out inside the plowing. *Rev. Codes N. D.* 1899, § 1668.

LEGAL FRAUD.

See, also, "Fraud in Law."

"Legal fraud" is synonymous with "constructive fraud," and is such as is implied by law from the nature of the transaction itself. The question of the existence or nonexistence of an actual purpose to defraud does not enter as an essential factor in determining the question, but the law regards the transaction as fraudulent per se. *Newell v. Wagness*, 44 N. W. 1014, 1016, 1 N. D. 62.

The phrase "legal fraud" has sometimes been interpreted as meaning fraud by construction, and as indicating that something less than actual fraud may sustain an action for deceit; but to sustain an action for deceit intentional fraud must be shown, as fraud without damage or damage without fraud gives no cause of action, but when these two concur an action lies. *Kountze v. Kennedy*, 41 N. E. 414, 147 N. Y. 124, 29 L. R. A. 360, 49 Am. St. Rep. 651.

LEGAL HEIRS.

Where a testator bequeaths his residuary estate in trust to be expended so far as necessary for the support of the wife, with remainder over to legal heirs, two of testator's children otherwise omitted from the will were not entitled to the portion which would have come to them if the father had died intestate; the word "legal heirs" referring to the children who had been named as beneficiaries in the will. *Smith v. Sheehan*, 39 Atl. 332, 333, 67 N. H. 344.

The phrase "legal heirs," in the by-laws of a beneficial association organized to provide a fund for the benefit of the members' widows and orphans, and providing that the fund due by the association on a member's death shall be payable to his legal heirs, was construed to mean his widow and children. *Janda v. Bohemian Roman Catholic First Cent. Union*, 75 N. Y. Supp. 654, 71 App. Div. 150.

Code 1873, § 2455, provides that, if the intestate leave no issue, one half of his estate shall go to his parents and the other half to his wife. Such section is the only instance where the rights given to a widow under the statute partake of the nature of heirship. A decedent at his death held a policy

of life insurance payable to "his legal heirs." He left surviving him a widow and one child. Held, that the words "his legal heirs" do not include the widow, and hence the whole amount of the policy should go to the child. "The distinction between the word 'widow' and the word 'heir' is marked in common parlance. No one having children speaks of his wife, in contemplation of her survivorship, as his heir; but it is believed, and it is universal, that she is referred to as 'widow' and the children as 'heirs.' While technically, and in the single instance stated in the statute, a widow may become a legal heir of her deceased husband, our conclusion is that, whether used in their technical or general sense, the words 'legal heirs' were not intended, and should not be construed in this case, to include the widow." *Phillips v. Carpenter*, 44 N. W. 898, 899, 79 Iowa, 600.

Where a will bequeathed property to a woman for life, remainder to her "legal heirs," and authorized the sale of the property for reinvestment in other lands, if the deeds therefor were taken in the name of such woman and her legal heirs, with the same provisions contained in the will, the words "legal heirs" were equivalent to children or their descendants, and the estate did not vest in her and her heirs, so as to convert the life estate into a fee. *Waller v. Martin*, 61 S. W. 78, 74, 106 Tenn. 341, 82 Am. St. Rep. 882.

The term "legal heirs," though generally a term of description, has a well-defined meaning, and, whether applied to real estate or personalty, it includes only next of kin or relatives by blood, and excludes the widow. *Kaiser v. Kaiser* (N. Y.) 3 How. Prac. (N. S.) 104, 105.

The term "heirs," or "legal heirs," or other equivalent words used to designate the beneficiaries in any life insurance policy or certificate of membership in any mutual aid or benevolent association, where no contrary intention is expressed in such instrument, shall be construed to include the surviving husband or wife of the insured. Code Iowa 1897, § 3313.

In a will devising certain property to the "legal heirs" of my brother J.'s children, the words are used in the popular sense, as indicating the people entitled to inherit if his brother were dead. *Healy v. Healy*, 39 Atl. 793, 794, 70 Conn. 467.

"Legal heirs," as used in a will directing a sum of money to be equally divided among all my children "or their legal heirs," should be construed to have been used, not to individuate grandchildren, but to supply a legal succession on the death of any one, and to mean simply legal representatives. *Mull's Ex'rs v. Mull's Adm'r*, 81 Pa. (31 P. F. Smith) 393, 394 (cited in Appeal of Reed,

11 Atl. 787, 788, 118 Pa. 215, 4 Am. St. Rep. 588).

LEGAL HOLIDAYS.

See, also, "Holiday."

"Legal holidays," as used in a statute declaring that certain days shall be legal holidays, on which all the public offices of the state may be closed, and shall be treated and considered as Sunday or the Christian Sabbath for all purposes regarding the presenting for payment or the acceptance, and of protesting for and giving notice of the dishonor of bills of exchange, bank checks, and promissory notes, does not imply that those days are assimilated to Sunday or the Christian Sabbath. In relation to civil matters, such as the presentation of negotiable paper for acceptance or payment, protests, and the like, to the extent that holidays had been assimilated to Sunday by statute, they must be enforced, but no further. They are not to be held the same as the Sabbath, or as not a day for judicial or legal proceedings, as the Sabbath is denominated. Courts are not required to suspend their proceedings on those days, except at their own discretion. *Dunlap v. State*, 9 Tex. App. 179, 186, 35 Am. Rep. 736.

"Legal holidays," as used in Act 1879, providing that all saloons, restaurants, bars in taverns or elsewhere, and all other places where malt, spirituous, or intoxicating liquors are sold, shall be closed on the first day of the week, commonly called Sunday, election days, or legal holidays, should be construed to include Christmas. The term "legal holidays" is used in order to distinguish them from such other as particular sects and classes might voluntarily observe as holidays, and to import to them under the name of "holidays," or "legal holidays," a somewhat special character. The 25th of December is one of that category. *Reithmiller v. People*, 6 N. W. 667, 668, 44 Mich. 280.

Christmas is not a legal holiday, so as to render a sale under execution made on that day void. *Hadley v. Musselman*, 3 N. E. 122, 124, 104 Ind. 459.

Const. art. 6, § 5, providing that the superior courts shall always be open, "legal holidays excepted," merely prohibits the Legislature from establishing terms of court, and does not prohibit the transaction of business in court on legal holidays. *People v. Soto*, 4 Pac. 664, 665, 65 Cal. 621.

A legal holiday is not a judicial day, and, although an act might be performed by the prothonotary on such day, he is not bound to perform it. Appeal of Lutz, 23 Wkly. Notes Cas. 515, 518, 123 Pa. 273, 16 Atl. 853.

The words "legal holiday" shall include the 22d day of February, the 19th day of

April, the 30th day of May, the 4th day of July, the first Monday of September, Thanksgiving Day, and Christmas Day, or the day following when any of the four days first mentioned or Christmas Day occurs on Sunday. Rev. Laws Mass. 1902, p. 88, c. 8, § 5, subd. 9.

The provision in a statute that a legal holiday shall be as Sunday applies only to commercial paper and its maturity and protest, and not to judicial acts or to worldly employment in general. *Paine v. Fesco*, 1 Pa. Co. Ct. R. 562, 567.

LEGAL IMPEDIMENT.

"Legal impediment," as used in Comp. Laws, § 4729, making it criminal for any person to undertake to join others in marriage, knowing that he is not lawfully authorized so to do, or knowing of any legal impediment to the proposed marriage, includes everything which would prevent a valid marriage. *Bonker v. People*, 37 Mich. 4, 7.

LEGAL INSANITY.

"Legal insanity is a disorder of the intellect," and is distinguished from "moral insanity," which is "a disorder of the feelings and propensities." The existence of insane illusions is the legal test of insanity. In *re Forman's Will*, 54 Barb. 274, 291.

LEGAL INTEREST.

Under a statute declaring that no person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, etc., it is held that the test of interest is whether the witness will gain or lose by the direct legal operation and effect of the judgment or final order rendered in the proceeding in which the testimony is offered. *Tecumseh Nat. Bank v. McGee*, 85 N. W. 949, 953, 61 Neb. 709.

The simplest and most generally accepted test in determining whether one is a proper party complainant to a bill for an injunction is whether he possesses a legal or equitable interest in the subject-matter of the controversy. High. Inj. par. 756. Giving to the terms "legal or equitable interest" a fairly liberal construction, this test is a reasonably safe guide. *Town of Burlington v. Schwarzman*, 52 Conn. 181, 52 Am. Rep. 571. The legal interest which qualifies a complainant, other than the state itself, to sue in such a case, is a pecuniary interest in preventing the defendant from doing an act, where the injury flows from its quality and

character, as a breach of some legal or equitable duty. *New Orleans, M. & T. R. Co. v. Ellerman*, 105 U. S. 186, 26 L. Ed. 1015. A railroad company, not having an exclusive franchise, has no such interest in the construction of a street railway between towns on its lines that it can enjoin the construction, merely because the street railway is acting ultra vires in building the proposed line. *New England R. Co. v. Central Ry. & Electric Co.*, 36 Atl. 1061, 1063, 69 Conn. 47.

Legal interest is the rate fixed by law, which attaches to contracts where the parties have not agreed upon a rate. *Fowler v. Smith*, 2 Cal. 568, 570.

The words "legal interest," as used in an answer in an action in which the defense was usury, one of the allegations being that at the time of the loan the note given therefor was made payable at the city of N. with the express purpose of exacting from the borrower the amount of exchange in addition to the legal rate of interest, mean the highest rate of interest which the law allows the parties to contract for, although they may be sometimes used in the sense of the rate of interest fixed by law on debts or obligations, in the absence of contract with reference thereto; but their true sense in any instance must be determined from the subject-matter and the connection in which they are used. *Towslee v. Durkee*, 12 Wis. 480, 485.

Legal interest is the rate of interest fixed by law when the contract is silent on the subject of interest. *American Mut. Bldg. & Sav. Ass'n v. Harn* (Tex.) 62 S. W. 74, 75.

"Legal rate of interest," as used in 1 Comp. Laws, § 2185, providing that it shall not be lawful for any banking association under the general banking law to take or receive more than the "legal rate of interest" in advance on its loans and discounts, does not mean 7 per cent., which is the rate fixed by law where the contract is silent on the rate, but authorizes the taking of 10 per cent., which may be agreed on. *Cameron v. Merchants' & Manufacturers' Bank*, 37 Mich. 240, 242.

"Legal interest," as used in St. 1865, p. 471, providing that certain county warrants shall bear legal interest from the date thereof, means interest at the rate per cent. prescribed by law on the date of the passage of the act. *Beals v. Amador County Sup'rs*, 35 Cal. 624, 633.

"Legal interest," for which judgment is authorized to be entered in favor of the plaintiff under Act Feb. 23, 1803, authorizing an action on Indian war bonds issued by the state, and providing for interest on judgments, is only such interest as is authorized by law. If the plaintiff is not legally entitled to interest upon his claim, either by reason

of its nature or the immunity of the state from an obligation to pay interest, this statute does not authorize a recovery. *Molineux v. State*, 42 Pac. 34, 109 Cal. 378, 50 Am. St. Rep. 49.

"Legal interest" is that interest which is allowed by law when the parties to a contract have not agreed upon any particular rate of interest. *Rev. St. Tex. 1895, art. 3098.*

LEGAL IRREGULARITY.

"Legal irregularity," within the meaning of *Laws N. Y. 1858, c. 338*, which authorizes a party aggrieved by any fraud or irregularity in proceedings relative to assessment for local improvements in the city of New York to apply to a justice of the Supreme Court to vacate the assessment, means any omission of or irregularity in one or more of the statutory steps required in laying the assessment. *In re Hay (N. Y.) 14 Abb. Prac. 53, 56.*

LEGAL JURY.

See "Jury."

LEGAL MALICE.

See "Malice."

LEGAL MEANS.

"Legal means," as used in *Act 1841*, making it the duty of the sheriff, on the receipt of notice of a mob or riot endangering property, to take all legal means to protect the property so attacked or threatened to be attacked, means all means which the sheriff may officially use. "The sheriff is required to take all 'legal means' to prevent the injury, and there is a clear differential distinction between the word 'legal' and 'lawful,' and the former is used in the law with reference to this distinction. It imports a much more limited range of means than is employed by the word 'lawful,' and imposes a much less onerous duty on the officers named. When the law requires an officer to take all 'legal means' to effect an object, it intends that he shall take all such means as he may officially use, and he is not chargeable with neglect of duty if he adopts the means prescribed by the law for such occasions, though he may omit other plain physical and moral means. These may be lawful, because not forbidden, but they are not 'legal means,' because not prescribed by law as means to be used by him in his office." *McCandless v. Allegheny Bessemer Steel Co.*, 25 Atl. 579, 585, 152 Pa. 139.

LEGAL MEMORY.

"Legal memory, or time out of mind," was in England, under the statute of limita-

tion of 32 Hen. VIII, 60 years. In Massachusetts the time of legal memory is analogous to the time prescribed for bringing a writ of right. In New York previous to 1830 it was 25 years, and subsequent to that time it was 20 years. *Miller v. Garlock (N. Y.) 8 Barb. 153, 154.*

LEGAL MERCHANDISE.

Other legal merchandise, see "Other."

LEGAL MORTGAGE.

"Legal mortgage" is that which is created by operation of law. *Civ. Code 1900, La. art. 3287.*

The law alone in certain cases gives to the creditor a mortgage on the property of his debtor, without it being requisite that the parties should stipulate it. This is called "legal mortgage." It is called "tacit mortgage," because it is established by the law without the aid of any agreement. *Civ. Code La. 1900, art. 3311.*

LEGAL NEGLIGENCE.

In cases where the common experience of mankind and the common judgment of prudent persons have recognized that to do or omit to do certain acts is prolific of danger, the doing or omission of them is "negligence per se," or "legal negligence." The omission of a duty enjoined by law for the protection and safety of the public by a common carrier, or the doing of an act by such a carrier which by the common experience and consensus of prudent persons would create danger to passengers, is legal negligence. It is legal negligence for a passenger to ride in a fast-going passenger coach with his arm protruding out of the window and beyond the line of the body of the car. *Carrico v. West Virginia Cent. & P. Ry. Co.*, 14 S. E. 12, 35 W. Va. 389.

Legal negligence is the failure to exercise the degree of care that a prudent and careful man would under like circumstances. *Drake v. Wild*, 39 Atl. 248, 251, 70 Vt. 52.

Legal negligence is the omission of such care as persons of ordinary prudence exercise and deem adequate to the circumstances of the case. *Johnson v. Chicago & N. W. Ry.*, 5 N. W. 886, 888, 49 Wis. 529.

LEGAL NOTICE.

Legal notice means something more than bare knowledge of the given facts. It is knowledge brought home to a party in a prescribed form. When its terms are so unambiguous that the meaning cannot without negligence or inattention be misunderstood, the notice is sufficient. Defects in form, by

which a party is not misled to his injury, do not render a notice invalid; but a notice giving wrong information, or silent as to material information which the statute requires, cannot be regarded as legal notice. *Sanborn v. Piper*, 10 Atl. 680, 681, 64 N. H. 335.

Rev. St. §§ 4275, 4276, prescribing a certain fee for the publication of legal notices, defines the term "legal notice" as "embracing every summons, order, citation, notice of sale, or other notice, and every other advertisement of any description required to be published by law, or in pursuance of any law, or of any order of any court." Under this definition the general election notice, or notice for the information of voters, required to be published by Laws 1891, c. 379, is a legal notice. *Bohan v. Ozaukee County*, 60 N. W. 702, 703, 88 Wis. 498.

Legal notice is said to be the information of some act done or the interpellation by which some act is required to be done. It also signifies simple knowledge. *People's Bank v. Etting* (Pa.) 17 Phila. 233, 235.

LEGAL OFFICER.

A person actually obtaining office with the legal indicia of title is a legal officer until ousted. *Hallgren v. Campbell*, 46 N. W. 381, 382, 82 Mich. 255, 9 L. R. A. 408, 21 Am. St. Rep. 557.

LEGAL OWNER.

Under the laws of South Carolina a mortgagee of lands was not the "legal owner," within the terms of Act Cong. March 2, 1891, c. 496, 26 Stat. 822, providing for the refunding of the direct tax to the legal owner of land. *Glover v. United States*, 17 Sup. Ct. 95, 96, 164 U. S. 294, 41 L. Ed. 440.

LEGAL PLAINTIFF.

A legal plaintiff is he in whom the legal title or right of action is vested. Under Act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], requiring contractors for the construction of public buildings to give bonds for the early payment of those furnishing labor or materials, and authorizing any person who has supplied labor or materials for the prosecution of such work to bring an action on the bond in the name of the United States, such action may be brought in the name of the United States for the use of the laborer or materialman, but in such action the United States is not a legal plaintiff. *United States v. Henderson* (U. S.) 102 Fed. 2, 4.

LEGAL PRESUMPTION.

Legal presumptions ought to be logical inferences from the natural and usual con-

duct of men under the circumstances. *Gunter v. Scranton Illuminating Heat & Power Co.*, 37 Atl. 550, 552, 181 Pa. 327, 59 Am. St. Rep. 650.

Legal presumptions are founded upon the experience and observation of distinguished jurists as to what is usually found to be the fact resulting from any given circumstances, and, the result being thus ascertained, whenever such circumstances occur, they are *prima facie* evidence of the fact presumed. Where a will duly executed, and in the custody of the testator for five years afterwards and within ten months previous to his decease, could not be found after his death, there was a legal presumption that the testator had destroyed it *animo revocandi*. *Betts v. Jackson* (N. Y.) 6 Wend. 173, 182.

Legal presumption is that which is attached by a special law to certain acts or certain facts. Such are: (1) Acts which the law declares null, as presumed to have been made to evade its provisions, from their very quality. (2) Cases in which the law declares that the ownership or discharge results from certain determinate circumstances. (3) The authority which the law attributes to the thing adjudged. Civ. Code La. 1900, art. 2235.

LEGAL PROCEEDINGS.

The words "legal proceedings," as used in a stipulation in an insurance contract that legal proceedings to recover thereon must be brought within six months from the date of the death of insured, mean proceedings in a court to enforce the claim; and the filing of proofs, employment of counsel, drafting of papers, or other preparations for enforcing the claim are not legal proceedings within the meaning of the policy. There is nothing uncertain or ambiguous in the clause. *Ex parte* preparations before commencing a suit hardly meet the requirement that legal proceedings shall be begun within the time limited. Legal proceedings, within the purview of this stipulation, must mean such proceedings to enforce the claim as the law sanctions or authorizes. *Griem v. Fidelity & Casualty Co.*, 75 N. W. 67, 99 Wis. 530.

The words "legal proceedings," as used in Bankr. Act July 1, 1898, c. 541, § 67, 30 Stat. 564, 565 [U. S. Comp. St. 1901, p. 3449], declaring that levies, judgments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be void, have no strictly technical meaning and are used in a general sense. In their necessary meaning they signify a suit or a proceeding at law or in equity, but in a wider sense they embrace every proceeding brought by law for acquiring a right or enforcing a remedy. The foreclosure of a mortgage by

advertisement under a statute is a legal proceeding. The mechanic's lien law of New York provides a statutory remedy for the collection of individual debts, which consists of two legal steps—one for acquiring the lien, and the other for foreclosing it. The two steps are indispensable to each other, and the entire proceeding, considered as a whole, is a legal proceeding. In *re Emslie* (U. S.) 98 Fed. 716, 720.

The phrase "legal proceeding," as used in Bankr. Act July 1, 1898, c. 541, § 67, 30 Stat. 564, 565 [U. S. Comp. St. 1901, p. 3449], is any proceeding in a court of justice by which a party pursues a remedy which the law affords him. The term embraces any of the formal steps or measures employed in the prosecution or defense of a suit. It refers to the use of a judicial process; the phraseology of the statute being "levies, judgments, attachments, or other liens obtained through legal proceedings." The filing of a notice of a mechanic's lien has no necessary relation to the initiation or the prosecution of a suit. It is essential in order to maintain an action to foreclose the lien, but it is no more a preliminary step in the suit than is the protesting of a note in a suit against the indorser. In *re Emslie* (U. S.) 102 Fed. 291, 293, 42 C. C. A. 350.

A note secured by a deed of trust provided that 10 per cent. should be added as attorney's fees, if legal proceedings were instituted for its collection. The maker was afterwards adjudged to be of unsound mind, and a guardian was appointed for him. After maturity of the note the payee placed it in the hands of an attorney, who properly proved it up and presented it for payment to the guardian. Held, that this constituted legal proceedings within the meaning of the law. *Morrill v. Hoyt*, 83 Tex. 59, 18 S. W. 424, 29 Am. St. Rep. 630.

Where a bill alleges that a certain person had accused defendant of crime and was threatening legal proceedings to recover damages, and besought plaintiff for his services to save the expense and punishment incident thereto, and agreed to pay him therefor, the words "legal proceedings," in connection with the context, fairly import criminal, as well as civil, proceedings; and, if a part of the consideration for the contract which the orator asked to have enforced was the suppression of criminal prosecution, equity will not aid the orator in enforcing it. *Mack v. Campeau*, 38 Atl. 149, 151, 69 Vt. 558, 69 Am. St. Rep. 948.

The words "legal proceedings," used in Bankr. Act July 1, 1898, c. 541, § 3, subd. 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], providing that an act of bankruptcy by a person shall consist of his having "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceed-

ings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference," have reference to any proceedings in a court of justice, interlocutory or final, by which the property of the debtor is seized and diverted from his general creditors. In *re Rome Planing Mill Co.* (U. S.) 96 Fed. 812, 815.

LEGAL PROCESS.

An order of a state court appointing a receiver of the property of a debtor is legal process, within the meaning of section 39 of the bankruptcy act of 1867. In *re Bininger* (U. S.) 3 Fed. Cas. 412, 416.

At common law the owner of a chattel could not maintain an action for replevin for the possession of goods taken from him by legal process. The Code modified this rule, and authorized the maintenance of the action of replevin for personal property seized by legal process, when it was exempt from seizure by such process. The term "legal process" contemplates a process issued in virtue of and pursuant to law. If a warrant for the seizure of liquors should be issued by a magistrate of his own volition, not by authority of any law, it could not be contended that a seizure made in pursuance thereof would be lawful, or that the possession thus acquired would be by virtue of legal process. Nor can property seized under an unconstitutional law any more be said to be seized under legal process than if the process issued without law. Hence the fact that the liquors for which replevin was instituted were seized under a warrant issued under an unconstitutional statute is no defense to the action. *Cooley v. Davis*, 34 Iowa, 128, 130.

A foreclosure of a mortgage by advertisement is not a legal process or a judicial decree. The proceedings in this kind of a foreclosure are carried on wholly outside of court and without the aid of its process or decree; and neither the giving of a mortgage nor the sale of the premises on foreclosure, prior to the expiration of the time for redemption, effect any change in title or possession of the property. *Loy v. Home Ins. Co.*, 24 Minn. 315, 319, 31 Am. Rep. 346.

"Legal process," as used in an insurance policy, which provided that, if any change should take place in the possession of the property by legal process, the policy should be void, meant "valid legal process." *Runkle v. Citizens' Ins. Co.* (U. S.) 6 Fed. 143, 146.

The words "legal process" mean all the proceedings in an action or proceeding. They would necessarily embrace the decree, which ordinarily includes the proceedings. As used in a policy of fire insurance, conditioned that if the property shall be sold or transferred, or any change take place in the title or pos-

session, whether by legal process, judicial decree, or voluntary transfer or conveyance, then and in every such case the policy shall be void, the phrase means what is known as a "writ," and as attachment or execution on writs are usually employed to effect a change of title to property, they are, or are among, the processes contemplated by the policy. *Perry v. Lorillard Fire Ins. Co.* (N. Y.) 6 Lans. 201, 204.

Process, whether by writ or by warrant, is legal whenever it is not defective in the frame of it and is issued in the ordinary course of justice from a court or magistrate having jurisdiction of the subject-matter, though there have been error or irregularity in the proceedings previous to the issuance of the process. *Commonwealth v. Brower*, 7 Pa. Dist. R. 254, 255.

LEGAL PROPORTION.

"Legal proportion," as used in a will giving to testator's son's wife, in case of the son's death, the use of the son's legal proportion of testator's estate, means such an aliquot portion of the estate as would equal the son's share in it under the statute of distributions in case of intestacy. *Security Co. of Hartford v. Cone*, 31 Atl. 7, 11, 64 Conn. 579.

LEGAL PROVOCATION.

"Legal provocation" is synonymous with "lawful, adequate, and reasonable provocation," and means an assault or personal violence. *State v. Bulling*, 15 S. W. 367, 371, 105 Mo. 204.

On a trial for murder, the judge, charging in reference to homicide effected by a deadly weapon, so defined voluntary manslaughter as to require that sudden heat and passion should not only exist, but be excited by "sufficient legal provocation," or "be justly excited by legal provocation." In his charge "deliberation" and "sufficient legal provocation" are respectively made to characterize murder and manslaughter, and, using the terms in a strict technical sense, this is correct; but "deliberation" must be understood to mean not slowness and composure, as distinguished from suddenness and excitement, but freedom from the temporary frenzy excited by sufficient legal provocation, as distinguished from that frenzy which the law allows to moderate its rigor in pity for human frailty. A voluntary act, which is without sufficient legal provocation, is deliberate, no matter how sudden or how furious it may be. Legal provocation is supposed not to be a proper technical expression, as every sufficient provocation must be something illegal. Judge Gaston, in the case of *State v. Will*, says: "Some causes of passionate excitement are termed 'legal provocations,' while others have been declared not

to be legal provocations. This must not be understood to mean that a man has a legal right to be provoked, but only that the law regards certain offensive acts as provocations, while it refuses to consider others as such. The latter, though provocations in common parlance, are not provocations in a legal sense, and therefore not comprehended in the legal phrase 'legal provocations.'" *State v. Smith* (S. C.) 10 Rich. Law, 341, 346, 347.

LEGAL PUNISHMENTS.

Legal punishments are defined by the statute as follows: "Fines, hard labor for the county, imprisonment in the county jail, imprisonment in the penitentiary (which includes hard labor for the state), and death by hanging." Code 1886, § 4492; *State v. Judge*, 87 Ala. 46, 47, 6 South. 328, 329.

LEGAL RATE OF INTEREST.

The term "legal rate of interest" means the statutory rate which obtains in the absence of contract. *McDonnell v. De Soto Sav. & Bldg. Ass'n*, 75 S. W. 438, 444, 175 Mo. 250, 97 Am. St. Rep. 592.

Where a statute provides for 6 per cent. interest, but that the rate may be made 8 per cent. by contract, the former is generally termed the "legal rate," and the latter the "contract rate." *Arbuthnot v. Brookfield Loan & Building Ass'n*, 72 S. W. 132, 134, 98 Mo. App. 332.

Under Civ. Code, § 2876, a legal rate of interest is fixed at 7 per cent. where no rate is named, but in no event is the interest to exceed 8 per cent. As used in such section, "legal" is not synonymous with "lawful." Three per cent. is lawful, but not the legal rate; 8 per cent. is lawful, when specified in writing; 7 per cent. is both legal and lawful. *Green v. Equitable Mortg. Co.*, 33 S. E. 869, 870, 107 Ga. 536.

LEGAL REASON.

"Legal reason," as used in Pen. Code, § 378, authorizing the court to withhold sentence when a legal reason exists why it should not be inflicted, but without defining what is a legal reason, leaves the question as to what constitutes such legal reason to be determined by the principles of the common law. *Aaron v. State*, 40 Ala. 307, 312.

LEGAL RELEVANCY.

Chamberlayne's Best on Evidence (Am. Notes) p. 251, after quoting Mr. Justice Stephen's definition of "relevancy," lays down the rule that legal relevancy, which is essential to admissible evidence, requires a higher standard of evidentiary force. It in-

cludes logical relevancy, and for reasons of practical convenience demands a close connection between the fact to be proved and the fact offered to prove it. All evidence must be logically relevant; that is, absolutely essential. The fact, however, that it is logically relevant, does not insure admissibility. It must also be legally relevant. A fact which, in connection with other facts, renders probable the existence of a fact in issue, may still be rejected, if in the opinion of the judge and under the circumstances of the case it is considered essentially misleading or too remote. *Hoag v. Wright*, 54 N. Y. Supp. 658, 662, 34 App. Div. 260.

LEGAL REMEDY.

A legal remedy, such as will bar relief by mandamus, is a remedy at law, as distinguished from a remedy in equity; and the mere existence of an equitable remedy is not of itself a conclusive objection to the exercise of the jurisdiction, although it may and should influence the court in the exercise of its discretion in the particular case. The principle involved is that whenever a legal right exists the party is entitled to a legal remedy, and when there is no other legal remedy mandamus will lie. *State v. Sneed*, 58 S. W. 1070, 1075, 105 Tenn. 711.

LEGAL REPRESENTATIVE.

The terms "representatives," "legal representatives," and "personal representatives" of deceased persons were used interchangeably, and primarily meant those artificial representatives, the executors and administrators, who by law represented the deceased, in distinction from the heirs, who were the natural representatives; but as, under statutes of distribution, executors and administrators are no longer the sole representatives of the deceased as to personal property, these words have lost much of their original distinctive force, and are now used to describe either executors and administrators, children or descendants, and next of kin or distributees, and, when not applied to those who represent deceased persons, they may mean trustees in insolvency and receivers. *Staples v. Lewis*, 41 Atl. 815, 71 Conn. 288.

In a just sense, heirs or descendants are often legal representatives of the deceased person. In the commonly accepted sense, the term may mean the administrator or executor, heirs, next of kin, or descendants. *Warnecke v. Lembca*, 71 Ill. 91, 12 Am. Rep. 85. In legal parlance, the executor or administrator is most commonly called the "legal representative." In regard to things real, the heir is also the legal representative, and so is a devisee who takes by purchase. Heirs may be the legal representatives, or they may not. *Grand Gulf R.*

& Banking Co. v. Bryan, 16 Miss. (8 Smedes & M.) 234. But, even where the death of the party to be represented is in contemplation, the context may change the usual meaning of the words in the given case. *Merchants' St. Nat. Bank v. Abernathy*, 32 Mo. App. 211. It may mean heirs, assignees, or receivers. *Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157; *Phelps v. Smith*, 15 Ill. (5 Peck) 572, 574; *Barbour v. National Exch. Bank*, 12 N. E. 5. 45 Ohio St. 133; *Hammond v. Mason & Hamlin Organ Co.*, 92 U. S. 724, 23 L. Ed. 767. The words with which the term is associated show its meaning. When used with reference to land, it ordinarily means those to whom the land descends. When used in a deed providing that in the event of the grantor's death the property shall descend to the legal representatives of a certain person, the term "legal representatives" means all heirs at law, and cannot be construed to mean the executor or administrator. *Ewing v. Jones*, 29 N. E. 1057, 1058, 130 Ind. 247, 15 L. R. A. 75.

A legal representative, or personal representative, in the common-law sense, means the administrator or executor; but this is not the only definition. It may be heirs, next of kin, or descendants, or sometimes an assignee or grantee. The sense in which the term is to be understood depends somewhat on the intention of the parties using it, and is to be gathered, not always from the instrument itself, but as well from the surrounding circumstances. *Warnecke v. Lembca*, 71 Ill. 91, 95, 12 Am. Rep. 85.

In Rev. St. § 6024, providing that service of a scire facias may be had on the legal representative of a deceased defendant, the term "legal representative" has a twofold meaning. In proceedings affecting land, it means the heir or devisee; as to personality, the administrator or executor is meant. *Stewart v. Gibson*, 71 Mo. App. 232, 235.

The term "legal representatives," as used in an act of Congress authorizing the Secretary of the Treasury to pay to the legal representatives of a certain person a certain sum of money, ordinarily means executors or administrators; but it is a broad expression, which may refer to heirs or to others who represent rights by succession to a conveyance. See *Lodge v. Weld*, 139 Mass. 499, 504, 2 N. E. 95. The power of sale in a common form of mortgage in this commonwealth is to the legatee and his representatives, which certainly gives the authority to assignees of the mortgage, as well as to executors or administrators. *Thayer v. Pressey*, 56 N. E. 5, 7, 175 Mass. 225.

As administrators or executors.

The term "legal representative" is not of uniform interpretation. It may mean those who succeed to the inheritance of an

estate, or it may mean those upon whom the law devolves the legal capacity of an administrator or executor. The ordinary meaning of the words "representative," "legal representative," and "personal representative" is that they refer to the person constituted representative by the proper court; and the burden is upon those attempting to maintain a different construction to show a different meaning. In the absence of anything appearing in the context, these words found in a statute or written instrument must be held to mean the administrator or executor. The heir is not technically a representative of the deceased, unless made so by express appointment or reasonable intendment. He succeeds to property and legal rights by inheritance, and takes the estate because of the death of the owner; but the administrator or executor represents the original owner in the settlement of his estate. Under the term "legal representative" in the Japanese indemnity fund act of 1883 (22 Stat. 421), it is held that the administrator of a seaman entitled to a distributive share of the fund may maintain an action to recover it. *Thompson v. United States* (U. S.) 20 Ct. Cl. 276, 278.

The ordinary meaning of the words "legal representatives" is executors and administrators; and they will be given this meaning when there is nothing in the instrument in which they are used to indicate an intention to use them in any other sense. *Cox v. Curwen*, 118 Mass. 198, 200; *Lodge v. Weld*, 2 N. E. 95, 96, 139 Mass. 499; *Golden Star Fraternity v. Martin*, 35 Atl. 908, 910, 59 N. J. Law, 207; *Weaver v. Roth*, 105 Pa. 408, 412; *Griffin v. Bower*, 21 Pa. Co. Ct. R. 188, 190; *Johnson v. Van Epps*, 110 Ill. 551, 580; *Matthews v. American Cent. Ins. Co.*, 48 N. E. 751, 752, 154 N. Y. 449, 39 L. R. A. 433, 61 Am. St. Rep. 627; *Geoffroy v. Gilbert*, 38 N. Y. Supp. 643, 646, 5 App. Div. 98; *Reilly v. Phillips*, 57 N. W. 780, 781, 4 S. D. 604; *Brent v. Washington's Adm'r (Va.)* 18 Grat. 528, 533.

"Legal representatives," in a policy of insurance, ordinarily means executors or administrators, when not in any way qualified by the context; but it may be shown to be next of kin, or successors, or assigns. *Pittel v. Fidelity Mut. Life Ass'n* (U. S.) 86 Fed. 255, 256, 30 C. C. A. 21.

"Legal representatives," in a life insurance policy payable to the legal representatives of the insured, is to be construed in its ordinary meaning, as meaning his executors or administrators, and not his heirs or next of kin, unless the circumstances show that it was for their benefit. *Griswold v. Sawyer*, 8 N. Y. Supp. 517, 518, 56 Hun. 12; *Firemen's Fund Ins. Co. v. Sims*, 42 S. E. 269, 270, 115 Ga. 939; *People v. Phelps*, 78 Ill. 147, 149; *People v. Petrie*, 61 N. E. 499, 503, 191 Ill. 497, 85 Am. St. Rep. 268; *Preston v.*

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Connecticut Mut. Life Ins. Co., 51 Atl. 838, 839, 95 Md. 101; *Armstrong v. Mutual Life Ins. Co. (U. S.)* 11 Fed. 573, 575.

The words "legal representative" are alike descriptive of an executor or administrator, and hence it is held that the address or notice of default of a negotiable instrument to the legal representatives of a deceased indorser was proper; the person sending the notice being unnotified as to whether the person to be notified was an executor or an administrator. *Pillow v. Hardeman*, 22 Tenn. (3 Humph.) 538, 541, 39 Am. Dec. 195.

Testator bequeathed one-half of his residuary estate to his daughter M. for life, to go at her decease to her children and the legal representatives of any of them who may then have deceased, and their heirs. The other half he bequeathed to his daughter J. for life, to go at her death to her children and the descendants of any deceased child, but, in case J. left no descendants, then such portion to go to the children of M. and the legal representatives of any one of them then deceased, and their heirs subject only to a life estate in one-third thereof to J.'s husband if he survived her. Held, that the term "legal representatives," as applied to the succession of M.'s life estate, meant executors and administrators. *Johnson v. Edmond*, 37 Atl. 503, 505, 65 Conn. 492.

The expression "legal representatives," as used in the statute of 1788 authorizing a remedy by motion by a surety against the legal representatives of a deceased co-surety, may mean, if taken in its more general signification as synonymous with "lawful," either the lawful representatives of the real estate, or the lawful representatives of the personal estate, of the deceased; but since the undertaking between sureties to make contribution is an implied assumpsit, which properly applies to and devolves upon the executor or administrator, but does not devolve upon the heir, it seems more proper to render this expression in the statute according to the subject-matter, and to refer the phrase to the executors and administrators, who lawfully represent and are bound by the implied assumpsit of the deceased, than to the heirs. *Lansdale's Adm'rs v. Cox*, 23 Ky. (7 T. B. Mon.) 401, 405.

"Legal representative," as used in a clause of a will providing that, if a son of testator shall die before, he shall receive his proportion of the principal of the trust estate, then so much of the trust estate shall belong to "the legal representative of such deceased and their heirs," means executors and administrators, and not the next of kin. *Tarrant v. Backus*, 28 Atl. 46, 48, 63 Conn. 277.

A bequest of personal estate to the "representatives," or "legal representatives," or

"personal representatives" of any one, means *prima facie* executors or administrators, and in a will by a wife, giving to the legal representatives of her deceased husband all the property received by her under his will, the term "legal representatives" refers to the executors, and not his heirs. *Halsey v. Paterson*, 37 N. J. Eq. (10 Stew.) 445, 448.

It is held in a number of cases that the words "legal representatives" are synonymous in their ordinary use with executor or administrator; but it is also ruled that the ordinary sense of the words may be controlled by a different intention appearing on the whole instrument. The words are alike descriptive of an executor or administrator, and would be appropriate to a case where a party directing a notice of protest where the indorser was deceased might be uninformed as to whether the person to be notified was an executor or administrator. *Pillow v. Hardeman*, 22 Tenn. (3 Humph.) 538, 540, 541, 39 Am. Rep. 195.

Where a testator gave a legacy to his son in trust for his wife, income payable to her for life, with power of appointment by will in her as to the principal, and provided that, if it was not so disposed of, it should be equally divided among testator's children or their legal representatives, it was held that the words "legal representatives" were used in their primary sense as meaning executors and administrators, as words of limitation, and not in their sense of next of kin, as words of substitution. *Norwood v. Mills' Ex'r*, 3 Ohio Dec. 356, 1 Ohio N. P. 314.

A power to sell and convey contained in a mortgage stated that in the event of the mortgagee's death his legal representatives or assigns were authorized to make the sale, and that if the sale was made his heirs, executors, administrators, or assigns were authorized to make a deed. Held, that the mortgagee's administrator was within the meaning of the words "legal representatives," and was empowered to make the sale as well as the deed. *Stevens v. Shannahan*, 160 Ill. 330, 343, 344, 43 N. E. 350.

Assignee or grantee.

An assignee or grantee is a legal representative of the assignor or grantor in regard to the things assigned or granted. *Grand Gulf R. & Banking Co. v. Bryan*, 16 Miss. (8 Smedes & M.) 234, 276.

The term "legal representative" primarily means one's executors or administrators. This meaning is well-nigh universal, when applied in connection with the decease of some one. It is not necessarily so when not so applied. But it is held that, even in cases where the death of the party to be represented is in contemplation, the context of the

instrument may change the usual meaning of the words in the given case. In a mortgage providing that the mortgagee or his legal representatives may take possession of the property in certain instances, it is held that the phrase "legal representatives" will include those who may represent the mortgagee by assignment, as well as those who will represent him after his death. *Merchants' Nat. Bank v. Abernathy*, 32 Mo. App. 211.

In a contract concerning the use of a patented invention, and binding the parties and their "legal representatives" to the covenants and agreements of the contract, the term "legal representatives" includes not only administrators and executors of the parties, but their successors and assignees in business and interest. *Hammond v. Mason & Hamlin Organ Co.*, 92 U. S. 724, 726, 23 L. Ed. 767.

The assignee of a note and deed of trust securing the same is not authorized to appoint a new trustee by a provision in the deed empowering the cestuis que trust or their legal representatives to make such appointment; the court holding that the assignee of a note is not the legal representative of the payee, so as to be entitled to substitute the trustee. "An assignee," says the court, "claims in his own right, and not in a representative character." *Fuller v. Davis*, 63 Miss. 78, 80.

The term "legal representative" used in the act of Congress of March, 1803, relative to pre-emption claims under the act, does not mean children or heirs only, but embraces also assignees and grantees, who in regard to the thing assigned or granted are the legal representatives of the assignor or grantor. With reference to the phrase "legal representatives" the court observes that in legal parlance the executor or administrator is most commonly called the "legal representative," but in regard to things real the heir is also the legal representative, and so is a devisee. *Grand Gulf R. & Banking Co. v. Bryan*, 16 Miss. (8 Smedes & M.) 234, 275.

"Legal representatives," as used in the formula in the Land Office that the patent certificate, and even the patent, should issue to the original grantee or his legal representatives, means representatives of the original grantee in the land by contract, such as assignees or grantees, as well as by operation of law. *Hogan v. Page*, 69 U. S. (2 Wall.) 605, 607, 17 L. Ed. 854.

A grantee is a legal representative of the grantor, within Code Civ. Proc. § 473, providing that the court may relieve a party or his legal representative from a judgment taken against him through his mistake, in advertence, surprise, or excusable neglect. *Malone v. Big Flat Gravel Min. Co.*, 28 Pac. 1063, 93 Cal. 384.

"Legal representatives," as used in a grant by Congress of the pre-emption right to land to a certain person and his legal representatives, means the grantee of such person, as well as his heirs, who succeeds to the property. *Delaunay v. Burnett*, 9 Ill. (4 Gilman) 454, 496; *Phelps v. Smith*, 15 Ill. (5 Peck) 572, 574; *Duncan v. Walker* (Pa.) (2 Dall.) 205, 1 L. Ed. 350.

The term "legal representatives" is not necessarily restricted to the personal representative of one deceased, but is sufficiently broad to cover all persons who with respect to the property stand in his place and represent his interests, whether transferred to them by his act or by operation of law. Hence it is held that the phrase "legal representatives," in a life insurance policy made payable to the insured or his legal representatives, included the assigns of the insured, as well as executors and administrators. *Mutual Life Ins. Co. v. Armstrong*, 6 Sup. Ct. 877, 879, 117 U. S. 591, 29 L. Ed. 997.

In the act of Congress providing that, where an officer, sailor, or soldier shall have fallen or died in the service, his heirs or "legal representatives" shall be entitled to and receive the same quantity of land as would have been due to such officer, etc., had he been living, it is not likely that the expression "legal representatives" was meant to apply to devisees of deceased officers and soldiers, for whom the bounty was intended if they had lived, because at the time this law was passed there could not be a devise of those lands under the general law. It is more probable that they were intended to provide for the class of persons who may have purchased the right of the officer or soldier to such bounty as the legislation might grant to them. *Stevenson v. Sullivan*, 18 U. S. (5 Wheat.) 207, 256, 257, 5 L. Ed. 70.

Under the statutory remedy for confirmation of title given to purchasers and "the heirs and legal representatives" of purchasers of lands at judicial and tax sales (Gould's Dig. c. 170, § 1), the purchaser from one buying at an auditor's sale of land sold for taxes is the legal representative of the original purchaser, and it is not necessary that he obtain the legal title to the land from such original purchaser before proceeding for confirmation of the tax title. *Scott v. Watkins*, 22 Ark. 556, 558.

Where a trust authorized the trustee or his legal representative to execute the trust by sale, etc., it will be held to mean that the assignee or grantee of the trustee, having the legal title that was in the trustee, shall execute the power, and not a mere stranger, having no title, such as the administrator of the trustee. *Warnecke v. Lemba*, 71 Ill. 91, 93, 12 Am. Rep. 85.

Assignee in bankruptcy.

An assignee in bankruptcy is the legal representative of the borrower, within the meaning of the thirtieth section of the national banking act, providing that, in case a usurious rate of interest has been paid a national bank, the person or persons paying the same, or their legal representatives, may recover back twice the amount of interest thus paid. *Wright v. First Nat. Bank* (U. S.) 30 Fed. Cas. 673; *Crocker v. First Nat. Bank* (U. S.) 6 Fed. Cas. 827, 828; *Markson v. First Nat. Bank* (U. S.) 16 Fed. Cas. 768; *National Bank v. Trimble*, 40 Ohio St. 629; *Monongahela Nat. Bank v. Overholt*, 96 Pa. 327, 329.

The words "legal representatives," as used in Act Cong. June 3, 1864, providing for the recovery of twice the amount of usurious interest from a national bank by the legal representatives of the person paying such interest, must be construed strictly, and does not include the assignee in bankruptcy of such person. *Barnett v. Muncie Nat. Bank* (U. S.) 2 Fed. Cas. 880, 881 (affirmed 98 U. S. 555, 25 L. Ed. 212); *Barnits v. First Nat. Bank* (U. S.) 2 Fed. Cas. 901, 902.

"Legal representative," in a life policy, does not include a trustee in bankruptcy. *Firemen's Fund Ins. Co. v. Sims*, 42 S. E. 269, 270, 115 Ga. 939.

Assignee for benefit of creditors.

In Pennsylvania the term "legal representatives" means executors and administrators, in the absence of anything showing that the words are used in a different sense; and an assignee for benefit of creditors cannot maintain an action in such state in his own name against a national bank to recover the penalty for usurious interest paid such bank by the assignor, under Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], authorizing such action by the party paying the illegal interest or his "legal representatives." *Osborn v. First Nat. Bank*, 34 Atl. 858, 859, 175 Pa. 494 (distinguishing *Monongahela Nat. Bank v. Overholt*, 96 Pa. 327).

The term "legal representative" ordinarily means executors and administrators, though it may be used in a different sense, and shown by the connection in which it was used to have a different meaning. In *Osborn v. First Nat. Bank*, 175 Pa. 494, 34 Atl. 858, it was held that the term, in the absence of anything to show that it was used in a different sense, means executors and administrators, and the right of an assignee for the benefit of creditors to recover the penalty, authorized by Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], of twice the amount of illegal interest paid, was denied, though it has been held by some courts that an assignee in bankruptcy is a

"legal representative," within the meaning of the statute authorizing such recovery. *Pardoe v. Iowa State Nat. Bank*, 76 N. W. 800, 802, 106 Iowa, 345.

Assignees under a deed of trust for the benefit of creditors are "personal representatives," within Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], providing that, in case a greater rate of interest has been paid to a national bank than is allowed by the laws of the state in which the bank is located, the person by whom it has been paid or his legal representative may recover twice the amount of interest thus paid. *Henderson Nat. Bank v. Alves*, 15 S. W. 132, 133, 91 Ky. 142.

An assignee for the benefit of creditors, under the Kentucky Statutes, who, in order to get possession of collaterals, pays to a national bank a note of his assignor, which includes usurious interest, may maintain an action to recover it back under Rev. St. 5198 [U. S. Comp. St. 1901, p. 3493]; being the assignor's "legal representative" in the meaning of that section. *Louisville Trust Co. v. Kentucky Nat. Bank* (U. S.) 87 Fed. 143, 147.

Children.

If an inference can be drawn from a will that a testator used the words "personal or legal representatives" to designate individuals answering the description, though not in the strict legal sense of the terms, those persons will be entitled in preference to executors and administrators. 1 *Rop. Leg.* 128; *Williams' Ex'rs* (6th Am. Ed.) 1217-1225. A devise to A. & B. or their legal representatives has been construed to mean children taking by substitution. *Albert v. Albert*, 12 Atl. 11, 16, 68 Md. 352 (citing *Abbott v. Jenkins* [Pa.] 10 Serg. & R. 296; *Appeal of Stook*, 20 Pa. 349).

Descendants.

A clause in a life insurance policy, providing for the payment to the wife of the insured or her legal representative, means not her administrator, but some one appointed by her to receive the fund. "Legal representative" in its broadest sense means one who was lawfully representing another in any matter whatever; and where the wife was not living when the policy matured, and her children were also dead, the money due thereon was not part of her estate, but the fund passed down the line of descent to her grandchildren. In re *Conrad's Estate*, 56 N. W. 535, 536, 89 Iowa, 396, 48 Am. St. Rep. 396.

The term "legal representatives" has been used to designate an administrator or executor, devisees and legatees, children, brothers and sisters, and almost all degrees of relationship. The term "legal representatives" in Rev. St. 4159, providing that up-

on the death of a person seised of property it shall descend to his children and their legal representatives, and in section 4162, providing that, if there are no children or their legal representatives living, then such estate, real and personal, shall pass and descend one-half to the brothers and sisters of such intestate or their legal representatives, etc., means lineal descendants of those of different degrees of relationship mentioned in section 4159. Under section 4162, the legal representatives are the lineal descendants of such brothers and sisters, and not the collateral relatives, such as uncles or aunts. *Thomas v. Lett*, 6 Ohio Dec. 429, 431, 4 Ohio N. P. 393.

The words "legal representatives," as used in a will providing that, if a beneficiary dies before the will takes effect, his or her share shall revert to his or her legal representatives, means issue or lineal descendants, under which a child, and not the husband, takes the deceased wife's estate. In re *Hess' Estate*, 10 O. C. D. 823, 824.

Distributees.

The term "legal representatives," used in an insurance policy to designate the beneficiary thereof, cannot be held to mean the executor or administrator of the insured, so as to give them a beneficial interest in the policy, but must be considered to designate those who under the laws succeeded to the personal estate of the insured, which, under *Milliken & V. Code*, §§ 3135, 3335, are the widow and next of kin of the insured. *Rose v. Wortham*, 32 S. W. 458, 459, 95 Tenn. (11 Pickle) 505, 30 L. R. A. 609.

The term "legal representative," as used to designate those to whom a trust fund shall be paid upon the death of cestui que trust, is broad enough to include both the administrator and those who are entitled to the distribution of the estate. *Bouv. Law Dict.* The meaning of the term depends upon the manner of its use. *Casey v. Lockwood*, 52 Atl. 803, 804, 24 R. I. 72.

By the phrase "legal representatives," in a will providing that, if any of testator's children should be deceased at the time fixed for distribution of a certain property, their shares should go to their legal representatives, is held to mean those who would take under the statute of distribution. *Farnham v. Farnham*, 2 Atl. 325, 334, 53 Conn. 261.

Devisees and legatees.

"Legal representatives," as used in Rev. St. art. 2248, prohibiting parties from testifying in actions by or against the heirs or legal representatives of the decedent, does not include devisees and legatees. *Newton v. Newton*, 14 S. W. 157, 158, 77 Tex. 508.

"Legal representatives," as used in a devise of the remainder of an estate, to be di-

vided at the decease of testator's sisters among his then "heirs at law or their legal representatives," means the heirs or devisees of such heirs as were mentioned in the will. Appeal of Stook, 20 Pa. 549, 553.

Guardian.

Act Feb. 23, 1874, touching the taxation of wild lands and a sale of such lands for nonpayment of taxes, was operative upon the lands of minors who were represented by guardian both at the time the taxes accrued and when the sale was made; such guardian, although not clothed with the legal title, being embraced within the term "legal representative," as contained in the twenty-first section of said act. *McLain v. Bedgood*, 15 S. E. 670, 89 Ga. 793.

Heirs or next of kin.

"Legal representative," as used in the Ohio act prescribing the duties of county auditors, and providing that such certificates (meaning tax certificates) shall be assignable in law and vest in the assignee, or his legal representative, the right and title of the original purchaser, means the heir, to whom the realty descends. *Rice's Lessee v. White*, 8 Ohio (8 Ham.) 216.

By the words "legal representatives," in Pre-emption Act Pa. Dec. 21, 1784, is to be understood heirs or alienees. *Duncan v. Walker* (Pa.) 2 Dall. 205, 1 L. Ed. 350.

The expression "legal representatives" is equivocal, and may refer either to heirs, executors, or administrators, according to the subject-matter. In a statute relating to lands it is considered as referring to heirs. *Duncan's Lessee v. Walker* (Pa.) 1 Yeates, 213, 220.

A will provided that after the decease of the tenant for life of the whole estate the property should be equally divided between the testator's two children "or their legal representatives." Held, that the words "legal representatives" were used in the sense of heirs, and that the children took a remainder in fee, vesting upon the death of the testator. *Chasy v. Gowdry*, 9 Atl. 580, 581, 43 N. J. Eq. (16 Stew.) 95.

A deed provided that the estate should be held by the grantor's mother during his life. After his death it was to go to his lawful issue, if he had any, and in default of such issue to be equally divided among his surviving brothers or their legal representatives. Held, that the words "legal representatives" were evidently used as the equivalent of "heirs," and upon the death of the grantor without issue the estate should be divided among his brothers then living and the heirs of those who were then dead. *Ringwalt v. Ringwalt* (Pa.) 42 Leg. Int. 80, 81.

In a will providing that, on the death of a beneficiary of a trust created by the will, the property thereby placed in trust shall descend to the legal representatives of the said beneficiary, provided, however, that an adopted son of the testator shall under no circumstances whatever inherit or be entitled to any part or parcel thereof, the words with which the term "legal representatives" is associated shows its meaning. With the word "descend," it cannot with propriety be construed to mean an executor or administrator, since land goes by descent to heirs or descendants. The exclusion of the adopted son from inheritance shows that the author of the trust intended to vest the remainder in those who succeeded by inheritance or descent. The subject-matter is land, and where the term "legal representatives" is used with reference to land it ordinarily means those to whom the land descends. The whole scope and tender of the instrument indicates that the term was used as a synonym of "descendants" or "heirs." *Ewing v. Jones*, 15 L. R. A. 75, 79, 130 Ind. 247, 29 N. E. 1057.

Where a testator gave money and realty to trustees, to be distributed on the death of N.'s children among their heirs at law—that is to say, as the children of N. decease a proportion of the fund is to be distributed "among the children or legal representatives of each child so dying"—the words "legal representatives" did not refer to the executor or administrator of a child so dying, and must therefore have reference to those who would succeed to their property, either real or personal. *Olney v. Lovering*, 45 N. E. 766, 167 Mass. 446.

The words "legal representatives," in a life insurance policy, are construed as meaning heirs or next of kin, and not executors or administrators; the court saying: "It is always permissible to construe these words in that way, especially in wills and policies of life insurance, wherever it is apparent from the context or subject-matter that they were used in that sense. They will be construed in that way more readily in policies of life insurance than in almost any other kind of instrument, for the reason that such insurance is very commonly intended as a provision for the family of the insured." *Schultz v. Citizens' Mut Life Ins. Co.*, 61 N. W. 331, 332, 59 Minn. 309.

A will gave to testator's wife during widowhood the net rents and profits of his real estate and the net income of his personality, and provided that on her death or remarriage the property should be divided among his two sons and the two daughters for life, and to their issue absolutely, and, if any of them should die without issue, to the surviving sister or brother. In consideration of the children withdrawing their opposition to the will, the widow contracted to pay during her widowhood one-eighth of the net

income to each of them and to the legal representatives of those dying. Held that, by analogy with the provisions of the will and the statute of distribution of New York, the term "legal representatives," as used in the contract, meant "next of kin," and that, one of the daughters having died without issue, her share is not payable to her executor. *Greenwood v. Holbrook*, 18 N. E. 711, 713, 111 N. Y. 465.

A testator gave certain property to his child, and then provided, "and in case any of my children shall die after me, and after having attained the age of 21 years, then the share, portion, or interest of the child so dying shall go to the heirs, devisees, or legal representatives of the child so dying." Held, that the words "heirs, devisees, or legal representatives" were words of purchase, and not of limitation, and that those persons who answered to the description of heirs, devisees, or legal representatives of the deceased child of the testator, having a regard to the nature and character of the property, were the persons entitled to take under the will. If the property transmitted were personal estate, and the child left no will, the persons who would take under the term "legal representatives" would be those who by the statute of distribution are known as the "next of kin," rather than the executors and administrators of the deceased child. *Drake v. Pell* (N. Y.) 3 Edw. Ch. 251, 270.

The term "legal representatives," as used in a codicil to a will giving a portion of the residuary estate in real property to trustees, to pay the income and profits to one for life and on her death to convey the trust fund to her legal representatives, means, not the executors or administrators of the person entitled to the income and profits for life, but those who would take for their own benefit as her next of kin. *Greene v. Huntington*, 46 Atl. 883, 885, 73 Conn. 106.

"Legal representatives" is construed by the Supreme Court of Texas, in *Allen v. Stovall*, 63 S. W. 863, 866, 94 Tex. 618, to be synonymous with "heirs."

The term "legal representatives," in a will leaving property to testator's children, with a proviso that, if any of the children die before testator, the estate shall be divided among the survivors or their legal representatives, was construed to mean lawful heirs, and to authorize the legal heirs of a deceased to take the share of their deceased parent. *Rivenett v. Bourquin*, 18 N. W. 537, 538, 53 Mich. 10.

The words "legal representatives," in a will directing that on the termination of a trust created thereby the corpus of the estate should be divided into three equal parts, and that the parts should go to the heirs or

"legal representatives" of testator's three children, was construed to be used in the same meaning as the word "heirs" was used, and that each word was intended to describe the persons who were to take the corpus of the estate at the time of the distribution. They were held to be used in their natural and proper sense, as including all those persons who at that time should be capable of inheriting from either of testator's children, or of taking the property of either of such children under the statute of distributions. *Blakeman v. Sears*, 51 Atl. 517, 518, 74 Conn. 518.

Heirs of a deceased partner are "legal representatives," within the meaning of St. 1823, c. 140, giving courts of equity jurisdiction in disputes between copartners and their legal representatives, where the requisite measures have been pursued to render such heirs liable to respond to the demand of the surviving partner, although heirs generally are not to be so considered. *Johnson v. Ames*, 28 Mass. (11 Pick.) 173, 180.

Indorser of bill.

The indorser of a bill of exchange is not the "legal representative" of the one for whose benefit the bill was discounted, and consequently is not entitled to be subrogated to his rights, arising under Act Cong. June 3, 1864, providing for the recovery of twice the amount of usurious interest from a national bank, from the payment of usurious interest on such bill. *Barnett v. Muncie Nat. Bank* (U. S.) 2 Fed. Cas. 880, 881 (affirmed 98 U. S. 555, 25 L. Ed. 212).

Judgment creditor.

The term "legal representatives," as used in Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], giving to the person paying usurious interest, or his legal representatives, the right of action against a national bank for collecting usurious interest, does not embrace a judgment creditor of the person paying such interest. *Barrett v. Shelbyville Nat. Bank*, 3 S. W. 117, 118, 85 Tenn. 426.

Named beneficiaries.

The term "legal representatives," in a clause of a life insurance policy providing that, where the deceased has no legal representatives, the money shall become the property of the association, means those who are legal representatives in the contemplation of the charter and by-laws of the association, namely, the people who are there enumerated—the widows, orphans, heir, or legatee. *Masonic Mut. Relief Ass'n v. McAuley* (D. C.) 2 Mackey, 70, 80.

Privy in representation.

The words "legal representative," when used with reference to the right of a legal representative to set aside a decree wholly

in personam against a deceased person, means executor or administrator or devisee in a will, who has the power and authority under the law to legally represent the estate of a deceased person. It is true that heirs, trustees, and grantees of real property, assignees of contracts or patents, or receivers or assignees in bankruptcy, may in certain cases be considered as the legal representatives of the property involved. The general rule is that no person can revive a suit abated by the death of a party unless he is in privity with the deceased, but it is not sufficient that he may in a legal sense be a privy in estate. He must be a privy in representation. Lord Coke, in 1 Inst. 271, says: "There are four sorts of privies: Privies in estate, as debtor and donee, lessor and lessee; privies in blood, as heir and ancestor; privies in representation, as executors and administrators; and privies in tenure, as lord and tenant—which are all reducible to two heads, privies in law and privies in deed. Now the right to revive is not applicable to all these different sorts of privies, but by the authorities is expressly confined to persons who are in privity by representation, such as heirs in relation to the real estate, and executors and administrators in relation to the personality." *Ralston v. Sharon* (U. S.) 51 Fed. 702, 714.

Purchaser at execution sale.

The term "legal representatives," within the meaning of Act March 29, 1813, providing for the relief of sundry landholders in the county of York and their legal representatives, does not mean the representatives of the personal estate of the landholder, but his representatives on the land itself. Therefore, where the land was sold under a judgment against the landholder, the sheriff's vendee, and not the administrator of the deceased landholder, was entitled to the money directed to be paid by the act to the landholder or his legal representatives. *Commonwealth v. Bryan* (Pa.) 6 Serg. & R. 81, 83.

The purchaser at a sale of mortgaged property under decree of the court is the legal representative of the proprietor, who is chargeable with a tax on the property, and may redeem on payment of taxes under City Charter 1820, § 10, providing that if within such time the proprietor of any property which shall have been sold for taxes, or his legal representative, shall repay to such purchaser the moneys paid for the taxes, etc., he shall be reinstated in his original right and title as if no such sale had been made. *Oneale v. Caldwell* (U. S.) 18 Fed. Cas. 695, 696.

Receiver.

A receiver of an insolvent corporation is a "legal representative," within the meaning of Rev. St. U. S. § 5198, providing for

the recovery by "the person by whom it has been paid, or his legal representatives," in twice the amount, of illegal interest paid a national bank. *Barbour v. National Exch. Bank*, 12 N. E. 5, 45 Ohio St. 133.

Sponse.

The term "legal representatives," in an insurance policy payable to legal representatives or assigns, may be construed to mean testator's wife in her personal capacity, when the policy is bequeathed to his wife. The language of the policy is not required to be technically construed, as passing the proceeds of the policy to the wife as executrix. In *Griswold v. Sawyer*, 26 N. E. 464, 125 N. Y. 411, the court held that while the strict technical meaning of the words "legal representatives" is administrators or executors, and they must be so construed in the absence of anything showing a different intent, as they are not always used in this sense, it is the province of construction in any case to ascertain the sense in which they were used, and that for that purpose the subject-matter and surrounding circumstances, as well as the language used, may be considered. *Leonard v. Harney*, 71 N. Y. Supp. 546, 549, 63 App. Div. 294.

Where an insured directed that the amount of his policy should be paid to his legal representatives, the words "legal representatives" should be construed to include the widow, and should not be held to have been used in their technical legal sense, since the insured, not being a lawyer, could not be supposed to have used the words in their strict technical legal sense, but it would be more reasonably supposed that he used them in a general sense, in which they are frequently used and generally understood by laymen. *Griswold v. Sawyer*, 26 N. E. 464, 465, 125 N. Y. 411 (cited and approved *Lyons v. Yerex*, 58 N. W. 1112, 1113, 100 Mich. 214, 43 Am. St. Rep. 452).

"Legal representatives," within the meaning of Gen. St. c. 207, § 12, providing that actions pending at the death of either party, in which the right of action does not survive, may be prosecuted, at the election of the surviving party or of the legal representatives of the deceased party, as actions may be prosecuted the cause of which survives, a husband who had joined with his wife in bringing a suit for personal injury to her on her death is not her legal representative, by reason of the marital relation, so as to authorize him to prosecute the action. *Saltmarsh v. Town of Candia*, 51 N. H. 71, 76.

Primarily the words "legal representatives" signify the executors or administrators of a deceased person. They, however, have been construed to refer to blood relations as heirs or next of kin, and are held to mean that class of persons where the cir-

cumstances indicate such intention, and where a father took out a life policy payable to his daughter four years old or her legal representatives, and she married and died before her father, her husband is not entitled to the proceeds of the policy. *Geoffroy v. Gilbert*, 36 N. Y. Supp. 884, 885; 15 Misc. Rep. 60.

The term "legal representatives," in a devise of real estate in trust for testator's niece during life, with power of appointment by will of the principal, or in default of a will to her legal representatives, did not include the husband of the devisee. In *re Lesieur's Estate*, 54 Atl. 579, 580, 205 Pa. 119.

Successors in title.

Under a statute (Gen. St. 1873, p. 582, § 329) providing that no person having a direct legal interest in the result of any civil case or proceeding shall be a competent witness therein when the adverse party is an executor, administrator, or legal representative of a deceased person, it is held that the word "representative" applies to any person or party who has succeeded to the rights of the deceased, whether by purchase, descent, or by operation of law. In discussing this question the court says: "It is said that in legal parlance the executor or administrator is most commonly called the 'legal representative.' In regard to things real the heir is also the legal representative, as is the devisee; and the assignee or grantee is also a legal representative of the assignor or grantor in regard to things assigned or granted." *Wamsley v. Crook*, 3 Neb. 344, 350.

"Legal representative," as used in a trust deed authorizing the trustee or his legal representative to execute the trust by sale, etc., means that the assignee or grantee of the trustee, having the legal title that was in the trustee, shall execute the power, and not a mere stranger having no legal title, such as the administrator of the trustee. The "legal representative," or "personal representative," in the commonly accepted sense, means the administrator or executor; but this is not the only definition or use of the word, as in this case it means assignee or grantee. *Warnecke v. Lembca*, 71 Ill. 91, 93, 12 Am. Rep. 85.

The phrase "legal representative," as used in a clause of a deed of bargain and sale, providing that, if the grantor should survive the grantee, he should have the right at any time within 18 months after the death of the grantee to purchase back again all right, title, and interest in the farm at a valuation to be then made by two disinterested persons, one of whom should be selected by the legal representatives of the grantee, means those who succeed the grantee in the title of the land, rather than a personal representative of deceased grantee,

within whose functions dealings in real estate do not fall. And where the land was devised in trust by the grantee, the ones to select the two disinterested persons to fix the value of the farm were the trustee and cestui que trust. *Woodruff v. Woodruff*, 16 Atl. 4, 5, 44 N. J. Eq. (17 Stew.) 849, 1 L. R. A. 880.

The term "legal representative," as used in the law of Congress entitled "An act authorizing the laying off of a town on Bear river, in the state of Illinois, and for other purposes," is designed to describe a party in interest who has succeeded to the right of the deceased party, who had received the permit or made the requisite improvement, and by virtue of which the land is authorized to be entered. The administrator of such deceased party is not entitled to take the benefit of the law by virtue of his appointment. Whoever succeeded to the right of the settler by operation of law or by grant is his legal representative. *Morehouse v. Phelps*, 18 Ill. (8 Peck) 472.

"Legal representatives," as used in a covenant to warrant and defend the title of another in a town lot against the claims of all persons, except those of A. and his legal representatives, includes the person succeeding to the claims A. then had, whether as heir, devisee, grantee, or assignee, and not to executors or administrators, who could take no interest in the land, or to any claim which A. might subsequently acquire. Though the term "legal representatives," in its strict and literal acceptation, means executors and administrators, it is frequently used in a different sense, and the question of intention is to be considered in its construction. *Bowman v. Long*, 89 Ill. 19, 21.

A legal representative, in the most extensive acceptation of those words, is one who legally and lawfully represents another in any matter or thing, of whatever nature or character it may be. In a recorder's certificate, issued to a person or his legal representatives, it is held that the phrase "legal representatives" includes all those claiming by purchase or descent under the person to whom the certificate was originally granted. *Wear v. Bryant*, 5 Mo. 147, 164.

The phrase "legal representative" is often used in statutes in a broad sense, so as to include all persons, natural or artificial, who by operation of law stand in the place of and represent the interests of another. It is in this broad sense that the phrase is used in the Minnesota standard form of insurance policies. A receiver appointed by the court for an insolvent corporation is its "legal representative," within the meaning of this phrase. *Alford v. Consolidated Fire & Marine Ins. Co.*, 93 N. W. 517, 518, 88 Minn. 478.

An insurance policy provided that it should be void in case of any fraud or false

swearing by the insured, either before or after the loss, touching any matter relating to the insurance, and that the word "insured," as used in the policy, should be held to include the legal representative of the insured. Held, that the term "legal representative" referred to one who succeeds to the legal rights of the insured by reason of his death or the transfer of the property, and not a mere agent of the insured. *Metzger v. Manchester Fire Assur. Co.* (Mich.) 63 N. W. 650, 651.

Parties who have acquired the entire interest of deceased in the subject-matter of the action are his "legal representatives," within the meaning of that phrase as used in the provision of Code Civ. Proc. § 7473, relating to default judgments. *Plummer v. Brown*, 1 Pac. 703, 64 Cal. 429.

Surviving partner.

The term "legal representative" is one having a well-defined legal meaning, its primary meaning being executors or administrators; and when used in a contract it must be presumed to have been so used, and not to apply to a surviving partner. This primary meaning would, of course, yield to a context which clearly showed that a different meaning was intended. *Sullivan v. Louisville & N. R. Co.*, 30 South. 523, 534, 128 Ala. 77.

A surviving partner succeeds by operation of law to all the rights and liabilities of the firm, and is entitled to represent the firm. If by law he represents the firm, he is its legal representative. The term "legal representative" has been held to apply to all persons who, with respect to another's property, stand in his place and represent his interest, whether transferred to them by his act or by operation of the law. *Lasater v. First Nat. Bank* (Tex.) 72 S. W. 1054, 1055 (citing *Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997).

LEGAL RESIDENCE.

The words "legal settlement" are synonymous with "legal residence." *Town of Louriston v. Swift County Com'rs*, 93 N. W. 1052, 1053, 89 Minn. 91.

"Legal residence" is synonymous with "domicile," and is defined to be a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. It means more than "residence"; there being a distinction between actual and legal residence. *Cincinnati, H. & D. R. Co. v. Ives*, 3 N. Y. Supp. 895.

The phrase "legal residence," as to poor persons, in a statute with reference to caring for the poor, implies both the act and intent on the part of the pauper, in order to create

a liability on the part of the county, town, or municipal corporation whose duty it is to care for the poor. *Town of Albion v. Village of Maple Lake*, 74 N. W. 282, 283, 71 Minn. 503.

Legal residence is the place of a man's fixed habitation, where his political rights are to be exercised, and where he is liable to taxation. "Legal residence," "inhabitation," and "domicile" mean the same thing. *Crawford v. Wilson* (N. Y.) 4 Barb. 504, 522.

While the legal residence of a person rests largely in his intent, it is equally true that what constitutes a legal residence is, generally speaking, dependent upon the facts of each particular case, and consequently it often happens that facts which constitute a legal residence in one locality for one purpose do not necessarily establish such a residence for another purpose. To illustrate, a person may be a legal voter in the borough of Brooklyn, and yet be a taxable resident of the borough of Manhattan, where he spends most of his time and transacts his principal business. But, wherever that residence may be, it is well settled that for the purposes of taxation for personal property it will be deemed to continue until a change is affirmatively and satisfactorily shown to have taken place. *Paddock v. Lewis*, 69 N. Y. Supp. 1, 3, 59 App. Div. 430.

A distinction is recognized between legal and actual residence. A person may be a legal resident of one place and an actual resident of another, as when he goes from the place of his legal residence, to reside temporarily at the other place, intending to return. *Hinds v. Hinds*, 1 Iowa (1 Clarke) 39; *Love v. Cherry*, 24 Iowa, 205; *Bradley v. Frazer*, 54 Iowa, 289, 6 N. W. 293. Legal residence, as distinguished from mere temporary actual residence, is the residence contemplated by the Code relating to the bringing of actions aided by attachment. *Ludlow v. Szold*, 57 N. W. 676, 678, 90 Iowa, 175.

As contradistinguished from a person's "legal residence," he may have an "actual residence" in another state or country. He may abide in one country without surrendering his legal residence in another, if he so intends. His legal residence may be merely ideal, but his actual residence must be substantial. He may not actually abide at his legal residence at all, but his actual residence must be his abiding place. Though one may have a legal residence in one state, yet if his actual residence is in another state, the latter fact is sufficient to authorize an attachment against his property in the first state upon the ground of nonresidency. And in an action for divorce the mere fact of a plaintiff's legal residence being within the state, his actual residence being out of the state, would not be sufficient to defeat a motion to compel him to execute a nonresident's bond for

costs. Furthermore, a mere legal residence in the state, with an actual residence out of the state, does not satisfy Civ. Code, § 423, requiring that a plaintiff for a divorce must have "a residence in the state" for one year before the commencement of the action. *Tipton v. Tipton*, 8 S. W. 440, 441, 87 Ky. 243.

LEGAL RIGHT.

In the statute defining forgery as the false making or material altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal right or liability, the words "legal right" evidently mean a right that may be enforced in a civil action. *Colson v. Commonwealth*, 61 S. W. 46, 47, 110 Ky. 233.

LEGAL SCHOOL AGE.

"Legal school age," as used in St. 1881, c. 172, providing for the incorporation of a new town out of a portion of the territory of an old one, and declaring in section 6 that the annual excess, if any, of maintaining the public schools, shall be ascertained by the commissioners appointed for that purpose on the basis of the average number of scholars in the public schools of legal school age for a certain year, means the age of 21 years; for it is provided by statute that all children within the commonwealth may attend the public schools in the place in which they have their legal residence. Hence all residents of the commonwealth under the age of 21 years, as soon as they have sufficient capacity, are entitled to attend the public schools, and are scholars of legal school age, and it is not confined to scholars between the ages of 8 and 14 years. *Inhabitants of Needham v. Inhabitants of Wellesley*, 31 N. E. 732, 139 Mass. 372.

LEGAL SERVICE.

A return by a constable that he had "served the summons on the defendant by offering to read the same to him, but he would not stay to hear it," shows a legal service. *Slaght v. Robbins*, 13 N. J. Law (1 J. S. Green) 340, 341.

A "legal service of summons" is one which is made in case the defendant resides out of a state by affixing a copy on the building on which the mechanic's lien is claimed, and sending a copy by mail direct to him at the post office nearest his residence, or, in case his residence is not known to the plaintiff, then by affixing a copy to such building and publishing it for four weeks in a newspaper circulating in the county. *Revision N. J. p. 668; Heidritter v. Elizabeth Oilcloth Co.*, 5 Sup. Ct. 135, 136, 112 U. S. 294, 28 L. Ed. 729.

When a party refuses to accept a copy of summons, which is offered him in a civil manner, after being informed what the paper is, there is no other way to make service but to deposit the process in some appropriate place in the presence of the party, if visible, or where it would be most likely to come to his possession. If then the party to be served does not get the copy of the summons, it will be entirely owing to his own fault. "If a defendant declines to receive from the officer a paper presented by him for service, he may deposit it in the presence of the party." Mr. Justice Field, in *Norton v. Meader* (U. S.) 18 Fed. Cas. 420, 426. And if a party refuse to accept papers after being distinctly informed what they are, he should be held to the consequences of his own perverseness; and then if they should be laid down for him and before him, such offer, information, refusal to accept, and leaving of the papers for him and in his presence should be deemed legal service. *Borden v. Borden*, 23 N. W. 573, 574, 63 Wis. 374; *Davidson v. Baker* (N. Y.) 24 How. Prac. 39, 41, 42.

"Legal service" is defined by the New Jersey mechanic's lien law as service by sending a copy by mail directed to a nonresident defendant at the post office nearest his residence, or, in case his residence is not known, then by the publishing of the summons in some newspaper of the state. *Smith v. Colloty*, 55 Atl. 805, 807, 69 N. J. Law, 365.

LEGAL SETTLEMENT.

"Legal settlement thereon," as used in Sp. Laws 1849, c. 264, § 1, which provides that the territory described therein, "together with all persons having a legal settlement thereon," are hereby incorporated into a separate town by the name of Yarmouth," etc., embraces all those persons who had previously acquired a legal settlement on the territory composing the town, who by the application of other laws would have had a right to support from the town thus incorporated in case of falling into distress and becoming necessitous, providing the town had previously had an independent existence. *Inhabitants of Yarmouth v. Inhabitants of North Yarmouth*, 44 Me. 352, 360.

The words "legal settlement" are synonymous with "legal residence." *Town of Lounston v. Swift County Com'rs*, 93 N. W. 1052, 1053, 89 Minn. 91.

"Legal settlement," as used in St. 1839, which annexes a part of the town of Dearborn, with the "inhabitants having a legal settlement" on the territory set off, to the town of Belgrade, includes such inhabitants as were entitled to support and relief from Dearborn in case of their falling into distress, whether residing on the territory at the time of the annexation or removed therefrom without having acquired a settlement

in another town. *Inhabitants of Belgrade v. Inhabitants of Dearborn*, 21 Me. 334, 337.

A person shall not be deemed to have a legal settlement in any county or town until he has resided therein one year, and shall not be deemed to have such settlement in either if he has migrated into this state within three years, unless at the time of so migrating he was able to maintain himself. Code Va. 1887, § 876.

Rev. Pol. Code 1903, §§ 2810, 2812, charge the care of an insane person to a county where he has acquired a "legal settlement," without defining what shall constitute such settlement. Held, that it must be deemed to have been used with the same meaning as in section 2764, relating to "poor and indigent persons," and providing that they acquire a legal settlement, charging a county with their support, by a residence therein for 90 days, which they lose by acquiring a new one, or by willful absence from the county for 90 days; it not appearing that a legal settlement was otherwise defined by any statute. *Moody County v. Minnehaha County* (S. D.) 96 N. W. 698.

LEGAL STRIKE.

A dispatch that "there is a legal strike in force upon the T. Railroad," etc., sent by an official of the Brotherhood of Locomotive Engineers, should be construed to mean one consented to by the grand chief, since his consent is necessary under the rules of the order. The term "legal strike" means a strike declared in pursuance to the rules of the order. *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.* (U. S.) 54 Fed. 730, 733, 19 L. R. A. 387.

LEGAL SUBDIVISION.

Act Cong. Sept. 28, 1850, granting certain swamp and overflowed lands to a state, and providing that in making out a list and plat of the lands all legal subdivisions shall be included in the said list and plat, refers to the smallest subdivision under the congressional system of surveying. *Robinson v. Forrest*, 29 Cal. 317, 324.

LEGAL SUBROGATION.

Legal subrogation is a right to be subrogated to the position of a creditor, when the right arises from the mere fact of payment by one who is compelled to pay the debt to protect his own rights, or by one who stands in the attitude of a surety for the debtor. *Gore v. Brian* (N. J.) 35 Atl. 897, 898; *Home Sav. Bank v. Bierstadt*, 48 N. E. 161, 162, 163 Ill. 618, 61 Am. St. Rep. 146.

The right to subrogation, which springs out of the mere fact of the payment of a debt,

is termed "legal subrogation," and exists only in favor of the surety for the payment of a debt, or one who is compelled to pay the debt, to protect his own rights. It differs from "conventional subrogation," which arises when a third person, under an obligation or necessity to pay the debt of another, pays it under an agreement with either the debtor or the creditor that the person paying shall be subrogated to the liens by which the debt is secured. *Seeley v. Bacon* (N. J.) 34 Atl. 139, 140.

A legal subrogation arises when by operation of law a third person becomes equitably entitled to stand in the place of the creditor. This mode of subrogation as effectually divests the creditor of his title to the debt or security, and vests it in the third person, as does conventional subrogation. *Connecticut Mutual Ins. Co. v. Cornwall*, 25 N. Y. Supp. 348, 350.

The right of subrogation which springs from the mere fact of the payment of a debt is what is termed "legal subrogation"; but in addition to this principle of legal subrogation there exists another principle, which is termed "conventional subrogation," which results from an equitable right springing from an express agreement with the debtor by which one advances money to pay a claim for the security of which there exists a lien, by which agreement he is to have an equal lien to that paid off. *Gordon v. Stewart* (Neb.) 96 N. W. 624, 628.

LEGAL SUCCESSION.

"Legal succession" is that which the law has established in favor of the nearest relation of the deceased. Civ. Code La. 1900, art. 877.

LEGAL SURPRISE.

See "Surprise."

LEGAL TENDER.

The terms "lawful sum in money" and "legal tender" are not synonymous, but have different meanings. A tender, to be good in law, must be made in legal tender notes or coin of the United States. National bank notes and gold and silver certificates are lawful money, and so recognized in the commercial exchanges of the United States; but they are not legal tender. *Martin v. Bott*, 46 N. E. 151, 153, 17 Ind. App. 444.

LEGAL TENDER NOTE.

A legal tender note is a contract on the part of the government to pay its nominal value in coin. *O'Neill v. McKewn*, 1 S. C. (1 Rich.) 147, 148.

"Legal tender notes," as used in an indictment charging larceny of United States legal tender notes, means genuine and current treasury notes. *State v. Beebe*, 17 Minn. 241, 249 (Gil. 218, 226).

LEGAL TITLE.

Under a statute providing that the widow of any decedent should be entitled to dower in the land of which her husband had during coverture the legal title, etc., the words "legal title" mean a title by which the husband had such a seisin of the land as, previous to the statute, would have entitled his widow to dower. *Nottingham v. Calvert*, 1 Ind. (1 Cart.) 527, 528.

LEGAL TRANSFER.

"Legal transfer," as used in Act June 20, 1820, providing that the male or female children of slaves shall obtain a legal settlement in the city, borough, township, or precinct in which such servant shall first serve with his or her master or mistress for the space of seven years, and if, afterwards, such servant shall duly serve in any other place for such space of seven years, such servant shall obtain a legal settlement in the city where such service was last performed, either with his or her first master or mistress, or with any other master or mistress by virtue of a legal transfer of such servant, does not imply more than an agreement for sale on a consideration. *Cadwallader v. Durham*, 46 N. J. Law (17 Vroom) 53, 56.

LEGAL VOTER.

All legal voters, see "All."

A legal voter is one duly qualified. In re *White's Contested Election*, 4 Pa. Dist. R. 363, 376.

Laws 1886, c. 411, authorizes the legal voters of a certain school district to levy a tax for schoolhouse purposes, and declares that a majority of the legal voters of said district may determine the amount of money so to be levied and collected, etc. Held, that the term "legal voters," as so used, was not synonymous with "qualified electors" of the district, but meant a qualified elector who does in fact vote, and therefore the statute only required a majority of those present at the meeting who were legal voters and in fact voted on the question. *Sanford v. Prence*, 28 Wis. 358, 362.

LEGAL VOTES.

"Legal votes," as used in Code 1892, §§ 1619, 1620, relating to special elections to determine whether or not liquor shall be sold in a county, in the absence of any specific

provision as to qualifications of electors thereat, means those votes which would be legal at an election contemplated by the Constitution and laws. *Bew v. State*, 13 South. 808, 869, 71 Miss. 1.

LEGAL WARRANT.

"Legal warrant," as used in Cr. Code. § 283, providing that persons may be arrested for certain offenses and detained until a legal warrant can be obtained, has a similar meaning to "process" in section 285, giving power to police and probate judges to issue process. *White v. State*, 44 N. W. 443, 445, 28 Neb. 341.

LEGALITY.

The prohibition of 2 Rev. St. p. 563, § 42, forbidding an inquiry by court or officer in the administration of the writ of habeas corpus, into the legality of any previous judgment of any competent tribunal by virtue of which a prisoner is confined, merely prohibits the review of the decision of a court of competent jurisdiction, and does not mean that the prisoner cannot be discharged if the record shows that the court could not have had jurisdiction under any circumstances or upon any state of facts to have pronounced such judgment. *People v. Liscomb*, 60 N. Y. 559, 568, 569, 19 Am. Rep. 211; *People v. Stout*, 30 N. Y. Supp. 898, 902, 81 Hun. 336.

"Legality of which is brought in question," as used in Act N. J. March 13, 1866, providing that where the property of an insolvent corporation in the hands of a receiver is incumbered with mortgages or other liens, the legality of which is brought in question, the court of chancery may order the receiver to sell the same clear of all incumbrances, includes all litigation between incumbrancers respecting the validity, extent, or priority of their liens. *Randolph v. Larned*, 27 N. J. Eq. (12 C. E. Green) 557, 560.

LEGALITY AND JUSTICE.

The words "legality and justice," in Rev. St. p. 563, § 42, forbidding inquiry upon return to a writ of habeas corpus into the legality and justice of any process, judgment, decree, or execution, were not intended to include questions of jurisdiction or power. *People v. Liscomb*, 60 N. Y. 559, 604, 19 Am. Rep. 211.

LEGALIZE.

"Legalize," as used in St. 1863, c. 38, entitled "An act to legalize the doings of cities and towns in aid of the war," and providing that acts and doings of cities and towns in paying and agreeing to pay bounties to soldiers are hereby ratified, confirmed, and

made valid, has reference to past acts in paying or agreeing to pay bounties, and does not authorize such acts in the future. *Barker v. Inhabitants of Chesterfield*, 102 Mass. 127, 128.

LEGALIZED NUISANCES.

The power of a municipality to erect and maintain hospitals and pesthouses may be exerted exactly as it could have been availed of by the state. Acts done under such authority, which without it would in themselves be public nuisances, furnish no ground for civil or criminal proceedings. They are what have been sometimes described as "legalized nuisances," since they are strictly necessary and probable results of legislative authorization. They rest for their sanction ultimately upon the paramount power of the Legislature, and the importance of the public benefit and convenience involved in their continuance, as affecting the greatest good to the greatest number. *City of Baltimore v. Fairfield Imp. Co.*, 39 Atl. 1081, 1083, 87 Md. 352.

LEGALLY.

"Legally," as used in the rule that every negro, equally with every white person accused of crime, is entitled to at least one legally conducted trial, does not mean "punctiliously accurate in point of law, but free from all material error." *Fletcher v. State*, 17 S. E. 100, 101, 90 Ga. 468.

"Legally" is not synonymous with the word "duly," and the one is not the equivalent for the other. Where a statute required one to be "legally" summoned, an allegation that he had been "duly" summoned did not show a compliance. *State v. Clancy*, 56 Vt. 698, 700.

"Legally," as used in a lease wherein it was provided that, in case the grant or sale of the leased premises to the landlord should be rescinded by the state during the term, the lessees should pay for that portion of the term only up to the time they are to be legally dispossessed, carried the idea that the parties stipulated for an event which should be accompanied with legal proceedings, or such proceedings as are resorted to to obtain legal possession of demised premises. *Mattoon v. Munroe* (N. Y.) 21 Hun, 74, 82.

LEGALLY AUTHENTICATED.

The words "properly and legally authenticated," in a statute requiring certain instruments to be so authenticated in order to render them admissible in evidence, are properly to be construed as if the expression were "so properly and legally authenticated as to entitle them to be admitted in evidence"; that is, "so properly and legally authenticated that they would be entitled to be ad-

mitted in evidence." This authentication in regard to original papers may be made by oral proof as to the verity and identity of the original and that they would be given their alleged effect in the courts of the country where they were used. In *re Fowler* (U. S.) 4 Fed. 303, 310.

LEGALLY AUTHORIZED.

"Legally authorized," as used in the statute of frauds, requiring a writing signed by one to be charged, or some one legally authorized by him, as a requisite to the valid execution of a contract for the sale of lands, means authority conferred by parol or otherwise, and it is not necessary that the authority should be under seal. *Hampton v. Martin*, 29 Tenn. 495, 498.

"Legally authorized and assigned," as used in the certificate to an acknowledgment which recited that the persons signing the above acknowledgment were at the time of affixing their signatures thereto two of the justices of the peace for the county aforesaid legally authorized and assigned, is to be construed as equivalent in meaning to the phrase "duly confirmed and sworn." *Hall v. Gittings' Lessee* (Md.) 2 Har. & J. 380, 390.

LEGALLY CONFINED IN JAIL.

A person is "legally confined in jail," or "legally detained in custody," when he has been committed or arrested upon a legal warrant, or arrested in any of the modes pointed out in the Code of Criminal Procedure. Pen. Code Tex. 1895, art. 241.

LEGALLY CONSTITUTED MARKET.

A de facto market, not shown to be a legally established market, was not a "legally constituted market," within *Hawkers' Act*, 50 Geo. III, c. 41. *Benjamins v. Anderson*, 5 C. B. 299, 305.

A sale by public auction at a horse repository outside of the city of London was held, in *Lee v. Bayes*, 18 C. B. 599, 603, not a sale in a regularly constituted market.

LEGALLY DUE.

An offer to pay a debt legally due applies to a debt the remedy for which is barred by limitations. Having made an offer to do equity, the court will not permit the promisor to set up limitations as an excuse for his refusal to perform equity. *Barke v. Early*, 33 N. W. 677, 680, 72 Iowa, 273.

LEGALLY ESTABLISHED.

"Legally established," as used in a complaint in a suit to restrain the destruction of a highway, alleging that the highway was

duly and legally established, meant a lawfully established highway, whether by dedication and public acceptance, or by establishment and under statutes and ordinances. The phrase was not limited to highways established pursuant to statutes and ordinances. *City of Hartford v. New York & N. E. R. Co.* (Conn.) 22 Atl. 26, 27.

LEGALLY IRRESPONSIBLE.

By the phrase "legally irresponsible" is meant that the person referred to is not financially solvent. *Greer Machinery Co. v. Stains* (Tenn.) 59 S. W. 692, 699.

LEGALLY LAID OUT.

"Legally laid out roads," as used in Rev. St. § 1227, providing penalties for neglecting to erect guideboards at the intersection of certain main traveled and legally laid out roads, mean only such roads as have been laid out according to the statute providing for the laying out of highways, and do not embrace highways which have become such by mere use or dedication. The term "laid out" is qualified by a word which by common usage signifies affirmative action according or in conformity to law, and the whole phrase "legally laid out" clearly implies a legal procedure, and when the word "legally" is used in connection with highways it is commonly understood to mean a highway laid out according to the specific requirements of law, in contradistinction from highways which have become such by prescription or dedication. The phrase "laid out" is the participle of the active verb "to lay," meaning to establish, and implies a nominative, or action. It implies that some one is active in laying out the highway, and "legally laid out" signifies that this is done by those authorized by law and in the manner fixed or required by law. *State v. Siegel*, 11 N. W. 435, 436, 64 Wis. 86.

LEGALLY MADE.

"Legally made," as used in Rev. St. c. 24, § 111, authorizing city councils, prior to the levy of taxes, to ascertain the total amount of appropriations for corporate purposes legally made and to be collected from the tax levy of that fiscal year, should be construed to mean legally made at the time the council is required to ascertain the total amount thereof. *People v. Peoria, D. & E. R. Co.*, 6 N. E. 459, 461, 116 Ill. 410.

LEGALLY REQUIRED.

"Legally required," as used in a bond reciting that the sheriff by virtue of an execution had levied on certain articles, which the defendant, being desirous of shipping, in lieu thereof should deliver to the sheriff simi-

lar articles, when legally required under the execution, does not mean by regular process of law—that is to say, by the regular succeeding process of the law—but a legal demand made upon the principal and surety in the bond for the return of the goods by any regular legal process. *Stocker v. Dech*, 31 Atl. 555, 556, 167 Pa. 212.

LEGALLY SATISFIED.

Unless the court hears the parties on the issue as to prejudice or not, it cannot know whether the denial which involves a denial of jurisdiction is true or false. If it does not know whether the denial is true or false, it cannot know whether it has jurisdiction, and this is not the condition of being "legally satisfied," which the Supreme Court declares the law requires before it permits the court to take jurisdiction of an action removed for prejudice. *Montgomery County v. Cochran* (U. S.) 116 Fed. 985, 990.

LEGATEE.

See "Principal Legatee"; "Residuary Legatee"; "Sole Legatee."

The person to whom a legacy is given is styled the "legatee." *Probate Court v. Matthews*, 6 Vt. 269, 274; *In re Pentz's Estate*, 49 Atl. 361, 364, 200 Pa. 2.

A legatee is a person to whom chattels are bequeathed by will. *Rogers v. Farrar*, 22 Ky. (6 T. B. Mon.) 421, 424; *Nye v. Grand Lodge A. O. U. W.*, 36 N. E. 429, 436, 9 Ind. App. 131.

A legatee is a person who takes personality under a will. *In re Ferguson*, 84 N. Y. Supp. 1102, 1103, 41 Misc. Rep. 465.

The words "legatee" or "devisee" indicate a person or persons to be designated in the will either by name or by some other individualizing description. *Grant v. Mosely* (Tenn.) 52 S. W. 508, 510.

The term "legatees," in a will providing that on the happening of a certain event the share of a beneficiary shall be divided among certain legatees, is not a word of art, nor does it require any technical construction; but it is a designation of persons, not by name, but by the characters in which the testator has placed them by his will. *Irwin v. Dunwoody* (Pa.) 17 Serg. & R. 61, 63.

The use of the terms "devise" and "devisee," "legacy" and "legatee," with technical exactness throughout an entire chapter of the statute relative to wills and distribution, is held to show an intention of the Legislature to employ those terms in their strictly technical sense as defined at common law. In construing this chapter, the court says

that where clear, direct, and explicit terms are used by the Legislature, which have had a definite meaning since the beginning of common-law terminology, there can be no room for discussion as to their meaning. In *re Ross' Estate*, 73 Pac. 976, 979, 140 Cal. 282.

The words "legatee" or "devisee," in Shannon's Code, § 3928, providing that "whenever a devisee or legatee dies before the testator, * * * leaving issue who survives the testator, said issue shall take the estate devised or bequeathed, as the devisee or legatee would have done had he survived the testator, unless a different disposition thereof is made or required by the will," indicate "a person or persons to be designated in the will, either by name or by some other individualizing description. * * * When a will designates a devisee or legatee by name, or by what is equivalent thereto, it of course indicates clearly that the testator, when he executed the will, understood that that person should have the benefit of the legacy or devise mentioned therein. From this the transition in thought to those who in blood represent the legatee or devisee is easy." *Grant v. Mosely* (Tenn.) 52 S. W. 508, 510.

As absolute owner.

A "legatee," within the meaning of the inheritance tax law, is he to whom a legacy is payable once and for all, payment of which discharged all obligations as to that sum of money, and he may the next moment squander it, destroy it, do with it as he will, without fear of legal criticism. Direct legatees have the legal title and own the legacy, to do with as they will. The money is theirs as against all mankind. Not so with trustees. They take, it is true, the bare legal title, but for the sole benefit of others; nor can they hold such title beyond a specified time. Their legal designation is not "legatees," but rather "custodians." Thus an inheritance tax on a money legacy cannot be deducted from the principal of the legacy given in trust for one person for life, with remainder to another, as neither of these persons succeeds to, or has more than a legal right in, the fund, and from such right no such deduction can be made. In *re Hoyt*, 76 N. Y. Supp. 504, 507, 37 Misc. Rep. 720.

Beneficiary of testamentary trust.

Testator, after giving six legacies, bequeathed \$8,000 to his executor, to be held in trust for the use and benefit of his sister during her life, and to be divided between her two daughters at her death, and then directed that the residue of his estate should be divided among the legatees mentioned in the will, share and share alike. Held, that the cestuis que trust of the trust in the hands

of the executor were to be regarded as legatees, within the meaning of the residuary clause, and entitled to share equally with the other legatees. In *re Logan*, 30 N. E. 485, 486, 131 N. Y. 456.

Devisee.

"Legatee" is defined to be a person to whom personalty is bequeathed, but it sometimes is used so as to embrace a donee of realty by devise. *Tucker v. Tucker*, 40 N. C. 82, 84.

The term "legatee" is somewhat indiscriminately used to describe one who takes personalty or realty under the provisions of a will. *Corley v. McElmeel*, 43 N. E. 628, 630, 149 N. Y. 228.

"Legatees," as used in a will bequeathing testator's residuary estate to the legatees mentioned in the will, need not be construed in its technical legal sense of one who takes personalty under a will, but may be regarded as referring to devisees. *Weeks v. Cornwell*, 10 N. E. 431, 435, 436, 104 N. Y. 325.

"Legatees," as used in a will which, after making certain devises and bequests, provided that the estate should be finally closed in accordance with the terms of the will, and certain persons should have an equal portion with the other legatees, should be construed in the popular sense as meaning various devisees, and not as used in the technical legal sense. *Lallerstedt v. Jennings*, 23 Ga. 571, 574.

"Legatees," as used in a will bequeathing the residue of all the testator's estate to the above-named pecuniary and specific legatees, cannot be construed to include devisees. *Havens v. Havens* (N. Y.) 1 Sandf. Ch. 324, 335.

The word "legatees" means, in legal acceptance, donees of personal or movable estate, or it may mean donees of real estate, whenever a testator plainly uses the word in that sense. *Micheau v. Crawford*, 8 N. J. Law (3 Halst.) 90, 111.

A testator, after providing for the payment of his debts and funeral expenses, "gave, devised, and bequeathed" all the remainder of his estate, real and personal, in the following manner: First, he "gives" to his wife his homestead and also a sum of money. Second, he gives to his brother J. C. M., in trust for himself, his brothers and sisters, and their heirs, one-third part of his "estate" after the debts are paid, which "amount" he desired his executor to "pay" to the said J. C. M. for the purposes stated. He then "gave and bequeathed" certain sums of money to four different persons, and then directed that any sum left and remaining should be divided among his legatees in

the same ratio that he had already given them. Held, that the word "legatees," as used in the will, should be construed to have been used in its broader and more popular sense, as including all the devisees and legatees named in the will, the testator being an unprofessional person, and hence that persons technically devisees, and not legatees, were entitled to a share in the surplus. Appeal of Chandler, 34 Wis. 505, 512.

In the construction of statutes, the words "legatee" and "devisee" shall be held to convey the same idea. Ky. St. 1903, § 467.

As legal representative.

See "Legal Representative."

As pecuniary legatees.

The will of a lawyer, drawn by another lawyer, gave N., testator's brother-in-law, a pair of rifles, and to other persons certain articles of personal property and sums of money varying from \$100 to \$100,000, and provided "that all the foregoing legacies be paid and delivered to the persons named as speedily as practicable, and without deduction of any kind; it being my wish that all taxes, dues, and charges of every kind shall be paid by my executors, and that no charge be made against any of my said legatees by reason of any money passing from me to them at any time prior to my death. Held, that a debt of N., evidenced by a promissory note payable in five years, for \$5,000 loaned him by testator six years before the will was drawn, was forgiven and canceled by such will, the word "legatees" therein not having the significance of pecuniary legatees. Neville v. Dulaney's Ex'rs, 17 S. E. 475, 476, 89 Va. 842.

As remaindermen.

A testator gave all his real and personal estate to his wife during her life or widowhood, with remainder to his four children, and named his wife and a son as executors. By a codicil to the will the testator gave power to his wife to sell and dispose of his real estate, or any part thereof, at public or private sale, as she "shall deem most expedient and for the best interest of all my said legatees in my said will named." Held, that by the expression "legatees" the testator intended to designate his four children, whom he had named in the body of the will as those to whom he devised and bequeathed the residue and remainder of his estate after the death of his wife. The term did not include the widow, since in the execution of this power of sale she had no interest. It was to be executed, not for her own benefit or advantage, but for the best interest of those entitled to the estate after her death. Russell v. Russell, 36 N. Y. 581, 583, 93 Am. Dec. 540.

LEGHORN CITRON.

Leghorn citron, preserved by being cut in halves, boiled and soaked in salt water, freshened, and covered with syrup and boiled down, and fresh sugar placed thereon, is taxable as fruits preserved in sugar, under Tariff Act 1883, par. 302. United States v. Nordlinger, 121 Fed. 690, 691, 58 C. C. A. 438.

LEGISLATION.

See "Appropriate Legislation"; "Class Legislation"; "Local Legislation"; "Tax Legislation."

Special legislation, see "Special Law."

Wharton, in his lexicon, defines "legislation" as follows: "The act of giving or enacting laws; the power to make laws." State v. Hyde, 22 N. E. 644, 646, 121 Ind. 20.

"Legislation" is the exercise of sovereign power, and under some forms of government the power of the Legislature is supreme and uncontrollable, knowing no limits. Rison v. Farr, 24 Ark. 161, 166, 87 Am. Dec. 52.

LEGISLATIVE.

"Legislative," as the word is used in speaking of the legislative department of the government, means the organ or organs of the government which make the law. In re Railroad Com'rs, 50 N. W. 276, 277, 15 Neb. 679 (citing Webster's Dict.).

The word "legislative" is defined by Worcester as follows: "That which makes or enacts laws; lawmaking; legislative power; of or pertaining to legislation, or to a Legislature, as legislative proceedings." "Legislative" is defined by Zell as follows: "Making, giving, or enacting laws; relating or pertaining to the passing of laws." Webster defines "legislative" as follows: "Giving or enacting laws as a legislative body; pertaining to the enacting of laws; suitable to laws, as the legislative style; done by enacting, as a legislative act." Appointing to office is not legislative. State v. Hyde, 22 N. E. 644, 646, 121 Ind. 20; City of Evansville v. State, 21 N. E. 267, 272, 118 Ind. 426, 4 L. R. A. 93.

LEGISLATIVE ACT.

A legislative act is an act of the legislative department of the government, by which the law to be applied in future cases under particular states of fact, is established in the form of a statute, ordinance, resolution, or other written form. Smith v. Strother, 8 Pac. 852, 854, 68 Cal. 194.

Making a grant of a franchise is in its own nature not a "legislative act," so as to

be beyond the power of a court of equity to prohibit by injunction. *People v. Sturtevant*, 9 N. Y. (5 Seld.) 263, 273.

The passage of a resolution by a borough council awarding a contract for lighting streets is not a legislative, but a ministerial, act of a business character, and therefore the resolution is not invalid because it has not been recorded in the ordinance books or advertised as required in the case of the passage of an ordinance. *Seltzinger v. Borough of Tamaqua*, 41 Atl. 454, 455, 187 Pa. 539.

An act of the Legislature of Rhode Island confirming the sale of land situated in Rhode Island by an executrix in New Hampshire is not a judicial act, but a legislative one. *Wilkinson v. Leland*, 27 U. S. (2 Pet.) 627, 660, 7 L. Ed. 542.

"Legislative action," within the meaning of a statute which requires that the legislative action of councils of certain cities should be approved by the mayor, would not include a resolution of a council approving and accepting a bid for certain property which had been authorized to be sold by an ordinance, which ordinance had been approved in the regular form by the mayor; hence this resolution did not need the approval of the mayor. *Straub v. City of Pittsburg*, 22 Atl. 93, 94, 138 Pa. 356.

Judgment distinguished.

See "Judgment."

Judicial act distinguished.

That which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be, for the regulation of future cases falling under the provisions. The legislative power extends only to the making of laws. To construe and apply the law is the peculiar province of judicial power. To do this, therefore, to compare the claims of the parties with the law of the land before established, is in its nature a judicial act. *Cooley*, Const. Lim. 110, 111; *Philomath College v. Wyatt*, 37 Pac. 1022, 1024, 27 Or. 390, 26 L. R. A. 68; *Mabry v. Baxter*, 58 Tenn. (11 Heisk.) 682, 690; *City of Zanesville v. Zanesville Telephone & Telegraph Co.*, 59 N. E. 109, 110, 63 Ohio St. 442; *Board of Com'rs of Yellowstone County v. Northern Pac. R. Co.*, 25 Pac. 1058, 1060, 10 Mont. 414. The act of an ecclesiastical body in adopting the report of a committee appointed to determine the validity of a constitutional amendment and to submit it to the vote of its members, the amendment being adopted by the adoption of the report, is a legislative, and not a judicial, act. *Philo-*

math College v. Wyatt, 37 Pac. 1022, 1024, 27 Or. 390, 26 L. R. A. 68.

The distinction between a judicial and a legislative act consists in this: that one determines what the law is and what the rights of the parties are with reference to transactions already had, while the other prescribes what the law shall be in future cases arising under it. Whenever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions. *Union Pacific R. Co. v. United States*, 99 U. S. 700, 761, 25 L. Ed. 496; *Smith v. Strother*, 8 Pac. 852, 854, 68 Cal. 194; *Tanner v. Nelson*, 70 Pac. 984, 986, 25 Utah, 226.

The distinction between a judicial and legislative act is that the former determines what the law is, and what the rights of the parties are, with reference to transactions already had, while the latter prescribes what the law shall be in future cases arising under it. Accordingly the action of the board of education in adopting a series of readers for the public schools in lieu of a series previously in use is an exercise of legislative, and not of judicial, power, and therefore cannot be reviewed on certiorari. *People v. Board of Education of Oakland*, 54 Cal. 375, 376.

LEGISLATIVE AUTHORITY.

"Legislative authority," as used in Const. art. 4, § 1, declaring that the legislative authority of the state shall be vested in the General Assembly, means the power to make laws, or alter and repeal them. The Constitution only vested in the General Assembly the right to make laws, and did not surrender the right of local self-government in towns and cities, and the right of choosing their own local officers and rulers, or to delegate such power to the General Assembly. *State v. Denny*, 21 N. E. 274, 278, 118 Ind. 449, 4 L. R. A. 65.

LEGISLATIVE BODY.

The term "legislative body," in relation to the privilege of a newspaper in the publication of the proceedings of a legislative body, in the law of libel, has not been extended to cover a city council. *Buckstaff v. Hicks*, 68 N. W. 403, 404, 94 Wis. 34, 59 Am. St. Rep. 886.

LEGISLATIVE DEPARTMENT.

The first department of a free government is the "legislative department," which has for its object the making of the laws. It is independent of the other two departments, the executive and judiciary. In the language of the court: "Each department is

confined to its own functions, and can neither encroach upon or be made subordinate to those of another without violating the fundamental principle of a republican form of government." In re Davies, 61 N. E. 118, 121, 168 N. Y. 89, 56 L. R. A. 855.

LEGISLATIVE GRANT.

It is held that a grant legislative in its nature does not lose the character of a legislative grant because the authority to make it is conferred upon a subordinate body to which the Legislature had delegated a portion of its powers. *Citizens' St. Ry. Co. v. City Ry. Co.* (U. S.) 56 Fed. 746, 750.

LEGISLATIVE INTENTION.

The word "intention," when used in reference to the intention of the Legislature in making a law, is susceptible of at least two meanings. It may refer either to that which the Legislature in fact intended to do, or to that intention, as found from the words employed, to make it manifest. *Lee Bros. Furniture Co. v. Cram*, 28 Atl. 540, 541, 63 Conn. 433.

By "legislative intent," as that term is used with relation to the interpretation of statutes, is meant the intent as gathered from the act itself, and sometimes, viewed in the light of the knowledge of the court, in common with the public at large, of well-known conditions which may seem to have led up to the act under construction. But such consideration of extraneous facts is not resorted to to defeat the act, but to aid in its interpretation. *People v. Sturges*, 50 N. Y. Supp. 5, 7, 27 App. Div. 387.

LEGISLATIVE JOURNAL.

See "Journal."

LEGISLATIVE OFFICE.

Legislative offices are understood as relating to the enactment of laws. *State v. Womack*, 29 Pac. 939, 941, 4 Wash. 19.

LEGISLATIVE OFFICER.

"Legislative officer," as used in *How. St.* §§ 9241, 9242, authorizing the punishment for bribery of "executive, legislative, or judicial officers," applies just as well to local as to state functionaries, the character of whose duties falls within the meaning of the term. "Under our system of local self-government, there is no public corporation that has not an organic connection with the state, or which does not require guarding to promote the interest of the entire body politic. The statute authorized the punishment of municipal officers, as well as state officers." Prosecuting

Attorney v. Judge of the Recorder's Court, 26 N. W. 694, 696, 59 Mich. 529.

Every member of either house of the Legislative Assembly, and every member of any common council, board of aldermen, trustees, or other municipal, legislative, or deliberative body, by whatever name known or called, from the time of his election or appointment, shall be held and deemed to be a legislative officer, within the meaning of certain provisions in the Penal Code punishing the bribing, etc., of officers. *Ann. Codes & St. Or.* 1901, § 1881.

Legislative officers are those whose duties relate merely to the enactment of laws. *Braithwaite v. Cameron*, 38 Pac. 1084, 1087, 3 Okl. 630.

LEGISLATIVE PERMISSION.

Where a common council is empowered to construct sewers and maintain them, so as to discharge into a certain stream, it is a "legislative permission," and not a direction; and a legislative permission neither implies a right to appropriate property without compensation nor confers a license to commit a nuisance. *Sammons v. City of Gloversville*, 67 N. E. 622, 624, 175 N. Y. 346.

LEGISLATIVE POWER.

Executive power distinguished, see "Executive Power."

Judicial power distinguished, see "Judicial Power."

Legislative power is "that one of the three great departments into which the powers of government are distributed (legislative, executive, and judicial) which is concerned with enacting or establishing, and incidentally with repealing, laws." It is the power to enact, amend, or repeal laws. *City of Evansville v. State*, 21 N. E. 267, 272, 118 Ind. 426, 4 L. R. A. 93 (citing *Abb. Law Dict.*).

Legislative power over a subject, though delegated to a subordinate agency, must, in the nature of things, be dominating, and if it be regularly exercised the result must be as conclusive as if accomplished by direct legislative enactment. If it be subject to any other power, it is not legislative power. *Forsyth v. City of Hammond* (U. S.) 71 Fed. 443, 451, 18 C. C. A. 175.

Legislative power is a power to enact laws or to declare what the law shall be. It is the power to enact new rules for the regulation of future conduct, rights, and controversies. The board of health, in abating a nuisance, does not exercise such powers, where the Legislature has conferred upon the city council the creation of a board of health, and has authorized the council to invest the board with such duties as may be necessary

to avoid the danger of infectious diseases. *Waters v. Townsend*, 47 S. W. 1054, 1055, 65 Ark 613.

Legislative power extends only to the making of the laws, and in its exercise is limited and restrained by the state and federal Constitutions. That is not legislation, nor a valid exercise of the legislative power, which adjudicates in a particular case and prescribes a rule contrary to the general law. *Sanders v. Cabaniss*, 43 Ala. 173, 180. See, also, *Ogden v. Blackledge*, 6 U. S. (2 Cranch) 272, 277, 2 L. Ed. 276; *State v. Fry*, 4 Mo. 120, 189.

The term "legislative power" does not include the power given the inspector of factories in Laws 1897, p. 222, requiring fire escapes to be constructed on certain buildings and giving the inspector of factories a discretion as to the number, location, material, and construction of such escapes, and therefore, the statute is not unconstitutional as a delegation of legislative power. *Arms v. Ayer*, 61 N. E. 851, 855, 192 Ill. 601, 58 L. R. A. 277, 85 Am. St. Rep. 357.

Legislative power is the authority under the Constitution to make laws and to alter and repeal them; and it does not include the power to appoint to office other than such officers as are necessary to enable the legislative body to properly discharge its duties. *State v. Denny*, 21 N. E. 252, 254, 118 Ind. 382 (citing *Cooley*, Const. Lim. p. 90).

"Legislative power," as used in Const. art. 1, § 1, declaring that the legislative power of the state shall be vested in a Senate and Assembly, cannot be construed as including the right to attack private property. It does not reach the life, liberty, or property of a citizen who is not charged with a transgression of the laws and when the sacrifice is not demanded by a just regard for the public welfare. *Taylor v. Porter* (N. Y.) 4 Hill, 140, 144.

Legislative power is the power residing in the states to regulate the relative rights and duties of all persons and corporations within its jurisdiction, so as to provide for the public convenience and the public good. It is called "police power," or "governmental power." This governmental power applies not only to the enactment of regulations relating to the health, morals, and safety of the public, but also to whatever promotes the public peace, comfort, and convenience. *Lake Shore & M. S. Ry. Co. v. Ohio*, 19 Sup. Ct. 465, 470, 173 U. S. 285, 43 L. Ed. 702.

The expression "the legislative power of this state," in a constitutional provision that the legislative power of this state shall be vested in the Senate and House of Representatives, means all of the power of the people which may be properly exercised in the formation of laws against which there is no in-

hibition expressed or implied in the fundamental law. *Brown v. City of Galveston* (Tex.) 75 S. W. 488, 495.

The term "legislative power," as used in the constitutional provision that the legislative power of the state shall be vested in the Legislature, includes the power to authorize municipal aid to railroad corporations. *Leavenworth County Com'rs v. Miller*, 7 Kan. 479, 501, 12 Am. Rep. 425.

The words "legislative power," in connection with Const. art. 2, § 1, conferring the legislative power upon the General Assembly, mean such legislative power as might be necessary or appropriate to the declared purpose of the people in framing their Constitution and conferring their powers upon the various departments constituted for the sole purpose of carrying into effect their declared purpose. *McCullough v. Brown*, 41 S. C. 220, 237, 19 S. E. 458, 473, 23 L. R. A. 410.

The words "legislative power" mean the power or authority under the Constitution or frame of government to make, alter, and repeal laws. *O'Neill v. American Fire Ins. Co.*, 166 Pa. 72, 76, 30 Atl. 943, 26 L. R. A. 715, 45 Am. St. Rep. 650.

It is one thing to determine that the nature of a claim is such as to make it proper to satisfy it by taxation, and another to adjudge how much is justly due upon it. The one is the exercise of legislative power; the other, of judicial. *State v. Hampton*, 13 Nev. 439, 442.

The term "legislative power" includes the power to authorize municipal aid to railroad corporations. At the time the Constitution was framed the term "legislative power" had a definite and precise signification with reference to this question, established by legislative, executive, and judicial construction, practice, and usage, and the general understanding of the people throughout the United States, which general understanding and signification was that said term included the power to authorize municipal aid to railroad corporations; and therefore, in the absence of anything to the contrary, it must be presumed that the people of this state, when they framed their Constitution, used said term with the signification generally given to it, and therefore that they intended to give the Legislature the power to pass acts authorizing municipal aid to railroad companies. *Leavenworth County Com'rs v. Miller*, 7 Kan. 479, 501, 12 Am. Rep. 425.

LEGISLATURE.

See "House of Legislature."
Branch of Legislature, see "Branch."

The term "Legislature" is synonymous with General Assembly. *State v. Gear*, 5 Ohio Dec. 569.

A "legislature" is the body of persons in the state clothed with authority to make laws. *State v. Hyde*, 22 N. E. 644, 646, 121 Ind. 20.

The lawmaking power is frequently termed in common parlance the "Legislature," and once, if not more, such term is used in the Constitution to designate that body. *State Treasurer v. Weeks*, 4 Vt. 215, 222.

"Legislature," as used in Const. art. 11, § 8, relating to the adoption of city charters, and providing that the charter shall be submitted to the Legislature for its approval or rejection as a whole, without power of alteration or amendment, and, if approved by a majority vote of the members of each house, it shall become the charter of such city, does not include the Governor, as he is not in fact a part of the Legislature. *Brooks v. Fischer*, 21 Pac. 652, 653, 79 Cal. 173, 4 L. R. A. 429.

LEGITIMACY.

"Legitimacy, as the word imports, requires that the child be born in a manner approved by law." *Davenport v. Caldwell*, 10 S. C. (10 Rich.) 317, 337.

"Legitimacy is a status or social condition, and capacity to inherit is only one of its incidents. A legitimate child has from the moment of its birth until the day of its legal majority a common-law right to support from the father. It is entitled to bear his name, even though never acquired by common reputation. It may inherit, not merely from the father, but from remoter ancestors and collateral kindred. All these several adjuncts or incidents make up the status or condition which is called 'legitimacy'; but legislation may modify one or more of the incidents, without disturbing the rest, but when directed on the status it operates upon all of them alike." *Pratt v. Pratt*, 5 Mo. App. 539, 541.

LEGITIMATE.

"To legitimate is to make lawful, to legalize, and, in the case of an illegitimate, the plain and unambiguous meaning is to render legitimate. To communicate the rights of a legitimate child to one who is illegitimate is to invest with the rights of a lawful heir." *Webster; McKamie v. Baskerville*, 7 S. W. 194, 86 Tenn. (2 Pickle) 459.

LEGITIMATE CHILD.

"A legitimate child is he that is born in lawful wedlock or within a competent time afterwards." *Wilson v. Babb*, 18 S. C. 59, 69.

A legitimate child is one born in lawful wedlock, or born before the marriage of its

parents, who afterwards marry, and which receives the recognition of its father; and one of such children is just as legitimate before the law as the other. *Gates v. Seibert*, 57 S. W. 1065, 1068, 157 Mo. 254, 80 Am. St. Rep. 625.

As defined by Blackstone, "a legitimate child is one that is born in lawful wedlock." 1 Cooley, Bl. Comm. p. 446. And Lord Coke says, "By the common law, if the issue be born within a month or a day after marriage between parties of lawful age, the child is legitimate." A child begotten before, but born after, marriage, is legitimate, though the marriage was void, because the husband had a wife living at the time of the marriage, within Ky. St. § 2098, providing that "the issue of an illegal or void marriage shall be legitimate." *Swinney v. Klippert* (Ky.) 50 S. W. 841, 842.

A legitimate child is he that is born in lawful wedlock or within competent time afterwards. 1 Bl. Comm. 367. In the civil law the rule is, "Pater est quem nuptiæ demonstrant." But in England and in this country the nuptials must be precedent to the birth, and while a post-nuptial birth is not conclusive on the question of legitimacy, yet it raises a presumption which will stand until overthrown by sufficient and competent testimony. At one time nothing short of proof of impossibility of access on the part of the husband was regarded as sufficient to destroy this presumption, but such is not the law now. It now stands as any other question of fact, resting on the testimony for and against it. *Wilson v. Babb*, 18 S. C. 59, 69.

LEGITIMATE CAUSE.

The term "legitimate cause," as used in the Louisiana Code, prohibiting onerous contracts, but permitting donations en paiement, where there exists a legitimate cause, means a debt. *Succession of Miller v. Manhattan Life Ins. Co.*, 34 South. 723, 725, 110 La. 652.

LEGITIMATE HEIRS.

"Legitimate heirs," as used in a will devising property to a beneficiary, but providing that, if the beneficiary leaves no legitimate heirs, it shall pass to a third person, means children born in lawful wedlock, or children generally, and not heirs generally, collateral as well as lineal, or issue in indefinite succession. *Lytle v. Beveridge*, 58 N. Y. 592, 605.

A devise to testator's son for life, and, if he leave no legitimate heirs, then to testator's son D., means by "legitimate heirs" the children of the first son or their descendants, not his heirs generally. *Prindle v. Beveridge* (N. Y.) 7 Lana. 225, 231.

LEGITIMATE PURPOSE.

"Legitimate" means lawful, and a "legitimate purpose" is a lawful purpose, and is so used in an instruction that a sale was valid, if made for any legitimate purpose, and not with intent to hinder or delay creditors. *Estes v. Fry*, 22 Mo. App. 80, 89.

LEGITIMATION.

"Legitimation," properly considered, refers to persons where the blood relation exists, and is not synonymous with "adoption," which properly refers to persons who are strangers in blood. *Blythe v. Ayres*, 31 Pac. 915, 916, 96 Cal. 532, 19 L. R. A. 40.

Adoption, properly considered, refers to persons who are strangers in blood; legitimation, to persons where the blood relation exists. *Blythe v. Ayres*, 31 Pac. 915, 916, 96 Cal. 532, 19 L. R. A. 40.

LEGITIME.

That portion of his property which the testator cannot dispose of to the prejudice of his children, and which consequently accrues to them at his death, is called the "legitime." *Cox v. Von Ahlefeldt*, 23 South. 959, 961, 50 La. Ann. 1266.

By "legitime" is meant the amount which the forced heir is entitled to collect for the succession. When she gets that amount, she cannot legally complain. She can insist on nothing more. *Miller v. Miller*, 29 South. 802, 805, 105 La. 257.

LEMON.

The words "lemon peel, preserved," in *Tariff Act July 24, 1897, c. 11, par. 267, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1626]*, providing a duty on such peel, includes lemons cut in two, and thrown into casks of brine, the pulp of which, when it has reached this country, has left half the lemon, and the fruit has been destroyed; and it is not entitled to come in free of duty under paragraph 559 of the free list, as fruits in brine. *Hills Bros. Co. v. United States (U. S.)* 113 Fed. 857.

LEND.

See, also, "Loan."

"To lend is the parting with a thing of value to another for a time fixed or indefinite, yet to have some time in ending, to be used or enjoyed by that other; the thing itself, or the equivalent of it, to be given back at the time fixed, or when lawfully

asked for, with or without compensation for the use, as may be agreed on." *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 177.

As give.

"Lend," as used in wills, is ordinarily equivalent to "give"; but when it is applied to property given to one person, and in the same clause the word "give" is used with reference to property bequeathed to another person, stress may be put on the difference between the two in the construction of the item, in order to ascertain the intention of the testator. *Hudgens v. Wilkins*, 77 Ga. 555, 558.

The word "lend" in a will, which declares that "I lend the whole of my estate to my wife during her natural life or widowhood, but if she choose to marry then the whole of my estate to be taken out of her hands by my executors and equally divided," etc., was construed not to have been used in the sense of the word "give." *Burch v. Burch*, 19 Ga. 174, 185.

It has been determined in *Bryan v. Duncan*, 11 Ga. 67, and in *Hinson v. Pickett (S. C.)* 1 Hill, Eq. 35, that the word "lend" in a will may sometimes be construed to be equivalent to "give," if the testator evinces a clear intention to part with the entire dominion over the bequest. In the latter case Judge O'Neill says: "The term 'lend' when used in a bequest is generally equivalent to 'give.' In some special cases it has an appropriate meaning, as in *Baker v. Baker & Red*, decided by this court in December, 1831; but in such cases there is something which shows that the testator did not intend a legal estate to pass to the legatee." When the testator parts with the entire dominion in the property, it is absurd to say that an estate which can never revert can be a loan, which implies that the use of the thing is parted with for a limited time or for a special purpose, and the right of property remains in the lender. *Booth v. Terrell*, 16 Ga. 20, 23.

In construing a clause in a will providing that "I hereby lend to my granddaughter [certain slaves] during her natural life, and at her decease I give the slaves to [a certain designated beneficiary]," it was said that the testator used the word "lend" to express the interest that his granddaughter should take in the property, and the word "give" to carry the property from her to the other beneficiaries. It certainly was not that the word "lend" should have its appropriate signification, for a loan is a grant of a thing to another for a limited time, to be specifically returned to its owner. It implies that the dominion of the thing remains on the lender. Here the testator parts with his entire interest in this property. "The interest given, and intended to

be given, then, not being a loan, but a gift, it must be construed to mean the same as if testator had said, 'I give,' instead of 'I lend.' This word was before the Court of Appeals of Virginia for construction in the case of *Deane v. Hansford* (Va.) 9 Leigh, 253, 256, in the following clause: 'I lend to Thos. Deane and the heirs of his body.' Here, the court says, 'there is no sound distinction between such a loan and words imputing the gift,' and that authority is conclusive upon us in this case." *Pournell v. Harris*, 29 Ga. 736, 742.

The word "lend" was said to have been used as the equivalent of "give" in a clause in a will which provides that "I lend to my niece for her life one negro girl," and at the death of the niece to other beneficiaries, as the testator evinced a clear intention to part with the entire dominion over the property bequeathed. *Bryan v. Duncan*, 11 Ga. 67, 75.

"Lend," as used in a bequest of personal property, providing that "I lend to my daughter four negroes during her natural life, and then to the heirs of her body," will be construed to mean "give." The term "lend," when used in a bequest, is generally equivalent to "give." *Hinson v. Pickett* (S. C.) 1 Hill, Eq. 35, 38.

Life estate conveyed.

A will provided that "the remaining two-thirds of my estate I lend unto my three daughters, S., M., and J., to them during their natural lives, and then to the lawfully begotten heirs of their body." Held, that the words "lend unto my three daughters," as so used and in view of the context, should be construed as giving them a life estate, with a remainder over to their children; the word "then" fixing the time of the remainders vesting to the death of the first taker. *Loving v. Hunter*, 16 Tenn. (8 Yerg.) 4, 29.

"Lend," as used in the following devise: "I 'lend' unto my grandson O. three negroes," etc. "Now, in case that the said O. should live to arrive at manhood and beget heirs lawfully, the above property to him and his heirs, forever; if not, I give and bequeath the above-mentioned property unto my son J., to him and his heirs, forever"—is construed to convey a life estate in the property to the grandson. *Felton v. Billups*, 21 N. C. 584, 586.

"Lend," as used in a will by which testator provides that he lends to his daughter during her natural life certain realty, to go to others at her death, is equivalent to "give, bequeath, or devise," and creates an estate for life. *Holt v. Pickett*, 20 South. 432, 433, 111 Ala. 362 (citing *Woodley v. Findlay*, 9 Ala. 716; *Ewing v. Standefer*, 18 Ala. 400).

As permission to take.

Sess. Acts 1855-56, p. 17, makes it a misdemeanor to sell, give or lend a deadly weapon to a minor. Defendant, having in his drawer a pistol belonging to another, and being asked by a minor to lend it to him, replied: "It is not mine, but belongs to a man. I have nothing to do with it. You can take it, if you choose. It was left here by C., who will return in four or five days, and it should be here when he returns and calls for it." Held, that such act constituted a lending within the meaning of the statute. *Coleman v. State*, 32 Ala. 581, 582.

LEND AN ACCEPTANCE.

Where defendant asked plaintiff to "lend him his acceptance," the intention of the parties to the contract must be taken to be that the defendant should be considered as the real acceptor of the bill and take up the bill when it became due. "Lending an acceptance" is a well-known phrase, and is always understood in that sense. *Reynolds v. Doyle*, 1 Man. & G. 753, 756.

LENGTH.

The use of the word "length" in a description in a patent of timber of a length equal to the thickness of a grindstone, contained in the invention, is only for the purpose of showing that the dimensions of a block in one direction are to be equal to the thickness of the grindstone, for the purpose of utilizing the whole grinding surface. *Miller v. Androscoggin Pulp Co.* (U. S.) 17 Fed. Cas. 301, 303.

Of railroad.

Act March 1, 1881 (16 Del. Laws, p. 526), providing that, whenever a certain railroad should become a part of a main-track line, they should pay, as a state tax, a sum bearing the same proportion to a certain sum that the length of their line did to the length of a certain other railroad, cannot be construed to include branch lines in determining the proportion. The length does not include branches or lateral additions that might be made or become the property of a railroad. *Herbert v. Baltimore & P. R. Co.* (Del.) 13 Atl. 902, 903, 8 Houst. 120.

Laws 1882, c. 353, § 13, providing that the salaries and expenses of the board of railroad commissioners should be borne by the several railroad companies according to their means, to be apportioned by the comptroller and state assessors, who shall assess on each of said corporations its just proportion of such expenses, one-half in proportion to its net income for the year next preceding that in which the assessment is made, and one-half in proportion to the length of the main track or tracks of the road, means,

where there are two or more parallel tracks between two terminal points, the distance between those points, and not the number of miles of rail. *People v. Chapin*, 12 N. E. 585, 106 N. Y. 265.

LEPROSY.

Leprosy is a disease of a nature which will cause the persons to be affected by it to be shunned and avoided, and therefore a publication charging one with having leprosy is libelous, even though the progress of science has revealed that leprosy is not an infectious or contagious disease. *Simpson v. Press Pub. Co.*, 67 N. Y. Supp. 401, 402, 83 Misc. Rep. 228.

The term "leprosy," as used in the Codes of 1808 and 1825, which make leprosy one of the redhibitory defects of slaves, does not apply to mere cutaneous diseases which do not materially affect the value of the slave, but "elephantiasis," common in Africa and in Louisiana before the suppression of the slave trade, is meant. *Walker v. Ferriere*, 6 La. Ann. 278.

LES EXCES.

"Les exces" are said by Poullier to be acts of violence which exceed all measure and may put the life of the spouse in danger. *Butler v. Butler* (Pa.) 1 Para. Eq. Cas. 329, 343.

LES SEVICES.

"Les seervices" are acts of cruelty which do not put the life in danger. *Butler v. Butler* (Pa.) 1 Para. Eq. Cas. 329, 343.

LESION.

Lesion is the injury suffered by one who does not receive a full equivalent for what he gives in a commutative contract. Civ. Code La. 1900, art. 1860; *Linkswiler v. Hoffman*, 34 South. 34, 36, 109 La. 948; *Smart v. Bibbins*, 34 South. 49, 109 La. 986.

LESS.

See "Not Less Than."

A policy of fire insurance on a building, providing that, when an insurance is general, it shall only be binding when the assured has an unincumbered title in fee simple, and that when he has a less estate therein the same shall be void, means an estate of less duration than a fee, as an estate in fee tail, for life, or years, or at will, and does not relate to the fact that the insured has mortgaged the property. *Swift*

v. Vermont Mut. Fire Ins. Co., 18 Vt. 305, 313.

In a condition of an insurance policy that "any interest in the property insured not absolute, or that is less than a perfect title must be represented to the company and expressed in the policy," the word "less" should be construed as referring to the quantity of the interest or estate, which is measured by its duration. The word "less" is a term denoting quantity. An estate of interest less than a perfect title may therefore mean one that is limited in its extent and duration, as an estate for life, for years, or at will; less than an estate in fee simple, or than of one of unlimited duration. *Woody v. Old Dominion Ins. Co.* (Va.) 31 Grat. 362, 375, 31 Am. Rep. 732.

As deducting or taking from.

Where a defendant, indebted on certain notes, claimed credits in addition to those indorsed on the notes, a special verdict finding him indebted "to the face of the notes, with interest, less the credits," is not indefinite, but means that the credits allowed are those indorsed on the notes. *Roberts v. Roberts*, 30 S. E. 347, 348, 122 N. C. 782.

An order directing an administrator to sell his intestate's real estate, and describing the land as an entire tract, "less or except the widow's dower," which is specifically described, means the widow's dower estate, and not the fee of the land so described as her dower. "Less (minus) means literally taking from; taking a smaller number quantity, or interest from a larger; the process of subtracting or withdrawing." *Attin v. Willis*, 8 South. 94, 90 Ala. 421.

LESSEE.

He to whom a lease is made is called the "lessee," or tenant. *Viterbo v. Friedlander*, 7 Sup. Ct. 962, 967, 120 U. S. 707, 30 L. Ed. 776.

The mere use of technical words and phrases which have a definite legal signification cannot be allowed to defeat the contrary intention of the parties, if that intention be manifest from the whole contract. *Caldwell v. Fulton*, 31 Pa. (7 Casey) 478, 72 Am. Dec. 760; *Funk v. Haldeman*, 53 Pa. (3 P. F. Smith) 229. So that the words " demise," "lease," "lessors," "lessees," and like words, specially appropriate to a contract between the owner and tenant for years, have no bearing, if the contract is in fact not a lease. *Lehigh & Wilkes-Barre Coal Co. v. Wright*, 35 Atl. 919, 920, 177 Pa. 387.

The terms "lessee," "owner," or "operators" of passenger terminals, and the person or company operating the same, in Laws 1899, c. 4700, § 6, relating to the power

of railroad commissioners to compel admission into certain passenger terminals of railroad companies desired or required by the commissioners to enter, and to fixing reasonable rates, etc., for the uses and privileges conferred, cannot be limited to corporations only, but also includes associations and individuals. *State v. Jacksonville Terminal Co.*, 27 South. 225, 237, 41 Fla. 377.

The term "lessee," in a pleading, is held to be insufficient to constitute a description of the interest of the pleader in certain premises, within the meaning of Code Civ. Proc. § 2235, providing that the petition in a summary proceeding for land must describe the interest of the petitioner; the term being held to be mere descriptio personæ. *Loft v. Kaziz*, 84 N. Y. Supp. 228, 229.

The terms "owner," "owners," "lessee," "agent," or "operator," as used in the act relating to mines and mining, shall include the immediate proprietor, lessee, or occupier of any coal mine, or any person having on behalf of any owner or owners, or lessee as aforesaid, the care and management of any coal mine or any part thereof. *Gen. St. Kan.* 1901, § 4141.

As agent of owner.

See "Agent."

As owner or proprietor.

See "Owner"; "Proprietor."

LESSOR.

As owner, see "Owner."

He who grants a lease is called the "owner," or "lessor." *Viterbo v. Friedlander*, 7 Sup. Ct. 962, 967, 120 U. S. 707, 30 L. Ed. 776.

LET.

See "Agree to Let."

As allow or permit.

"To let," as used in an agreement whereby E. agreed to let T. have all the timber on certain land, means to allow, to permit; that is, that E. will permit T. to have the timber upon the said land. *Elberts v. Thompson*, 4 Atl. 194, 196, 113 Pa. 19.

As a command or order.

"Let," as used in the expressions "Let an inventory be taken," "Let a family meeting be held as prayed for," "Let a writ of seizure and sale issue," etc., is equivalent to "it is hereby ordered," so that in the latter instance the expression is tantamount to saying, "It is hereby ordered that a writ of seizure and sale issue." *Ingram v. Larousini*, 23 South. 498, 501, 50 La. Ann. 69.

Covenants implied.

The words "demise or let," or their equivalent in a lease, imply a covenant for title and for quiet enjoyment; but no other covenant on the part of the lessor is implied therein. *Wilkinson v. Clauson*, 12 N. W. 147, 148, 29 Minn. 91.

As demise, grant, or lease.

"Let," as used in a lease by which the owner lets the premises, etc., is synonymous with "demise." *Hemphill v. Eckfeldt (Pa.)* 5 Whart. 274, 278.

"Let and lease," as used in a deed purporting to "let and lease" certain premises, are merely words of grant, and do not imply a covenant. *Lovering v. Lovering*, 13 N. H. 513, 518.

The word "let," or any equivalent words which constitute a lease, implies a covenant in a lease under seal, or in a lease not under seal, a contract, for title to the estate merely, and does not imply a contract for any particular state of the property at the time of the making of the lease, or that it shall continue fit for the purpose for which it was leased. *Foster v. Peyser*, 63 Mass. (9 Cush.) 242, 246, 57 Am. Dec. 43.

An instrument in writing, whereby the grantee of land granted agreed to "let" the grantor have the use of the house that he lived in on the farm that the grantee had bought of him for the certain term, and until the grantor should pay the money on a certain mortgage which the grantee held against him, denotes the leasing of the premises, creating the relation of landlord and tenant between the parties. *Hunt v. Comstock (N. Y.)* 15 Wend. 665, 667.

The words "let and hired," in a charter party which provides that the owners of the vessel let and hired the vessel for a certain gross sum to carry certain freight, does not give the charterer a special ownership in the vessel, when the owner of the vessel employs, pays, and supports the master and crew, retains the control of the navigation of the vessel by means of the master, and is answerable for his conduct, and therefore the owner has a lien on the cargo for the freight. *Palmer v. Gracie (U. S.)* 18 Fed. Cas. 1033, 1036.

The word "let," in a covenant that the lessee would not "sublet or assign over" the demised premises, is synonymous with the word "demise," and is a covenant against subletting. *Jackson v. Silvernail (N. Y.)* 15 Johns. 278, 280 (citing *Gregson v. Harrison*, 2 Term R. 425).

In an action of ejectment for the breach of a condition by a lessee, the words "let and underlet" in a lease will be construed to mean a demise and underletting, and not

an assignment of the whole interest of the lessee. *Lynde v. Hough* (N. Y.) 27 Barb. 415, 420.

Where the word "let" is employed in a deed, it is not used to designate the quantity of estate intended to be conveyed, but merely for the purpose of passing title to an estate described by other words introduced for that purpose. *Krider v. Lafferty* (Pa.) 1 Whart. 303, 315, 316, 317.

Demise distinguished.

"Demise" denotes something more than a mere letting or a lease, as, for instance, a grant. It would seem that it means more to the lessee than a mere letting by the landlord, or the mere taking by the lessee, generally embraced in the mere terms "to lease" or "to let." These latter words, it would appear, can have relation only to the mere term. *Mershon v. Williams*, 44 Atl. 211, 214, 63 N. J. Law, 398.

As exchange.

In construing a complaint in an action in justice court to recover for breach of warranty of a horse, in which plaintiff alleged that he "let the said Caleb have a certain bay horse, in consideration of which the said Caleb let the plaintiff have a certain sorrel horse, which the said Caleb warranted to be a sound and good working horse, whereas he was unfit for all manner of business, to the damage," etc., the court said: "In common parlance, 'let,' as used here, means 'exchange,' and so the court will understand it." And the objection made on appeal that the word "let" imports a bailment, and, if so, that the unsoundness of the horse was immaterial and not prejudicial to the plaintiff, was not sustained. *King v. Fuller* (N. Y.) 3 Caines, 152, 153.

As give.

The word "let," in a written direction to "let A. have whatever he wants for his support," ordinarily means to grant possession, to give, to furnish, etc. *Grant v. Dabney*, 19 Kan. 388, 389, 27 Am. Rep. 125.

The word "let," as employed in a lease, may be considered a translation of "tradidi," which is from "trado," signifying "to deliver, give, or yield up; surrender." *Krider v. Lafferty* (Pa.) 1 Whart. 303, 315, 316.

As hire or lend.

"Let," as used in a complaint for the negligent killing of a horse, stating that plaintiff let defendant have the use of his mare, and that she died by reason of defendant's negligence, is equivalent to an allegation of a hiring of the mare for a reward, under the rule that pleadings must be considered most strongly against the pleader; one of the ordinary significations of "let" being to lease or grant the use and possession of the thing for compensation. *Cartlidge v.*

Sloan, 26 South. 918, 919, 124 Ala. 596 (citing *Bouvier*).

The terms "letting" and "hiring" are used to designate the lending of property other than money for a compensation. *Kenney v. Hynds*, 49 Pac. 403, 404, 7 Wyo. 22.

LETTING.

According to *Webst. Dict.* "letting" is an Americanism used to signify the act of putting out portions of work to be performed by contract, as on a railroad or canal, and it has in our country that acceptation. The letting or putting out of the contract is a different thing from the invitation to make proposals for it. The letting is posterior to the invitation for proposals. It is made after the proposals have been received in pursuance to the invitation, and after they have been considered, and is the act of awarding the contract to the proposer. The distinction between the advertisement for proposals and the letting of a contract is precisely the distinction between the advertisement of a sale and a sale. *Eppes v. Mississippi, G. & T. R. Co.*, 35 Ala. 33, 55.

Of ship.

When a ship is let to another for a period of time, and the owner during that time has nothing to do with the appointment of her officers and crew, or with the working or management of her, that is called a "demise or letting of the ship," and the charterer becomes responsible for her navigation. *Bramble v. Culmer* (U. S.) 78 Fed. 497, 501, 24 C. C. A. 182.

LETTING LAND ON SHARES.

See "On Shares."

LETHAL WEAPON.

The term "lethal weapons" means deadly weapons. "Guns, swords, pistols, knives, and the like are lethal weapons as a matter of law, when used within striking distance of the party assaulted. All others are lethal or not according to their capability of producing death or great bodily harm in the manner in which they are used, and of this the jury must be the judges." The question whether a gun drawn on another was a lethal weapon, held to be dependent on the question whether or not it was loaded. *State v. Godfrey*, 20 Pac. 625, 628, 17 Or. 300, 11 Am. St. Rep. 830.

LETTER.

See "Post Letter."

A letter is defined as a written or printed message. *United States v. Britton* (U. S.) 17 Fed. 731, 732.

A letter is a written or printed message or communication in the form of epistolary correspondence. As used in the legislation of Congress, regulating the rates charged for postage, it is a technical word; a superior word; a word to represent a class of mail matter that is in every business sense of so high a grade that all else becomes inferior in classification and in enumeration to it. It stands first in postal concerns, and nothing is even equal to it. Historically and in public knowledge and wisdom this is so, and no word is ever substituted for "letters" to express what is commonly known as "letters" in relation to the postal service. The omission of the term from a statute enumerating the various items of mail which are excluded from the mails by reason of obscenity shows an intention that the statute should not apply to letters. *United States v. Huggett* (U. S.) 40 Fed. 636, 640.

The term "letter," in the statute making it a criminal offense to send or convey an insulting, etc., letter or communication, was construed to properly include a writing inclosed in an envelope and transmitted by mail. It is said that such writing might properly be called either a "letter" or a "communication." *Larison v. State*, 9 Atl. 700, 701, 49 N. J. Law (20 Vroom) 256, 60 Am. Rep. 606.

A letter, to come within the provision of sections 5467-5469 of the Revised Statutes [U. S. Comp. St. 1901, pp. 3691, 3692], must get into the mail in some of the ordinary ways prescribed by the postal authorities, and become fairly and reasonably a part of the mail matter under the control of the postal department. *United States v. Rapp* (U. S.) 30 Fed. 818, 821.

"A letter is a written or printed message. There can be no message to that which is not in existence." *United States v. Denicke* (U. S.) 35 Fed. 407, 409.

Circular.

"Letter," as used in Act Cong. March 3, 1825, § 28, providing for the punishment of any person who shall frank any letter other than those written by himself or by his order on the business of his office, cannot be construed to include printed circulars. The definition of "letters" as correspondence wholly or partly in writing necessarily excludes from the definition printed circulars, whether in the form of letters or otherwise. *In re Dewees* (U. S.) 7 Fed. Cas. 571, 572.

The term "letter," as used in Rev. St. § 3894, providing that no letter or circular concerning lotteries shall be carried in the mail, may designate a circular, as well as a letter. The statute does not recognize the distinction between the two things; that by a circular is intended a written or printed communication general and not personal in its

character, and that by a letter is intended a communication personal and individual in character and not general. The same paper may be both a letter and a circular. No doubt there may be many circulars that are not letters, but a circular which is in the form of a letter may be well described as a letter and a circular, and there is no reason for excluding such a circular from the operation of the statute. *United States v. Noelke* (U. S.) 1 Fed. 426, 429.

In Act Cong. prohibiting any person from sending a "letter or circular" concerning a lottery, the two terms are employed synonymously as to the person mailing the thing referred to. A letter is indited to a particular person. A circular is intended for a number of persons. Whoever was in the mind of Congress as mailing the circular was in its mind as mailing the letter—that is, lottery dealers; and it did not, therefore, apply to letters by any other persons. *United States v. Mason* (U. S.) 22 Fed. 707.

A sealed circular is, for all purposes affecting the postal offices, a letter. *United States v. Dauphin* (U. S.) 20 Fed. 625, 629.

Decoy letter.

The term "letter," in 4 Stat. 107, making it criminal to open a letter and steal money therefrom, includes a decoy letter prepared and mailed by an officer of the government for the purpose of entrapping the prisoner. *United States v. Cottingham* (U. S.) 25 Fed. Cas. 673.

"Letter," as used in Rev. St. §§ 5467, 5469 [U. S. Comp. St. 1901, pp. 3691, 3692], making the stealing of a letter from the mail or post office a penal offense, includes a decoy letter addressed to a fictitious personage, known to be such and not designed to be delivered, but only intended to lead to the detection of persons suspected of having stolen letters. *Goode v. United States*, 16 Sup. Ct. 136, 138, 159 U. S. 663, 40 L. Ed. 297 (citing *United States v. Foye* [U. S.] 25 Fed. Cas. 1198, 1199; *United States v. Wight* [U. S.] 38 Fed. 106; *United States v. Dorsey* [U. S.] 40 Fed. 752; *United States v. Bethea* [U. S.] 44 Fed. 802).

Rev. St. § 3891 [U. S. Comp. St. 1901, p. 2657], relating to the abstraction or embezzlement by a post office employé of any "letter intended to be conveyed by mail," imported a letter which had a sender and a receiver, a place from which it started and a destination to which it could be conveyed, and the term would not include a decoy letter placed in the mails for the purpose of detecting offenders. *United States v. Denicke* (U. S.) 35 Fed. 407, 408.

Marked words in magazine.

The marking and dotting of words and letters in a copy of a magazine, when sent

to a person, makes the communication as much a letter from the person so marking as though he had written the same thing in his own hand; and it is as competent to call any one to make the decipherment as much as it would be to read a letter so illegibly written as to be difficult to make out. *State v. Wetherell*, 40 Atl. 728, 70 Vt. 274.

Parcel.

A letter is a message in writing. A packet is two or more letters under one cover. Merely covering a parcel of gloves, silk hose, or other merchandise with paper, and directing it to a person to whom it is sent, would not make such parcel a letter; nor is there any difference between such a parcel and one containing bank notes. The term "letter" or "packet," in St. 11th Cong. c. 54, § 18, prohibiting any person carrying the mail from receiving or carrying any letter or packet, does not include a parcel or bundle of merchandise. *Dwight v. Brewster*, 18 Mass. (1 Pick.) 50, 56, 11 Am. Dec. 133; *Chouteau v. Steamboat St. Anthony*, 11 Mo. 228, 230.

Printed lottery ticket.

In Rev. St. § 3894, forbidding any one from knowingly depositing in the mail any letter or circular concerning lotteries, gift concerns, etc., "letter" does not include a printed lottery ticket. *United States v. Clark* (U. S.) 22 Fed. 708, 709.

Private letter.

The word "letter" has a meaning in itself distinct from the word "writing," and, as used in Rev. St. § 3893, declaring every obscene book, paper, letter, writing, or other publication of an indecent character to be nonmailable matter, includes an indecent private letter in a sealed envelope. *United States v. Ling* (U. S.) 61 Fed. 1001, 1002; *United States v. Andrews* (U. S.) 58 Fed. 861, 863 (affirmed *Andrews v. United States*, 16 Sup. Ct. 798, 799, 162 U. S. 420, 40 L. Ed. 1023).

A private sealed letter is held not to be within the prohibition of Rev. St. § 3839, as amended September 26, 1888, prohibiting the mailing of any obscene book, pamphlet, picture, paper, writing, print, letter, or other publication; it being held that the words of enumeration are limited in character by the concluding words "or other publication." *United States v. Wilson* (U. S.) 58 Fed. 768, 769; *United States v. Warner* (U. S.) 59 Fed. 355, 356.

Unsealed matter.

"Letters," as used in Act Cong. March 3, 1845, forbidding transportation by railroads, boats, etc., of letters, packages, and other mailable matter on such trains, boats, etc., as carry United States mail, except such as

may have relation to some part of the cargo or some article at the same time conveyed, includes an unsealed order sent on a steamboat, directing tobacco to be sent by the return boat. *United States v. Bromley*, 53 U. S. (12 How.) 88, 97, 13 L. Ed. 905.

The word "letter," as used in the federal statutes relating to nonmailable matter, refers only to the contents of sealed matter. *Middleby v. Effler* (U. S.) 118 Fed. 261, 263, 55 C. C. A. 355.

As a writing.

See "Write—Writing."

LETTER BOX.

The provision of Code Civ. Proc. § 797, that service on an attorney during his absence may be made by depositing the paper, in a sealed wrapper directed to him, in his letter box, is complied with by dropping it through a slit or opening for letters in the then closed door of an attorney's office, in a receptacle attached to such door on the inside for receiving letters during the attorney's absence. *Duval v. Busch* (N. Y.) 21 Abb. N. C. 214, 216.

LETTER OF ATTORNEY.

A mandate, procuration, or letter of attorney is an act by which one person gives power to another to transact for him, and in his name, one or several affairs. Civ. Code La. 1900, art. 2985.

A false writing stating that one is authorized to collect for a certain newspaper is within the statute making it forgery to falsely make a letter of attorney or other power to receive money. *Leslie v. State*, 69 Pac. 2, 3, 10 Wyo. 10.

A paper purporting to authorize the bearer to solicit subscribers for a local organization is not a letter of attorney, within a statute making such an instrument a subject of forgery. A letter or power of attorney is commonly understood to be a formal document authorizing some act, which shall have a binding effect upon the person making such power of attorney. It is usually under seal, and, while the want of a seal might not invalidate all powers of attorney, it would not follow that every paper conferring authority upon another is a letter of attorney. *People v. Smith*, 70 N. W. 466, 112 Mich. 192, 67 Am. St. Rep. 392.

LETTER OF RECOMMENDATION.

A distinction is to be made between what is known in terms as a "clearance card" and a "letter of recommendation"; the former being merely a letter, be it good, bad, or indifferent, given to an employé at the

A letter is a written or printed message or communication in the form of epistolary correspondence. As used in the legislation of Congress, regulating the rates charged for postage, it is a technical word; a superior word; a word to represent a class of mail matter that is in every business sense of so high a grade that all else becomes inferior in classification and in enumeration to it. It stands first in postal concerns, and nothing is even equal to it. Historically and in public knowledge and wisdom this is so, and no word is ever substituted for "letters" to express what is commonly known as "letters" in relation to the postal service. The omission of the term from a statute enumerating the various items of mail which are excluded from the mails by reason of obscenity shows an intention that the statute should not apply to letters. *United States v. Huggett* (U. S.) 40 Fed. 636, 640.

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Decoy letter.

The term "letter," in 4 Stat. 107, making it criminal to open a letter and steal money therefrom, includes a decoy letter prepared and mailed by an officer of the government for the purpose of entrapping the prisoner. *United States v. Cottingham* (U. S.) 25 Fed. Cas. 673.

"Letter," as used in Rev. St. §§ 5467, 5469 [U. S. Comp. St. 1901, pp. 3691, 3692], making the stealing of a letter from the mail or post office a penal offense, includes a decoy letter addressed to a fictitious personage, known to be such and not designed to be delivered, but only intended to lead to the detection of persons suspected of having stolen letters. *Goode v. United States*, 16 Sup. Ct. 136, 138, 159 U. S. 663, 40 L. Ed. 297 (citing *United States v. Foye* [U. S.] 25 Fed. Cas. 1198, 1199; *United States v. Wight* [U. S.] 38 Fed. 106; *United States v. Dorsey* [U. S.] 40 Fed. 752; *United States v. Bethea* [U. S.] 44 Fed. 802).

Rev. St. § 3891 [U. S. Comp. St. 1901, p. 2657], relating to the abstraction or embezzlement by a post office employé of any "letter intended to be conveyed by mail," imported a letter which had a sender and a receiver, a place from which it started and a destination to which it could be conveyed, and the term would not include a decoy letter placed in the mails for the purpose of detecting offenders. *United States v. Denicke* (U. S.) 35 Fed. 407, 408.

Marked words in magazine.

The marking and dotting of words and letters in a copy of a magazine, when sent

to a person, makes the communication as much a letter from the person so marking as though he had written the same thing in his own hand; and it is as competent to call any one to make the decipherment as much as it would be to read a letter so illegibly written as to be difficult to make out. *State v. Wetherell*, 40 Atl. 728, 70 Vt. 274.

Parcel.

A letter is a message in writing. A packet is two or more letters under one cover. Merely covering a parcel of gloves, silk hose, or other merchandise with paper, and directing it to a person to whom it is sent, would not make such parcel a letter; nor is there any difference between such a parcel and one containing bank notes. The term "letter" or "packet," in St. 11th Cong. c. 54, § 18, prohibiting any person carrying the mail from receiving or carrying any letter or packet, does not include a parcel or bundle of merchandise. *Dwight v. Brewster*, 18 Mass. (1 Pick.) 50, 56, 11 Am. Dec. 133; *Chouteau v. Steamboat St. Anthony*, 11 Mo. 226, 230.

Printed lottery ticket.

In Rev. St. § 3894, forbidding any one from knowingly depositing in the mail any letter or circular concerning lotteries, gift concerns, etc., "letter" does not include a printed lottery ticket. *United States v. Clark* (U. S.) 22 Fed. 708, 709.

Private letter.

The word "letter" has a meaning in itself distinct from the word "writing," and, as used in Rev. St. § 3893, declaring every obscene book, paper, letter, writing, or other publication of an indecent character to be nonmailable matter, includes an indecent private letter in a sealed envelope. *United States v. Ling* (U. S.) 61 Fed. 1001, 1002; *United States v. Andrews* (U. S.) 38 Fed. 861, 863 (affirmed *Andrews v. United States*, 16 Sup. Ct. 798, 799, 162 U. S. 420, 40 L. Ed. 1023).

A private sealed letter is held not to be within the prohibition of Rev. St. § 3830, as amended September 26, 1888, prohibiting the mailing of any obscene book, pamphlet, picture, paper, writing, print, letter, or other publication; it being held that the words of enumeration are limited in character by the concluding words "or other publication." *United States v. Wilson* (U. S.) 58 Fed. 768, 769; *United States v. Warner* (U. S.) 59 Fed. 355, 356.

Unsealed matter.

"Letters," as used in Act Cong. March 3, 1845, forbidding transportation by railroads, boats, etc., of letters, packages, and other mailable matter on such trains, boats, etc., as carry United States mail, except such as

may have relation to some part of the cargo or some article at the same time conveyed, includes an unsealed order sent on a steamboat, directing tobacco to be sent by the return boat. *United States v. Bromley*, 53 U. S. (12 How.) 88, 97, 13 L. Ed. 905.

The word "letter," as used in the federal statutes relating to nonmailable matter, refers only to the contents of sealed matter. *Middleby v. Effler* (U. S.) 118 Fed. 261, 263, 55 C. C. A. 355.

As a writing.

See "Write—Writing."

LETTER BOX.

The provision of Code Civ. Proc. § 797, that service on an attorney during his absence may be made by depositing the paper, in a sealed wrapper directed to him, in his letter box, is complied with by dropping it through a slit or opening for letters in the then closed door of an attorney's office, in a receptacle attached to such door on the inside for receiving letters during the attorney's absence. *Duval v. Busch* (N. Y.) 21 Abb. N. C. 214, 216.

LETTER OF ATTORNEY.

A mandate, procuration, or letter of attorney is an act by which one person gives power to another to transact for him, and in his name, one or several affairs. Civ. Code La. 1900, art. 2985.

A false writing stating that one is authorized to collect for a certain newspaper is within the statute making it forgery to falsely make a letter of attorney or other power to receive money. *Leslie v. State*, 69 Pac. 2, 3, 10 Wyo. 10.

A paper purporting to authorize the bearer to solicit subscribers for a local organization is not a letter of attorney, within a statute making such an instrument a subject of forgery. A letter or power of attorney is commonly understood to be a formal document authorizing some act, which shall have a binding effect upon the person making such power of attorney. It is usually under seal, and, while the want of a seal might not invalidate all powers of attorney, it would not follow that every paper conferring authority upon another is a letter of attorney. *People v. Smith*, 70 N. W. 466, 112 Mich. 192, 67 Am. St. Rep. 392.

LETTER OF RECOMMENDATION.

A distinction is to be made between what is known in terms as a "clearance card" and a "letter of recommendation"; the former being merely a letter, be it good, bad, or indifferent, given to an employé at the

time of his discharge or end of service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment. A letter of recommendation, on the contrary, is, as the term implies, a letter commending the former services of the holder, and speaking of him in such terms as would tend to bring such services to the favorable notice of those to whom he might apply for employment. *Cleveland, C. & St. L. Ry. Co. v. Jenkins*, 51 N. E. 811, 812, 174 Ill. 398, 62 L. R. A. 922, 66 Am. St. Rep. 296; *McDonald v. Illinois Cent. R. Co.*, 58 N. E. 463, 466, 187 Ill. 529.

A letter of recommendation is a letter commending the former services of the holder, and speaking of him in such terms as would tend to bring such services to the favorable notice of those to whom he might apply for employment. *McDonald v. Illinois Cent. R. Co.*, 58 N. E. 463, 466, 187 Ill. 529.

LETTERPRESS COPY.

Letterpress copies are impressions of letters or written matter which are obtained by placing a letter written on ordinary paper, or other written matter, between the leaves of a book filled with tissue paper; the pages upon which the copy is desired being usually dampened somewhat for that purpose, after which such book is subjected to great pressure by means of a hand or other press. The impressions thus made are the letterpress copies. *Lawrence v. Merritt*, 8 Sup. Ct. 1099, 1100, 127 U. S. 113, 32 L. Ed. 91.

LETTERPRESS ESTABLISHMENTS.

The term "letterpress establishments," as used in all laws relative to the employment of labor, shall mean any premises in which the process of letterpress printing is carried on. *Rev. Laws Mass. 1902*, p. 916. c. 106. § 8.

LETTERS OF ADMINISTRATION.

The expression "letters of administration" includes letters of temporary administration. *Code Civ. Proc. N. Y. 1899*, § 2514, subd. 5.

Letters of administration are granted by a court having probate jurisdiction to show that the authority incident to the office or duty of an executor or administrator has been devolved upon the person therein named. Such letters are, as a general rule, evidence only of their own existence, and are not evidence that the party therein assumed to have departed this life is in fact dead. *Mutual Benefit Life Ins. Co. v. Tisdale*, 91 U. S. 238, 243, 23 L. Ed. 314.

LETTERS OF CREDIT.

See "General Letter of Credit"; "Special Letter of Credit."

As negotiable instrument, see "Negotiable Instrument."

A letter of credit is a written instrument, addressed by one person to another, requesting the latter to give credit to the person in whose favor it is drawn. *Civ. Code Mont. 1895*, § 3710; *Rev. Codes N. D. 1899*, § 4664; *Civ. Code S. D. 1903*, § 2008; *Code Cal. 1903*, § 2858.

A letter of credit is either general or special. When the request for credit in a letter is addressed to specify the persons by name or description, the letter is special. All other letters of credit are general. *Civ. Code Cal. 1903*, § 2861.

A letter of credit, like a loan of money, is in itself indifferent in character. It may be maritime or nonmaritime, according to the objects of the loan, the intent of the parties, and the circumstances attending it. *Freights of The Kate (U. S.)* 63 Fed. 707, 720.

An indorsement upon a blank piece of paper, with intent to give the person credit, is in effect a letter of credit, so that, if a promissory note be afterwards written on the paper, the indorser cannot object that the note was written after the indorsement. *Violet v. Patton*, 9 U. S. (5 Cranch) 142, 150, 3 L. Ed. 61.

Letters of credit have been divided into two classes, general and special. They are general when addressed to any or all persons, without naming any one in particular. They are special when addressed to a particular individual or firm. A general letter of credit is addressed to, and invites people generally to advance money, give credit, or sell property in reliance on it; and when this is done the contract is complete, and the acceptor becomes a party to it, and may enforce it for his own benefit. *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273, 276, 45 Am. Rep. 204; *Birkhead v. Brown (N. Y.)* 5 Hill, 634, 641 (cited in *Union Bank v. Coster's Ex'rs*, 3 N. Y. Super. Ct. [1 Sandf.] 566).

A letter of credit is a paper well understood in the business and commercial world. If addressed to a particular person, who advances goods and money upon it in accordance with its tenor, then the letter becomes an available promise in favor of the person making the advance. *Pollock v. Helm*, 54 Miss. 1, 5, 28 Am. Rep. 342.

A letter of credit, as defined by *McCulloch's Commercial Dictionary*, is "A letter written by one merchant or correspondent to another, requesting him to credit the bearer with a sum of money," or, to take a fuller definition, it is "an open or sealed letter from

one merchant in one place directed to another in another place, requesting him that, if the person therein named or the bearer of the letter shall have occasion to buy commodities or to want moneys, he will procure the same, or pass his promise, bill, or other engagement for it, on the writer of the letter undertaking that he will provide him the money for the goods, or repay him by exchange, or give him such satisfaction as he shall require." *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599, 630 (reversing 11 N. Y. Super. Ct. [4 Duer] 480, in which the same definition is given).

A letter of credit may be defined to be a letter of request, whereby one person requests some other person to advance money or give credit to a third person, and promises that he will repay or guaranty the same to the person making the advancement. It is called a "general letter of credit" when it is addressed to all persons in general, requesting such advances to a third, and a "special letter of credit" when it is addressed to a particular person by name. *La Frague v. Harrison*, 9 Pac. 259, 261, 70 Cal. 380, 59 Am. Rep. 416; *Johannessen v. Munroe*, 32 N. Y. Supp. 863, 864, 84 Hun, 594.

LETTERS OF MARQUE AND REPRISAL.

Letters of marque and reprisal are a commission to attack the subjects of a foreign state on the high seas beyond the limits of the state, seize their property, and put it in sequestration. It is a hostile act of aggression. *Gibbons v. Livingston*, 6 N. J. Law (1 Halst.) 236, 255.

Letters of marque are a naval commission issued by a government, either actual or purported, authorizing its vessels to attack and seize the vessels of another power or government with which the government issuing such letters is at war. Unless the government issuing the letters has been recognized as a belligerent by some sovereign power, such letters or commission are void, and vessels sailing thereunder and threatening neutral commerce may be lawfully suppressed by seizure as pirates. *United States v. The Ambrose Light* (U. S.) 25 Fed. 408.

LETTERS PATENT.

"Letters patent are not to be regarded as monopolies created by an exclusive authority at the expense or to the prejudice of all of a community except the persons therein named as patentees, but as public franchises granted to the inventors of new and useful improvements for the purpose of securing to them, as such inventors, for the limited term therein mentioned, the exclusive right and liberty to make and use, and vend to others to be used, their own inventions, as tending to promote

the progress of science and the useful arts, and as matter of compensation to the inventors for their labor, toil, and expense in making the inventions and reducing the same to practice for the public benefit, as contemplated by the Constitution and sanctioned by the laws of Congress." *Seymour v. Osborne*, 78 U. S. (11 Wall.) 516, 533, 20 L. Ed. 33.

It is the policy of the law in this country, and had been enacted by Congress under powers given to it by the Constitution, that if a man finds out something new and useful—a machine, or preparation, or process, or what not, something new and useful—and publishes it to the world through the intermediation of the Patent Office, he shall in exchange for it, and as a compensation for doing so, receive a patent; that is, he receives a grant of a monopoly of manufacturing and selling and using that particular invention for a certain period of time—17 years. The man who holds a patent monopoly has earned the right to the monopoly, because he need not have invented the novelty unless he chose, and this monopoly is secured to the individual by a document which is issued by the government, and is called "letters patent"; a written document—that is, a printed document—accompanied generally with diagrams. And in that document it is stated specifically what the invention is, and what it seeks to accomplish, and how it is constructed, and how it works. *International Tooth Crown Co. v. Hanks Dental Ass'n* (U. S.) 111 Fed. 916, 918.

By granting letters patent for an invention, the government makes no transfer to the patentee of a right preferred, or estate theretofore vested in itself. The essential right is in the inventor before he obtains the patent. By making one grant therefor the government does not lose its power to make another. The letters constitute, under the law, simply prima facie evidence of the patentee's rights to the invention described as being his own discovery. But whether or not he was in fact the first inventor is left an open question between the patentee and other persons, whether they have patents for the same invention or not. *Western Electric Co. v. Sperry Electric Co.* (U. S.) 59 Fed. 295, 296, 8 C. C. A. 129.

The difference between letters patent and copyright may be illustrated by reference to the case of medicines. Certain mixtures are found to be of great value in the healing art. If the discoverer writes and publishes a book on the subject, as regular physicians generally do, he gains no exclusive right to the manufacture and sale of the medicine; he gives that to the public. If he desires to acquire such exclusive right, he must obtain a patent for the mixture as a new art, manufacture, or composition of matter. He may copyright his book, if he pleases, but that only secures to him the ex-

clusive right of printing and publishing his book. So of all other inventions or discoveries. And the court held that the publication of a work on bookkeeping, and the copyright of such work, did not give an exclusive right to the methods of bookkeeping therein explained and described. *Baker v. Selden*, 101 U. S. 99, 102, 103, 25 L. Ed. 841.

LETTERS ROGATORY.

Code Civ. Proc. § 913, providing for letters rogatory, gives no information as to the nature of such letters; and it must be assumed that the Legislature, in this provision, had in mind the nature of the letters rogatory, as ordinarily understood in legal literature. Weeks, in his *Law of Depositions* (section 128), says: "Letters rogatory are derived from the civil law, and the practice under them is regulated by the civil law. They are largely made use of in courts of admiralty. They are issued by the court of one country to the court or judge of another country. There is a broad distinction between the execution of a commission and the procurement of testimony by the instrumentality of letters rogatory. In the former case the rules of procedure are established by the court issuing the commission, and are entirely under its control. In the latter, methods of procedure must, from the nature of the case, be altogether under the control of the foreign tribunal, which is appealed to for assistance in the administration of justice. We cannot execute our own laws in a foreign country, nor can we prescribe conditions for the performance of a request which is based entirely upon the comity of nations, and which, if granted, is altogether *ex gratia*. We cannot dictate the methods to be pursued by a court whose assistance we invoke. The rules and practice of the foreign court must be the law of procedure in such cases. Letters rogatory were unknown to the common law. They came to us from the civil law, through the admiralty courts; and the civilians seem to agree that, in all that concerns the form of procedure in such cases, the judge ought to observe the laws of his own country." *Union Square Bank v. Reichmann*, 41 N. Y. Supp. 602, 605, 9 App. Div. 596.

LEVARI FACIAS.

Levari facias is a species of execution, and is defined to be a writ of execution directed to the sheriff for levying a sum of money upon a man's lands, tenements, goods, and chattels. *Pentland v. Kelly* (Pa.) 6 Watts & S. 483, 484.

LEEVE.

The word "levee" is defined in *Anderson's Law Dictionary* as an embankment in-

tended to prevent inundation. It has also been defined as an artificial mound of earth, intended exclusively as a protection from overflow. *Royse v. Evansville & T. H. R. Co.*, 67 N. E. 446, 447, 160 Ind. 592.

The word "levee" "comes to us from the French, and, in its primary sense, signifies a rising. But its signification has been much enlarged. Among other things, it is used to denote an embankment on the margin of the river to prevent inundation, particularly on the lower Mississippi, and, when this embankment is used as a landing place or quay, as at New Orleans, the 'levee' and the 'landing' become convertible terms. From this metropolis, from the South and Southwest, this use of the word passed up the river, and its tributary, the Ohio, to St. Louis, Cincinnati, Wheeling, and Pittsburgh, where the open bank or slope of the river was used as a landing place for the use of water craft, and the transfer of freight and passengers to and from them." *Coffin v. City of Portland* (U. S.) 27 Fed. 412, 415.

"Levee" has a well-understood meaning in the West and South. It is a place, on a river or other navigable water, for lading or unlading goods, or for the reception and delivery of passengers. It is either the bank or the wharf, to or from which persons or things may go from or to some vessel in the contiguous waters. *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 68 N. W. 458, 460, 63 Minn. 330, 34 L. R. A. 184 (citing *State v. Randall* [S. C.] 1 Strob. 110, 111, 47 Am. Dec. 548; *State v. Graham* [S. C.] 15 Rich. Law. 310).

The word "levee," as applied to portions of the public highways bordering on navigable streams and sloughs in the interior cities and towns in the state of California, has the same meaning as "landing." *City of Nappa v. Howland*, 25 Pac. 247, 248, 87 Cal. 84.

Embankment distinguished.

"Embankment," as used in an ordinance requiring the erection of an embankment, is not synonymous with the term "levee," as used in the statute authorizing mandamus where any corporation bound to construct a levee shall fail so to do. An embankment is an artificial bank or mound of earth. It may be used either exclusively as a roadway or as a railroad bed, or exclusively as a protection from overflow, or as both, while the levee is an artificial mound of earth, intended exclusively as a protection against an overflow. Every levee is therefore an embankment, but every embankment is not a levee; and it would not be a violent presumption to hold that, in referring to a levee, the reconstruction of which without delay would prevent a great disaster from an overflow, the lawmaker did not contem-

plate the same hasty necessity as in the case of the reconstruction of an embankment used as a roadway, which would involve only a question of use or convenience. *State ex rel. City of New Orleans v. New Orleans & N. E. R. Co.*, 7 South. 226, 228, 42 La. Ann. 138.

Embankments, locks, and dams are not levees, but they may enter into and form part of a comprehensive system of levees. *Dehon v. Lafourche Basin Levee Board*, 34 South. 770, 775, 110 La. 767.

Street distinguished.

The word "levee," as used in the West and South, means a landing place for vessels, and for the delivery of merchandise to and from such vessels, and, as incident to that, for the temporary storage of the merchandise. Hence a levee is different from a street, which is designed exclusively for the purposes of travel and intercommunication. *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 65 N. W. 649, 651, 63 Minn. 330, 34 L. R. A. 184.

LEEVE DISTRICTS.

Levee districts are neither public nor private corporations. They are special organizations to perform certain work which the policy of the state requires or promises to be done, and to which the state had given a certain degree of discretion in making the improvements contemplated. They are described by Dillon, in his work on Municipal Corporations (sections 24, 26), and he calls them quasi corporations. Perhaps it would have been more accurate to say that they are not corporations at all, but have been so classed, because many of the presumptions and rules which apply to corporations have been made applicable to them. *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 48 Pac. 1016. It follows from this that Act March 31, 1891 (St. 1895, p. 235), providing a new form of government for a certain levee district, is not in violation of Const. art 11, § 6, art. 12, § 1, declaring that neither municipal nor private corporations are created by special laws. *People v. Levee Dist. No. 6 of Sutter County (Cal.)* 63 Pac. 342, 343.

LEVEL

In ordinary language the word "level" does not invariably mean horizontally or a horizontal line. In a lease of coal mines to get the whole of the veins of coal lying under certain closes, not deeper than below the level of the bottom of the mine, the word is not necessarily to be taken in the meaning of "horizontal," but the local meaning of the word may be ascertained. *Clayton v. Gregson*, 4 Nev. & M. 602, 604.

LEVIABLE INTEREST.

A person settling upon land under a pre-emption gets no title till he has complied with the conditions of the law. If he fails to comply, he has no right. Till the time arrives when he signifies his acceptance, he is not seised, either in law or equity, with any interest or title in the land. Till he fulfills the prescribed conditions of the law, the title remains in the government. He may abandon the pre-empted lands at any time, and has no leviabie interest in them, nor any interest that can be sold under execution. *Bray v. Ragsdale*, 53 Mo. 170, 172.

LEVIS CULPA.

The term "levis culpa" is the term used in the civil law to designate ordinary fault or neglect. *Brand v. Schenectady & T. R. Co.* (N. Y.) 8 Barb. 368, 378.

LEVISSIMA CULPA.

"Levissima culpa" is the term used in the civil law to indicate slight fault or neglect. *Brand v. Schenectady & T. R. Co.* (N. Y.) 8 Barb. 368, 378.

LEVY.

The word "levy," in law, has a technical meaning, which is to collect money. *Collins v. Terrall*, 10 Miss. (2 Smedes & M.) 383, 386; *Lloyd v. Wyckonn*, 11 N. J. Law (6 Halst.) 218, 225, 227.

LEVY (Of Taxes).

The word "levy" has different meanings, according to the object to which it is applied. As applied to taxes, it sometimes means to raise and exact by authority of government, or to determine by vote the amount of tax to be raised. It is in this sense that town, city, and school districts levy taxes. In other cases it is used with reference to the mere ministerial or executive act of entering them on the taxbooks and collecting them. *State v. Lakeside Land Co.*, 73 N. W. 970, 973, 71 Minn. 283.

In Rev. St. §§ 1210a, 1210b, relating to tax levy, the word "levy" has no limited or technical meaning, and, as there used, means only a computation and extension of the tax according to the assessment. *Bradley v. Lincoln Co.*, 18 N. W. 732, 734, 60 Wis. 71.

Webster's Dictionary gives as one of the definitions of "levy": "To raise or collect by assessment; to exact by authority, as to levy taxes, tolls, tributes, or contributions." In *Morton v. Comptroller General*, 4 S. C. (4 Rich.) 430, the court says: "The duty enjoined on the Legislature is to levy a tax

When the aggregate value of the property is ascertained at the time the tax levy is ordered, the Legislature frequently makes the division, and directs the levy to be made according to the resulting rate which is thus established by law, instead of merely fixing the amount to be levied, and leaving the rate to be ascertained by computation after the aggregate valuation of property subject to taxation is ascertained and known. There are two distinct stages in this process, the result of one of which is to fix an indebtedness on the collective body of taxpayers, and the other on the individual taxpayer. So the word 'levy' is indifferently employed as commonly used to express either one of these processes separately, or both collectively. A tax is said to be levied when the amount or rate to be imposed is fixed by law, for what is wanting to complete such levy is supplied by the standing tax laws, and consists in a course of administrative action. The word 'levy' is frequently used in more than one sense, and its meaning in a particular instance is determined by resort to the context. It is sometimes used for the purpose of conferring all the powers incident to the creation and collection of a tax, as when corporate authorities are vested with power to assess and collect taxes for corporate purposes, while again it is only intended to confer administrative power in the collection of the tax, without reference to its creation." *Southern Ry. Co. v. Kay*, 39 S. E. 785, 786, 62 S. C. 28.

"Levying a tax" usually means the fixing of the rate at which property is to be taxed, and this is generally shown by the Legislature either mediately or immediately; that is to say, by the Legislature for the purpose of state taxation, and by the local governing bodies, such as boards of supervisors, for the local taxation, to which bodies the power of levying taxes is conferred by the Legislature. *Emeric v. Alvarado*, 2 Pac. 418, 409, 64 Cal. 529.

As all necessary proceedings.

The phrase "levy an assessment," in the tax legislation of 1882, means the doing of whatever things are required to be done in order to authorize the collector to procure the taxes. *Hohenstatt v. City of Bridgeton*, 40 Atl. 649, 62 N. J. Law, 169.

"Levy," as used in a statement that the board of police did legally levy a county, special, and poor tax, imports the ascertainment of the amount necessary to be raised for the county taxes, and a performance of such acts by the board of police as would authorize the tax collector to proceed to collect the taxes. It must be taken that they fixed the amount to be raised, and took such other steps as were necessary to authorize the tax collector to make collections, be-

cause otherwise there could not have been a legal levy of the amount of taxes. *Moore v. Foote*, 32 Miss. 469, 479.

Assess distinguished.

"Levied," as used in a lease providing that the lessee should pay all taxes whatsoever to be levied during the term, including the tax for the year in which the lease was made, is not synonymous with "assessed." To assess a tax is to declare a tax to be payable. To levy it is to raise or collect it. There is a wide difference between taxes assessed and taxes levied, and no tax can be levied until the assessor's return is made and acted upon by the county court, and the books placed in the hands of the collector. *Bouvier* says: "Assessment is the making out of a list of property, and fixing its valuation or appraisal. It is also applied to making out a list of persons, embracing their occupations, chiefly with the view of assessing the said persons and their property." *Jacob's Law Dictionary*, under the title of "Levy," says: "The term is used in the law for to collect or exact, as to levy money," etc. *Valle v. Fargo*, 1 Mo. App. 344, 347.

"Levy" and "assessment" have very different meanings. The levy of taxes is a legislative function, and declares the subjects and rate of taxation. Assessment is quasi judicial, and consists in making out a list of the taxpayer's taxable property, and fixing its valuation or appraisal. The distinction is the difference between prescribing a rule of action, and administering that rule to persons and subjects that fall within its provisions. *Perry County v. Selma*, M. & M. R. Co., 58 Ala. 546, 559.

"Levied or assessed," as used in Act Dec. 18, 1865 (*Laws Or. p. 767, § 90, subd. 4*), providing that the validity of a tax deed can be attacked on the ground that no part of the tax was "levied or assessed" upon the property sold, are convertible terms, but, strictly speaking, taxes are "levied," not "assessed." Under the law of the state, the assessment, which consists of the listing and valuation of the property, is made by the assessor, and upon this valuation the taxes are imposed or levied by the county court, and extended on the roll by its clerk. The assessment of land is made by entry in the appropriate column in the assessment roll, the name of the owner, and a description of the property, with its valuation, which, in case of a lot or block situated in any city, village, or town, a plat of which is recorded, may consist of the number of such lot and block, with the name of the village or town in which the same is situated; and where this is done the tax is levied or assessed upon the property. *Kelly v. Herrall* (U. S.) 20 Fed. 364, 369.

As collection.

The word "levy," when employed in relation to a public tax, has reference rather to the collection than the assessment of it. One of the law definitions of the word "levy" given by Webster is the taking or seizure of property on execution to satisfy judgments, or on warrants for the collection of taxes; a collection by execution. *Rhoads v. Given* (Del.) 5 Houst. 183, 186.

The word "levied" is not to be used in the sense of "collect." *Scudder v. Baker*, 33 N. J. Law (4 Vroom) 423, 427.

As determine to levy.

Act June 17, 1893, § 1, provides: "That whenever the corporate authorities of any city, town or village have heretofore levied or shall hereafter levy any special assessment pursuant to law, it shall be lawful for such corporate authority at any time prior to the commencement of the collection thereof, to provide by ordinance that said assessments be divided into installments," etc. Held, that a fair construction of the language, "whenever the corporate authorities of any city, town, or village have heretofore levied or shall hereafter levy any special assessment," was intended by the Legislature to mean merely that, whenever the corporate authorities have heretofore determined or shall hereafter determine to levy any special assessment, then they may provide by ordinance for a division of the assessments into installments. *Walker v. People*, 48 N. E. 1010, 1011, 170 Ill. 410

As a formal approval.

Acts 25th Gen. Assem. c. 62, § 1, provides that real estate on which liquor is sold shall be assessed a tax of \$600 per annum, which shall be a perpetual lien on all property used in the business. Section 3 provides for the return of the property for taxation by three citizens where the assessor fails to act. Section 9 provides for the levy of a tax by the board of supervisors at its annual meeting in September. Defendant's property subject to this tax was returned by three citizens for taxation. Defendant applied to the board of supervisors to rebate the tax, which was refused, and the tax was approved and certified to the county auditor. Pending the application for rebate, defendant mortgaged the property for a pre-existing debt. Held, that the word "levy," as used in the act, meant scarcely anything more than a formal approval, the levy being made by law, and not by the board of supervisors, and consequently the lien of the tax attached prior to the determination of the board of supervisors, and was superior to the lien of the mortgage. *Ferry v. Deene* (Iowa) 82 N. W. 424, 425.

5 Wds. & P.—12

As impose.

"Levy" is defined in the Standard Dictionary as the seizing or taking of property by virtue of a judicial writ, to impose or assess a tax on property, and collect it under authority of law. This definition carries with it the popular understanding of the word, and is appropriately used when speaking of taxation, and was so used in Const. art. 12, § 4, providing that the Legislature shall not levy taxes for any county, town, or municipal purpose. *State v. Camp Sing*, 44 Pac. 518, 519, 18 Mont. 128, 32 L. R. A. 635, 56 Am. St. Rep. 551.

In an alternative writ of mandamus, requiring corporate authorities "to assess, levy, and cause to be collected a special tax," etc., "levy" does not apply to the valuation of taxable property for taxing purposes, but means to lay a tax on the taxable property as the same is already valued for ordinary taxing purposes, no matter whether such taxation tableau is made up by the state or city authority. *United States v. Port of Mobile* (U. S.) 12 Fed. 768, 770.

The word "levying," as used in the statute authorizing the parishes of the state to increase the rate of taxation for the purpose of taking and constructing public buildings and works of public improvements after the same shall have been voted at a special election, and providing that, where the election results favorably to the tax, the parish or municipal authorities "shall immediately pass an ordinance levying such tax, and for such time as may be specified in the petition," is thus obviously, though incorrectly, used in the sense of imposing. *Clifton v. Hobgood*, 31 South. 46, 49, 106 La. 535.

Under a statute (Rev. St. 1899, § 1592) declaring that the board of aldermen shall have power by ordinance to levy and collect a special tax for the purpose of grading, etc., it is held that the word "levy" means to charge upon the person or the property which must respond to the tax a sum of money already ascertained; and an ordinance specifying that certain street improvements should be paid for by special tax bills is not such a levy. *City of Westport v. Mastin*, 62 Mo. App. 647, 655.

LEVY (Of Writs).

See "Equitable Levy."

Levy as proceeding, see "Proceeding."

The legal definition of the word "levy" is to have the property within the power and control of the officer. *Carey v. German American Ins. Co.*, 54 N. W. 18, 20, 84 Wis. 80, 20 L. R. A. 267, 36 Am. St. Rep. 907 (quoting Bouv. Law Dict.).

Levy of execution "is an appropriation by the sheriff of the land designed to be lev-

ied on, indicated by some act, such as advertisement or handbills." *Evans v. Wilder*, 7 Mo. 359, 364.

A levy is where an officer seizes and possesses himself of chattels under a writ in such manner as to enable him to maintain trespass or replevin against a wrongful taker thereof. *Carey v. German-American Ins. Co.*, 54 N. W. 18, 20, 84 Wis. 80, 20 L. R. A. 267, 36 Am. St. Rep. 907.

To levy means to do the acts by which an officer sets apart and appropriates for the purpose of satisfying the command of a writ of execution a part or the whole of a defendant's property. *Burkett v. Clark*, 64 N. W. 1113-1115, 46 Neb. 466.

"Levy," in its original sense, means an actual making the money out of the property, and in its secondary sense it means seizing the property preliminary to making the money out of it. *Nelson v. Van Gazelle Valve Mfg. Co.*, 17 Atl. 943, 945, 45 N. J. Eq. (18 Stew.) 594.

In the absence of statutes defining its requisites in respect to money demands, "levy," means the act of appropriating or singling out the property of a debtor by the officer legally in charge of the writ against him, for its satisfaction, and it is ordinarily done by making an indorsement to that effect upon the writ. *McMillan v. Gaylor* (Tenn.) 35 S. W. 453, 454.

Seizure under attachment.

The term "levy" is as appropriately used in speaking of an attachment as of an execution. A levy is defined by Bouvier to be a seizure, and it is no less a seizure when made under an attachment than when made under an execution. *Union Nat. Bank v. Byram*, 22 N. E. 842, 844, 131 Ill. 92.

The levy of a writ of attachment consists in the seizure, actual or constructive, of the property attached; and it is essential to the lien created by the attachment of personal property—at least, as against the subsequent purchaser—that the property should be removed and held in the custody of the law. *Smith v. Packard* (U. S.) 98 Fed. 793, 798, 39 C. C. A. 294.

Constructive seizure.

The idea of the term "levy" includes a constructive as well as an actual taking into possession of property under execution process. *Dover Glassworks Co. v. American Fire Ins. Co.* (Del.) 29 Atl. 1039, 1043, 1 Marv. 32, 65 Am. St. Rep. 264.

The act of an officer, with an execution in his hands, going into a store and exhibiting the execution to one of the defendants, with the goods in plain view, and then declaring that he levied upon such goods, and

making a memorandum thereof and of the goods levied on in the presence of such defendant, and folding the same in the execution, and, upon promise and acknowledgment of defendant to permit the goods to remain as they were, leaving them in the store and in such defendant's charge, amounts to an actual levy, which was not abandoned by so leaving the goods with the defendant. *Bond v. Willett*, *40 N. Y. (1 Keyes) 377, 386.

Where the officer made a pencil memorandum of the levy of an attachment on the debtor's land on a separate paper, and folded it with the writ, and afterwards indorsed the levy on the writ, the levy was valid, and dated from the time of the pencil memorandum, though the wording of the description of the land indorsed on the writ differed from that of the memorandum; either description being sufficient to identify the land. *McMillan v. Gaylor* (Tenn.) 35 S. W. 453, 454.

The expression "to levy on goods and chattels" means to do the act or acts by which a sheriff sets apart and appropriates, for the purpose of satisfying the command of his writ, a part or the whole of the defendant's goods and chattels. Actual touch of the goods is not necessary. It is enough if the officer at the time of levying have them in his presence or under his peaceable control. Nor is the removal of the goods necessary to the perfection of the levy, although the goods remaining in the possession of the defendant may be deemed fraudulent as against subsequent executions. *Lloyd v. Wyckoff*, 11 N. J. Law (6 Halst.) 218, 225, 227.

No particular formality is legally necessary to constitute a levy, so that a levy on stocks, a list of which the sheriff has in his possession, is valid, if he announces his levy thereon to the debtor, who confesses his ownership thereof, and then incloses the list with the writ, to be afterwards attached thereto. In *re Braden's Estate*, 30 Atl. 746, 747, 165 Pa. 184.

The action of an officer in entering certain shares of stock upon his inventory and making a return thereof with an execution, does not constitute a levy on the stock. *Princeton Bank v. Crozer*, 22 N. J. Law (2 Zab.) 383, 386, 53 Am. Dec. 254.

As a conveyance.

A levy is a statutory conveyance to which the same rules of construction are to be applied as to a deed of conveyance, and there is no difference in their application or effect whether applied to an exception, a reservation, or a grant. So a levy reserving an estate less than a fee of a part of the premises set off is void, in relation to the particular tract from which the reservation is made. *Jewett v. Whitney*, 43 Me. 242, 251.

A levy on land, followed by a set-off, occupies the place and serves the purpose of a conveyance. Standing alone, it is not even an inchoate transfer of title, except as against the judgment debtor and those identified in position with him. It is true that, under a levy duly perfected, the title of the creditor relates back to the first step of the process; but this legal fiction is never permitted to work injustice to a bona fide purchaser, in whom any rights may have meantime become vested. *Schroeder v. Tomlinson*, 39 Atl. 484, 486, 70 Conn. 348.

Taking of land.

The term "levy," when employed to denote the acts by which an officer manifests the intent to appropriate land to the satisfaction of an execution, and when not defined by statute, has considerable elasticity of meaning. Under Code Civ. Proc. § 691, in levying an execution on land subject to the judgment lien it is not necessary that the sheriff file a copy of the writ with the recorder of the county, a description of the property levied on, or a notice that it is levied on, as in the case of lands attached. *Lehnhardt v. Jennings*, 51 Pac. 195, 196, 119 Cal. 192.

Personalty only.

A provision in a fire insurance policy that the levy of an execution on property insured shall terminate the risk is applicable only to personal property; there being, in practice, no levy of an execution on real estate. *Hammel v. Queens Ins. Co.*, 11 N. W. 349, 350, 54 Wis. 72, 41 Am. Rep. 1.

A policy of insurance on a building provided that the commencement of foreclosure proceedings or the levy of an execution shall be deemed an alienation of the property. Held, that the words "levy of an execution" should be construed to refer only to a levy on personal property, as a levy on real estate is unnecessary, and is now unknown to the law. Hence the filing of a mechanic's lien, and the obtaining of a judgment enforcing the same, do not avoid the policy. *Colt v. Phoenix Fire Ins. Co.*, 54 N. Y. 595, 597.

In holding that a condition in a fire policy on real property that it shall become void if the property be levied on or attached, or change takes place in title or possession, was not applicable to real estate, but was confined exclusively to personal property, the court say that they are unable to find any similar case containing the word "attached," but find several cases using the words "levied on," or "taken into possession or custody;" and it was held that these words were meant to have special, if not exclusive, reference to personal property, the policies containing the clause being adapted to insurance of both real and personal property, and as, when

personal property is levied upon, there is usually an actual seizure of it by the officer in whose custody it remains until the sale, the phrase was designed to guard against any supposed increase of risk resulting from a change of possession, and therefore that it has no application to a technical levy of execution on real estate. We do not think that the word "attached" adds anything to the meaning of the phrase, or serves any purpose except to clear up a doubt which might possibly arise of its application to the case of an attachment of personal property on a writ; the word "levy" being more commonly used to designate the seizure of property on execution than on a writ of attachment. *Tefft v. Providence Washington Ins. Co.*, 32 Atl. 914, 19 R. I. 185, 61 Am. St. Rep. 761.

Seizure required.

The term "levy," in legal parlance, signifies taking possession. *Burchell v. Green*, 27 N. Y. Supp. 82, 83, 6 Misc. Rep. 236.

The word "levy" itself implies seizure in the ordinary way by entry. *Textor v. Shipley*, 38 Atl. 932, 933, 86 Md. 424.

The word "levy," as used in the chapter relating to executions, shall be construed to mean the actual seizure of property by the officer charged with the execution of the writ. *Rev. St. Mo. 1899, § 3174.*

To constitute a levy on personal property, the officer must assume dominion over it. He must not only have a view of the property, but he must assert his title to it so as to render himself chargeable as a trespasser, but for the protection of process. *Crass v. Memphis & C. R. Co.*, 11 South. 480, 481, 96 Ala. 447.

Where a sheriff returned on a writ of attachment, "Levied this attachment on the following named slaves," etc., it was held that by the word "levied" must be understood a legal levy, including a seizure of property. *Baldwin v. Conger*, 17 Miss. (9 Smedes & M.) 516, 520.

To "levy" means to seize property, subject it to the satisfaction of an execution; to levy on goods and chattels; to take into custody or seize specific property in satisfaction of a writ; and, when an officer levies on property under an execution, it is a seizure of the property, a taking possession of the same, and it is then under the dominion of such officer. *Carr v. Huffman*, 41 Pac. 982, 984, 1 Kan. App. 713.

The word "levy," as defined by our statutes, means actual seizure; that is, the officer must take actual possession of the goods. A sheriff with an execution against a carriage dealer, by merely going into the carriage shop when no one was present, and moving one buggy a few feet, and then go-

ing away without saying anything to any one, and thereafter indorsing on the execution a levy on several carriages, does not make a levy. *Douglas v. Orr*, 58 Mo. 573, 574.

The return of a levy indorsed on an execution is prima facie evidence in the proceeding of which it forms a part. "Levy," in its legal acceptation, means the act of appropriating—a singling out—certain property of the debtor for the satisfaction of an execution, and it is done by making an indorsement to that effect upon the execution. In regard to land, it may be made in the office, although it may be ten miles distant, and the officer has never seen it. In regard to personal property, it is necessary for the officer to go to it, so as to have it in his power to take it into his actual possession if he chooses. Hence it is held that the term "levy" does not, *ex vi termini*, mean a seizing or taking actual possession by laying hands on the property. *Bland v. Whitfield*, 46 N. C. 122, 125.

A "levy" means this, and never more,—the taking possession of property by the officer. When there is possession, absolute or constructive, there is a levy, and in any collateral proceeding it is enough that there was such possession. "Here the only possession which could be taken of the property was in fact taken under the order of sale. Now although such taking of possession was unauthorized, yet the officer could do nothing more if he had been authorized; and, having taken such possession and being in such possession, he made all the levy that was necessary to uphold his sale. He could have taken no further possession if a general execution had been placed in his hands. Hence we think that all the levy that was indispensable was in fact made." *Pracht v. Pister*, 1 Pac. 638, 639, 30 Kan. 568.

An officer cannot make a levy on the goods in a store by merely walking into the store with an execution in his possession, and subsequently making a memorandum of the levy, which he annexed to and placed within the execution. In order to constitute a valid levy, as to third persons, the goods must not only be within the view of the officer, but must be subjected to his control. He must take actual possession, which, although the goods are present, can only be done by manual acts, or by an oral assertion that a levy is intended, and which is acquiesced in by those who are present and interested in the question. A levy cannot rest on a mere undivulged intention to seize property. Something more is required. There must be possessory acts to indicate a levy, or it must be word of mouth, so that what is thus done by the officer, if not justified by the process in his hands, will make him a trespasser. *Camp v. Chamberlain* (N. Y.) 5 Denio, 198, 202, 203.

When an execution is issued for money, and comes into the hands of an officer, the levy of it—the satisfaction of it—is made by seizing the property of the defendant. To be sure, the conversion of the thing seized into money is made before the execution is, in common parlance, said to be satisfied. But a levy is prima facie a satisfaction. *Valle v. Fargo*, 1 Mo. App. 344, 347.

The word "levy," in our legal nomenclature, imports an actual seizure, by manual caption, of goods and chattels, accompanied by an inventory of the same, and, in the case of land, a description thereof, and no more. It is true that the word, in its broadest sense, may include the whole process of making the money mentioned in the writ by seizure of goods, making a description of lands, advertising them for sale, selling them, and collecting the money. This abundantly appears by a perusal of the various judicial deliverances upon the subject of proceedings under execution, as found in the reported cases collected in *Stew. Dig.* pp. 531, 532, 534. *Birbeck Investment, Savings & Loan Co. v. Gardner*, 37 Atl. 767, 768, 55 N. J. Eq. 632.

Service distinguished.

"The 'service of an execution' and the 'levy of an execution' are often referred to as convertible terms; but in strictly legal parlance the service of an execution may be said to be the communication of its contents to the execution defendant, accompanied by or followed with a demand for its satisfaction, and, in its natural order, precedes the levy of an execution." *Lahr v. Ulmer*, 60 N. E. 1009, 1010, 27 Ind. App. 107.

LEVY AND COLLECT.

A statutory authority to levy and collect special taxation assessments on real estate to pay the cost of street improvements is held not to carry with it or include the power to sell the real estate upon which such tax or assessment is imposed, in case of nonpayment. *Ransom v. Irey*, 60 N. W. 601, 605, 42 Neb. 186.

LEVY AND SALE.

When used with reference to judicial proceedings in civil matters, the words "levy and sale" are equivalent to the word "execution." Each expression means the subjecting of property to the satisfaction of the judgment. An exemption of land granted to an Indian tribe from levy and sale is held to render the land exempt from execution for satisfaction of any judgment. *Mianja County Com'rs v. Wan-zop-pe-che*, 3 Kan. 364, 365.

"Levy, sale, and forfeiture," as used in a provision in an Indian treaty exempting Indian lands from levy, sale, and forfeiture,

"Is not, in the absence of expressions so to limit it, to be confined to levy and sale under ordinary judicial proceedings only, but is to be extended to levy and sale by county officers also for nonpayment of taxes." *The Kansas Indians*, 72 U. S. (5 Wall.) 737, 760, 18 L. Ed. 687.

LEVYING WAR.

To levy war is to make war. *Lloyd v. Wyckoff*, 11 N. J. Law (6 Halst.) 218, 225, 227.

Any assemblage of men for the purpose of revolutionizing by force the government established by the United States in any of its territories, although as a step to or the means of executing some greater projects, amounts to levying war. *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 76, 2 L. Ed. 554.

To constitute levying war against the people in this state, an actual act of war must be committed. To conspire to levy war is not enough. *Cook's Pen. Code* (N. Y.) § 39; *Gen. St. Minn.* 1894, § 6322.

As any combination to resist law.

"Levying war," as used in the provision of the federal Constitution, declaring the act of levying war against the United States by a citizen thereof a crime, etc., includes not only the act of making war for the purpose of entirely overturning the government, but also any combination forcibly to oppose the execution of any public law of the United States, if accompanied or followed by an act of forcible opposition to such law, in pursuance of such combination. The words include the act of a conspiracy to forcibly resist an execution of a draft for soldiers. *Druecker v. Salomon*, 21 Wis. 621, 626, 94 Am. Dec. 571.

"Levying war," as used in the provision in the United States Constitution, defining treason against the United States as only consisting in levying war against them, or in adhering to their enemies and giving them aid and comfort, is construed to mean "a general assemblage of persons in force to overthrow the government or to coerce its conduct." "The words embrace not only those acts by which war is brought into existence, but also those acts by which war is prosecuted. They levy war who carry on war. The offense is completed whether the force be directed to the entire overthrow of the government throughout the country, or to only certain portions of the country, or to defeat the execution and compel the repeal of one of its public laws." *United States v. Greathouse* (U. S.) 26 Fed. Cas. 18, 25.

A levying of war, without having recourse to rules of construction or artificial reasoning, would seem to be nothing short

of the employment, or at least of the embodying of a military force, armed and arrayed in a war-like manner, for the purpose of forcibly subverting the government, dismembering the Union, or destroying the legislative functions of Congress. These troops should be so armed and so directed as to leave no doubt that the United States or their government were the immediate object of the attack. The act of resisting the embargo law by taking away from the United States officers and soldiers a raft of timber which had been seized by the collector, though done by a considerable force and by the firing of guns, and thereby intimidating the collector and troops, does not constitute a levying of war or the offense of treason. *United States v. Hoxie* (U. S.) 26 Fed. Cas. 397, 398.

Treason against the United States is defined by the Constitution itself. Congress has no power to enlarge, restrain, construe, or define the offense. The construction is intrusted to the court alone. By this instrument it is declared that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." What constitutes levying war against the government is a question which has been the subject of much discussion whenever an indictment has been tried under this article of the Constitution. The levying of war is not necessarily to be judged of alone by the number or array of troops, but there must be a conspiracy to resist by force, and an actual resistance by force of arms, or intimidation by numbers. The conspiracy and insurrection connected with it must be to effect something of a public nature, to overthrow the government, or to nullify some law of the United States, and totally to hinder its execution or compel its repeal. A conspiracy to resist by force the execution of a law in particular instances only—a conspiracy for a personal or private, as distinguished from a public and national, purpose—is not treason, however great the violence or force or numbers of the conspirators may be. So where a number of citizens in a free state collected together to prevent the enforcement of the fugitive slave law, and the return of an escaped slave to his master in a slave state, the question whether such individuals were levying war against the United States was submitted to the jury, who found for the defendants. *United States v. Hanway* (U. S.) 26 Fed. Cas. 105, 108.

Enlistment.

To constitute a "levying of war," within the meaning of those words as used in the federal Constitution, making the levying of war against the government an act of treason, there must be an assemblage of persons for the purpose of effecting by force a trea-

sonable purpose. The words do not include the mere enlistment of men to serve against the government. *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 128, 2 L. Ed. 554.

LEWD.

See "Gross Lewdness"; "Open and Gross Lewdness."

"Lewd" has been decided to mean having a tendency to excite lustful thoughts, in the law defining what kind of matter is non-mailable. Rev. St. § 3893, as amended by the act of July 12, 1876. Congress, in using the terms "obscene," "indecent," "lewd," and "lascivious," had in mind the common meaning of those terms, and meant by the use of these common and plain words that nothing should circulate in the mails which would disseminate immorality in any form to the people. *United States v. Britton* (U. S.) 17 Fed. 731, 733.

The word "lewd," in the federal statute prohibiting the mailing of lewd books, etc., means having a tendency to excite lustful thoughts. *United States v. Bennett* (U. S.) 24 Fed. Cts. 1093, 1104; *United States v. Slenker* (U. S.) 32 Fed. 691, 694.

"Lewd" means dissolute, lustful, filthy; and this is its meaning in a statute making it an offense for persons to lewdly and lasciviously cohabit. *State v. Lawrence*, 27 N. W. 126, 129, 19 Neb. 307.

A statement that a woman is a lewd woman is not actionable, as charging unchastity, since "lewd" means lustful, libidinous, but does not import criminal indulgence. *Snow v. Witcher*, 81 N. C. 346, 348.

"Lewd," as used in Rev. St. § 3893, making it a criminal offense to place in the mails any obscene, lewd, or lascivious publication, signifies that form of immorality which has relation to sexual impurity, and has the same meaning as is given at common law in prosecutions for obscene libel. *Swearingen v. United States*, 16 Sup. Ct. 562, 563, 181 U. S. 446, 40 L. Ed. 765; *United States v. Clarke* (U. S.) 38 Fed. 500, 501.

"Lewd" is defined to mean "given to the unlawful indulgence of lust; eager for sexual indulgence." The word is used in such sense in Rev. St. § 3893, which prohibits the transmission in the mails of obscene, lewd, or lascivious books, pamphlets, etc. *United States v. Bebout* (U. S.) 28 Fed. 522, 524.

25 Stat. 496, forbidding the sending of an obscene or lewd pamphlet, writing, etc., through the mails, means one describing dissolute or unchaste acts, scenes, or incidents, or one, the reading whereof, by reason of its contents, is calculated to excite lustful and sensual desires in those whose minds are

open to such influences. *United States v. Clarke* (U. S.) 38 Fed. 732, 733.

The question what constitutes obscene, lewd, lascivious, or indecent publications is largely a question for the conscience and opinion of the jury; but, before a publication can be regarded as lewd, it must be calculated, with the ordinary reader, to deprave his morals or lead to impure purposes. *Dunlop v. United States*, 17 Sup. Ct. 375, 380, 165 U. S. 486, 41 L. Ed. 799.

The words "obscene, lewd, and lascivious," in Rev. St. § 3893 [U. S. Comp. St. 1901, p. 2658], making it criminal to transmit any obscene, lewd, or lascivious book, etc., through the mail, do not apply to letters inclosed in envelopes directed to a debtor, on which the words "dead beats" are printed in such a manner as to attract attention. The purpose of the act was to prevent the mails from being used to circulate matter to corrupt the morals of the people. The history of this legislation clearly shows that Congress determined to exclude from the mails impure and immodest writings, and that rough and coarse language are not within the terms of the act. *Ex parte Doran* (U. S.) 32 Fed. 76, 77.

The words "lewd, obscene, lascivious, or of an indecent character," in the federal statute prohibiting the sending of such matter through the mail, do not necessarily mean that the separate words are of such a character, but the character of the letter is to be determined by treating it as a whole. *United States v. Hanover* (U. S.) 17 Fed. 444.

The words "obscene, lewd, or lascivious," in Rev. St. § 3893 [U. S. Comp. St. 1901, p. 2658], prohibiting the sending through the mail of any obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, are not descriptive of language of merely an insulting character, but are limited to the use of words or pictures appealing to the animal passion, stimulating it, corrupting and debauching the mind and heart. *United States v. Durant* (U. S.) 46 Fed. 753.

Imputation of crime.

Rev. St. § 3893 [U. S. Comp. St. 1901, p. 2658], prohibiting the transmission of an "obscene, lewd, or lascivious" print, writing, etc., through the mails, etc., does not include a letter imputing to the person addressed an atrocious crime, though exceedingly coarse and vulgar, where it has no tendency to excite libidinous thoughts or impure desires, or to deprave and corrupt the morals of those whose minds are open to such influences. The words imply something tending to suggest libidinous thoughts or excite impure desires. *United States v. Wightman* (U. S.) 29 Fed. 636.

LEWD HOUSE.

"Lewd house," as used in a statute forbidding the keeping of a lewd house for the practice of fornication or adultery, imports a house given to the unlawful indulgence of lust, including fornication or adultery. "A lewd house may be said to be a house in which fornication or adultery is practiced." Hence a charge of keeping a lewd house is sufficient, under the statute. *Clifton v. State*, 53 Ga. 241, 244.

LEWDLY.

That a man and woman did lewdly and lasciviously associate is shown by an indictment for adultery which alleges that they did unlawfully associate, bed, and cohabit together, and did commit adultery. *State v. Stubbs*, 13 S. E. 90, 108 N. C. 774; *Luster v. State*, 2 South. 690, 691, 23 Fla. 339; *Pinson v. State*, 28 Fla. 735, 9 South. 706, 707; *Thomas v. State*, 39 Fla. 437, 22 South. 725, 726; *Penton v. State*, 28 South. 774, 775, 42 Fla. 560.

LEWDNESS.

The term "lewdness," in Bl. Comm. c. 4, p. 64, does not mean illicit intercourse, but gross indecency, as if one expose himself naked in the streets. *Brooks v. State*, 10 Tenn. (2 Yerg.) 482, 483 (citing Jac. Law Dict.).

"Lewdness" is defined in 2 Abbott, Law Dict., as being equivalent to "licentiousness." The word "licentiousness" is so used in an act entitled to protect females from licentiousness. *Holton v. State*, 9 South. 716, 717, 28 Fla. 303.

Lewdness is that form of immorality which has relation to sexual impurity. *United States v. Males* (U. S.) 51 Fed. 41, 42.

"Lewdness" is unlawful indulgence of the animal desires. *State v. Toombs*, 45 N. W. 300, 301, 79 Iowa, 741.

Lewdness is the offense of living and cohabiting together as man and wife, openly, publicly, and notoriously, without being lawfully married. The idea of notoriety is a necessary ingredient of the offense, and must appear in its description in an indictment. *State v. Moore*, 31 Tenn. (1 Swan) 136, 137.

"Lewd and lascivious cohabitation," as used in Gen. St. c. 165, § 6, prohibiting lewd and lascivious cohabitation, does not include cohabitation under an honest, though mistaken, belief that the parties cohabiting are lawfully married, if the cohabitation is not under such circumstances as to create a common scandal or tend to corrupt the public morals. The words import an evil intention. *Commonwealth v. Munson*, 127 Mass. 459, 470, 34 Am. Rep. 411.

The word "lewdness" at common law meant open and public indecency, but as used in Gen. St. c. 165, § 6, imposing a punishment for open and gross lewdness and lascivious behavior, it is used in a broader sense, and means the irregular indulgence of lust, whether public or private. *Commonwealth v. Wardell*, 128 Mass. 52, 54, 35 Am. Rep. 357; *Commonwealth v. Lambert*, 94 Mass. (12 Allen) 177, 178.

Rev. St. c. 99, § 8, making gross lewdness and lascivious behavior punishable by imprisonment, etc., includes an indecent exposure of the person of a man to a woman, with a view to excite unchaste desires on her part, and to induce her to yield. The crime does not depend upon the number of persons to whom a man thus exposes himself—whether one or many. *State v. Millard*, 18 Vt. 574, 577, 46 Am. Dec. 170.

By Code 1873, § 4012, the offense designated as lewdness is described, among other things, as follows: "If any man or woman, married or unmarried, is guilty of open and gross lewdness, and designedly makes any open and indecent or obscene exposure of his or her person or the person of another, such person shall be punished," etc. *State v. Bauguess*, 76 N. W. 508, 509, 106 Iowa, 107.

LEX LOCI CONTRACTUS.

The phrase "lex loci contractus" is used, in a double sense, to mean sometimes the law of the place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is on that account confusing. The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have either expressly or presumptively incorporated into their contract, as constituting its obligation. It has never been better described than it was incidentally by Chief Justice Marshall in *Wayman v. Southard*, 23 U. S. (10 Wheat.) 1, 48, 6 L. Ed. 253, where he defined it as a principle of universal law—"the principle that in every forum a contract is governed by the law with a view to which it was made." The same idea had been expressed by Lord Mansfield in *Robinson v. Bland*, 2 Burrows, 1077. "The law of the place," he said, "can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." And in *Lloyd v. Guilbert*, L. R. 1 Q. B. 120, in the Court of Exchequer Chamber, it was said that "it is necessary to consider by what general law the parties intended that the transaction should be governed, or, rather, by what general law it is just to presume that they have submitted themselves in the

matter." *Pritchard v. Norton*, 1 Sup. Ct. 102, 111, 108 U. S. 124, 27 L. Ed. 104. The following propositions may be formulated from the above: First, it is a principle of universal justice that in every forum a contract is governed by the law with a view to which it was made, and therefore the mere place should not govern the transaction when it appears that it is entered into with direct reference to the law of another country; second, that it is necessary to consider by what general law the parties intended that the transaction should be governed, or, rather, by what general law it is just to presume that they have submitted themselves in the matter; third, that it is to be remembered that in obligations it is the will of the contracting parties, and not the law, which fixes the place of fulfillment, whether that place be fixed by express words or by tacit implication as the place to the jurisdiction of which the contracting parties elected to submit themselves. *Gibson v. Connecticut Fire Ins. Co.* (U. S.) 77 Fed. 561, 565.

LIABLE.

See "Secondarily Liable."

Webster distinguishes the shades of meaning between the word "liable" and its synonym "subject." He says: "'Liable' denotes something external which may befall us; 'subject' refers to evils which arise chiefly from internal necessity, and are likely to do so. Hence the former applies more to what is accidental; the latter, to things from which we often or inevitably suffer." An event is liable if its occurrence is within the range of possibility, but the law does not hold a master bound to guard against such an event, and, where the only proof that a certain event was liable to occur was that it did occur, the only thing the evidence tends to show is that it was an event within the range of possibility, and the master was not liable for the injuries. *Beasley v. Linehan Transfer Co.*, 50 S. W. 87, 89, 148 Mo. 413.

The clause in a marine policy that the insurers are not liable for seizure by the Portuguese for illicit trade meant the same as if it had stated, "Insurers do not take the risk of illicit trade with the Portuguese." *Church v. Hubbert*, 6 U. S. (2 Cranch) 187 236, 237, 2 L. Ed. 249.

"Liable," as contained in an instruction in an action by a servant against his master for injuries received from the fall of timber, which was being raised by a rope which slipped off, stating that it was negligence if the rope was so fastened that it was liable to slip off, meant exposed to the casualty or contingency, more or less probable, of slipping off the log; and the instruction was erroneous, as warranting the infer-

ence that if the rope was so tied that by any accident, due to any cause, however unexpected, it might slip off, the defendant was negligent. *Williams v. Southern Ry. Co.*, 26 S. E. 32, 119 N. C. 746.

The word "liable" refers to a future possible or probable happening which may not actually occur. The word means exposed to a certain contingency or casualty, more or less probable. As used in fire policies providing a certain amount of interest on freight cars, the property of other roads for which the assured are or may be liable while on the line of their road does not signify a perfected or fixed liability, but, rather, a condition out of which a legal liability may arise. *Home Ins. Co. v. Peoria & P. U. Ry. Co.*, 52 N. E. 862, 863, 178 Ill. 64.

Under a statute providing that, if creditors of an intestate fail to give in a statement of their debts within a certain time, the executor or administrator shall not be liable to make good the same, the words "shall not be liable" mean that the executor or administrator shall not be personally liable, and not that he shall not be officially liable if he has assets still remaining in his hands. *Yerby v. Matthews*, 26 Ga. 549, 551.

"Liable," as used in Gen. St. c. 189, § 1, providing that all persons who are qualified to vote on any proposition to impose a tax or for the expenditure of money in any town shall be liable to serve as jurors, etc., should be construed as tantamount to "qualified"; the section defining the qualifications of a juror, as well as the liability to serve. *State v. Davis*, 12 R. I. 492, 493, 34 Am. Rep. 704.

The statute declaring that "all free white male persons who are twenty-one years of age, and not over sixty, shall be liable to serve as jurors," necessarily implies that no one under 21 or over 60 shall be so liable. The word "qualified" is neither expressed nor implied in the act. The word both expressed and implied is "liable," which has a very different meaning from "qualified." Its meaning is "bound" or "obliged." The fact that a person over 60 years of age is not liable to serve as a juror does not mean that he is disqualified, but means that he is not required to serve if he claims his exemption. *Booth v. Commonwealth (Va.)* 16 Grat. 519, 525.

LIABLE TO DETERIORATE FROM KEEPING.

The words "liable to deteriorate from keeping," employed in Civ. Code, § 5463, for the purpose of designating a class of personal property which may, under its provisions, be brought to speedy sale, do not apply to articles which, because of their enduring nature, are unlikely, merely by reason of the lapse of a brief space of time, to undergo changes

in form or otherwise, causing depreciation in value, but to articles which are for such a reason subject to such changes. An ordinary cotton press does not fall within the class described by such words. *Jolley v. Har-deman*, 36 S. E. 952, 953, 111 Ga. 749.

LIABLE TO DISTRESS.

Within the statutes of Pennsylvania providing that the goods and chattels being in or upon any lands which are demised for life or years, taken by fraud and execution, and liable to the distress of the landlord, shall be liable for payment of money due for rent at the time of taking such goods and execution, the words "liable to the distress of the land-lord" are merely descriptive of the goods or chattels with respect to the lien or prefer-ence of the landlord's interests, and do not import that the distress must be made as a condition for the existence of such lien or preference. *In re Mitchell* (U. S.) 116 Fed. 87, 98.

LIABLE TO DRAFT.

"Liable to draft," as used in Act Aug. 25, 1864, § 3, allowing a bounty to any person liable to draft in any ward, who shall fur-nish a substitute, etc., refers to the whole process of drafting into service, and not merely the drawing of the name from the wheel, and hence after a person's name is drawn he is still "liable to draft" within the act. *Gregg Tp. v. Jamison* 55 Pa. (F. F. Smith) 463, 473.

LIABLE TO ENTRY

The words "other tract liable to entry," in Rev. St. U. S. § 2372 [U. S. Comp. St. 1901, p. 1451], providing for the transfer to the tracts intended of the entry of public land, erroneous because of the mistake in the num-bers or distributions of the tract on the part of the person entering, if the tract intended to be entered is unsold, but, if sold, to any tract liable to entry, and providing that the statute shall not affect the rights of third persons, refers to the time of the transfer, and not to the time of making the applica-tion. And therefore a transfer is authorized if the tract intended was unsold at the date of the transfer. *Manuel v. Fabyanski*, 46 N. W. 208, 209, 44 Minn. 71.

LIABLE TO EXECUTION.

"Execution" is process authorizing the seizure and appropriation of the property of a defendant in satisfaction of a judgment against him. The manner of converting the property into money after it is seized, and the steps to be taken, are prescribed by statute, and depend upon the nature and the character of the property, whether it be real

or personal, or choses in action. Whenever property may be seized upon by the writ, and, by proper proceedings prescribed by law, con-verted into money which is applied upon the judgment, it is "liable to execution." If by means of the writ the property is appropriat-ed to the satisfaction of the judgment, it may be said to be "liable to execution." *Lambert v. Powers*, 86 Iowa, 18, 20.

LIABILITY.

See "Contingent Debt or Liability"; "Outstanding Liabilities"; "Pecuniary Liability"; "Present Liabilities"; "Rights or Liabilities." All liabilities, see "All."

"Liability," as defined in Abb. Law Dict. 38, means "amenability or responsibility to law; the condition of one who is subject to a charge or duty which may be judicially en-forced." *Wood v. Currey*, 57 Cal. 208, 209.

"Liability," as a legal term, signifies that condition of affairs which gives rise to an obligation to do a particular thing to be en-forced by action; as we say an executor is liable for the debts of his testator, or a prin-cipal is liable for the acts of his agent. *Hay-wood v. Shreve*, 44 N. J. Law (15 Vroom) 94, 104.

"Liability is responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts, either express or implied, or in consequence of torts committed." *Bouv. Law Dict.* The term is broader than the term "debt." *McElfresh v. Kirkendall*, 36 Iowa, 224, 226; *Lattin v. Gillette*, 30 Pac. 545, 546, 95 Cal. 317, 29 Am. St. Rep. 115; *Benge's Adm'r v. Bowling*, 51 S. W. 151, 106 Ky. 575.

The word "liability," in Code Civ. Proc. § 339, limiting the time in which an action upon a contract, obligation, or liability not founded upon an instrument in writing may be brought, is the most comprehensive of the several terms used in the section, and in-cludes both of the others, inasmuch as it is the condition in which an individual is placed after a breach of his contract or a vio-lation of any obligation resting upon him. *Lattin v. Gillette*, 30 Pac. 545, 546, 95 Cal. 317, 29 Am. St. Rep. 115.

Giving the words "obligations and lia-bilities" their full force and effect in Gen. St. 1889, par. 1268, providing that any two or more railroad companies may consolidate and form one company, subject to all the obliga-tions and liabilities to the state which be-longed to or rested upon either of the com-panies making such consolidation, "obliga-tions" may be construed as embracing all pecuniary duties in the way of being answer-able for debts, demands, etc. "Liabilities"

may mean the burdens imposed by the Constitution and the statutes; that is, the responsibility or bounden duty to the state under the Constitution and statutes. If obligations to the state only were intended by both terms, it would not have been necessary to have added the words "liabilities to the state," because "liabilities" is defined as the state of being liable, as the liability of an insurer, liability to the law, responsibility, accountability, bounden duty. To hold that "obligations and liabilities" was limited to the state only would be to say that the Legislature was guilty of a repetition of the same meaning in different words. *Berry v. Kansas City, Ft. S. & M. R. Co.*, 34 Pac. 805, 808, 52 Kan. 759, 39 Am. St. Rep. 371.

"Liability" is defined by Black's Law Dictionary to be "the state of being bound or obliged in law or justice to do, pay, or make good something; legal responsibility." Webster defines it to be "the state of being bound or obliged in law or justice; responsibility." Bouvier defines it to be "responsibility; the state of one who is bound in law and justice to do something which may be enforced by action." *Benge's Adm'r v. Bowling*, 51 S. W. 151, 106 Ky. 575.

"Liability" has been defined as "responsibility; the duty of one who is bound in law and justice to do something which may be enforced by action." This liability may arise from contracts, express or implied, or in consequence of torts committed. *Piller v. Southern Pac. R. Co.*, 52 Cal. 42, 44.

"Liabilities" are the antithesis of "assets," and a prohibition in the statute against the creation of any "liability" by a municipal corporation in excess of a certain sum does not imply that liabilities may be incurred up to the amount of the assets. *Lovejoy v. Inhabitants of Foxcroft*, 40 Atl. 141, 147, 91 Me. 367.

Alimony.

In *Linton v. Linton*, 15 Q. B. Div. 239, 245; *Id.*, 54 Law J. Q. B. 529, 530; *Id.*, 33 Wkly. Rep. 714, 715; *Id.*, 2 Morrell, Bankr. Cas. 179; *Id.*, 49 J. P. 597—it was held that future payments of alimony were not capable of being valued, and were not a debt or "liability" within the meaning of the bankruptcy act, and so could not be proven in the bankruptcy of the husband. *Lynde v. Lynde*, 52 Atl. 694, 702, 64 N. J. Eq. 736, 58 L. R. A. 471, 97 Am. St. Rep. 692. See, also, *In re Hawkins* [1894] 1 Q. B. 25, 27; *Id.*, 10 Reports, 29, 31; *Id.*, 69 Law T. (N. S.) 769; *Id.*, 42 Wkly. Rep. 202, 203; *Id.*, 1 Manson, Bankr. Cas. 6, 8; *Kerr v. Kerr* [1897] 2 Q. B. 439, 441; *Id.*, 66 Law J. Q. B. 838; *Id.*, 77 Law T. 29, 30; *Id.*, 46 Wkly. Rep. 46; *Id.*, 4 Manson, Bankr. Cas. 207.

The bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St.

1901, p. 3418]) provides that the debts of a bankrupt which may be proved and allowed against his estate are a fixed liability, as evidenced by judgment or an instrument in writing, absolutely owing at the time of filing the petition against him, whether then payable or not, with any interest thereon which may have been recovered. As used in this act, the word "debt" differs from the same word as used in the bankruptcy acts which have preceded it, in that it has not the limited or restricted meaning which has been given to it in text-books. The act itself defines the word, and carries it beyond a certain sum of money due by certain and express agreement, and declares that for the purpose of the act it shall include any fixed liability evidenced by judgment. "Liability" is a term of broader significance than "debt." "Liability" is responsibility. In *Joslin v. New Jersey Car-Spring Co.*, 38 N. J. Law (7 Vroom) 141, "liability" is defined to be a state of being bound or obliged in law or justice. It signifies that condition of affairs which gives rise to an obligation to do a certain particular thing, to be enforced by action. *Haywood v. Shreve*, 44 N. J. Law (15 Vroom) 94. Under such definition a claim of a bankrupt's divorced wife for unpaid monthly installments of the alimony awarded her is a provable debt. *In re Van Orden* (U. S.) 96 Fed. 86, 88.

Bond.

A bond is not an "indebtedness" or "liability." It is only the evidence or representative of an indebtedness. So that the issuance of a bond to fund an existing debt is not to incur an indebtedness or liability. *City of Los Angeles v. Teed*, 44 Pac. 580, 582, 112 Cal. 319.

Bonds issued by a corporation previous to a transfer of stock by a stockholder in the corporation, though not due and payable at that time, constitute a "liability" within McClain's Code, § 1629, providing that a transfer of stock shall not exempt the person making it from any liability of the corporation created prior thereto. The word "liability" is ordinarily applied to a condition, and is defined to mean the condition of being responsible for a possible or actual loss, expense, or burden; that for which one is responsible or liable. *Standard Dict.* p. 1024. There is no reason for restricting the word as used in the statute under consideration to liabilities which had become due or payable at or before the transfer. The word "liability" has a much more extensive signification than the term "debt." *White v. Greene* (Iowa) 70 N. W. 182, 184.

A bond is not an "indebtedness" or "liability." It is only an evidence or representation of the indebtedness. *Reynolds v. Lyon County*, 96 N. W. 1096, 1098, 121 Iowa, 733.

Contingent future liability.

"Liabilities," as used in Rev. St. § 5211 [U. S. Comp. St. 1901, p. 3498], requiring the liabilities of a national bank to be stated in the reports to the Comptroller of the Currency, includes contingent as well as absolute liabilities, and hence an unmatured note, payment of which at maturity is guaranteed by the bank, should be included in the list of liabilities. *Cochran v. United States*, 15 Sup. Ct. 628, 629, 157 U. S. 286, 39 L. Ed. 704.

The second definition of the word "liability" in *Black's Law Dictionary* is "exposed or subject to a given contingency, risk, or casualty, which is more or less probable." In *Rapalje's Law Dictionary* it is said that "liability" is the condition of being actually or potentially subject to an obligation; is used either generally, as including every kind of obligation, or in the more special sense to denote inchoate, future, unascertained, or imperfect obligations, as opposed to "debts," the essence of which is that they are ascertained and certain. In *Cochran v. United States*, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704, the court said: "We know of no definition of the word 'liability,' either given in the dictionaries or as used in the common speech of men, which restricts it to such as are absolute, or excludes the idea of contingency. In fact, it is more frequently used in the latter sense than in the former, as when we speak of the liability of an insurer or of a common carrier, or the liability to accidents or to errors; and in *Webster's Dictionary* the word 'liable' is said to refer to a possible or probable happening, which may not actually occur." *State v. Sheets*, 72 Pac. 334, 335, 26 Utah, 105.

The charter of a municipal corporation provided that the common council shall have no power to contract debts, incur liabilities, or make expenditures in any one year which shall exceed the revenues for the same year, unless first authorized so to do by a majority vote of the taxpayers. A contract entered into without submitting the question to the taxpayers, provided for a supply of water for a term of years at a cost per year which would not exceed the authorized levy for past years, but the aggregate of which would exceed any such percentage as could be allowed in any one year. Held, that the whole contract obligation to the full extent of the rental for the entire period of years covered was a "liability" within the meaning of the charter, so that the contract was void. *Niles Waterworks v. City of Niles*, 59 Mich. 311, 314, 26 N. W. 525.

Where a bond provides for indemnity against liability for damage or expense, a right of action on the bond accrues when the party becomes legally liable for damage, and he need not wait until he has actually paid

the demand against him. *Jones v. Childs*, 8 Nev. 121, 125.

Contract responsibility.

The word "liability," as used in 2 *Balinger's Ann. Codes & St.* § 4800, making three years the limitation of time for commencing an action on a contract or liability, express or implied, is restricted in its meaning, so that it stands only for a liability founded on a contract or arising out of a breach of a contract, and does not include a liability created by the statute. *Aldrich v. McClaine* (U. S.) 98 Fed. 378, 379.

Covenant.

Insolvent Act, § 53, provides that the discharge shall release the debtor from all debts and "liabilities" which would or might have been proved against his estate. Held, that the word "liabilities" includes a contract of hiring for a definite period, even as to money which became due thereon after the filing of the petition in insolvency and after the discharge. A personal covenant creates a "liability" within the meaning of the act. *Mooney v. Detrick*, 26 Pac. 280, 281, 85 Cal. 549.

A covenant of warranty in a deed creates a "liability" as of the date of the deed, and not as of the date of eviction; and therefore, as against that liability, the grantor cannot claim a homestead in land, purchased after the deed was executed, under a statute providing that the homestead exemption should not apply to sales under execution, attachment, or judgment, if the debt or liability existed prior to the purchase of the land. *Benge's Adm'r v. Bowling*, 51 S. W. 151, 106 Ky. 575.

Debt.

The term "debt" is not synonymous with the term "liability," but is included within the meaning of the latter term. *McElfresh v. Kirkendall*, 36 Iowa, 224, 226.

The term "liabilities," as used in a deed securing all the debts and liabilities of certain firms and individuals composing them, was synonymous with "debts." *Witz v. Mullin's Personal Representative*, 20 S. E. 783, 784, 90 Va. 805.

"Liabilities," as used in a general assignment for the benefit of creditors, which, after making preferences for certain creditors, directed the assignee to pay and discharge in full, if the residue of the proceeds were sufficient, all the debts and "liabilities" now due or to grow due from the assignor, is synonymous with "debts due and to grow due," which refers only to debts then existing, including those payable in the future, and consequently does not include a claim for subsequently accrued rent of premises rented by the assignor previous to his as-

signment. The liabilities were those which in the extent of them, as of the time of the assignment, could be ascertained for the purpose of the execution of the trust; those debts which were existing at the time the assignment was made, and then due or to grow due. This fairly imports fixed, definite, and liquidated liabilities. Those liabilities are "debts." In *re Havenor*, 23 N. Y. Supp. 1092, 1093, 70 Hun, 56.

"Liabilities," as used in Code 1873, § 1072, providing a penalty for the act of a corporation in paying dividends without leaving sufficient funds to meet its liabilities, should be construed to mean existing indebtedness at the time a dividend is declared, the payment of which could be enforced. *Miller v. Bradish*, 28 N. W. 594, 595, 69 Iowa, 278.

In an assignment for benefit of creditors, providing for payment of assignor's debts and liabilities, now due or to grow due, the term "liabilities" should be construed as synonymous with "debts," and not to apply to a contingent liability arising from the fact that thereafter the lessor, in a lease made to the assignor prior to the assignment, took possession of the premises and relet them under provisions of the lease that if they became vacant he might relet them and apply the avails in reduction of the rent, since such liability arose subsequently to the assignment, and such debts were not within the meaning of the word "liabilities." In *re Hevenor*, 39 N. E. 393, 394, 144 N. Y. 271.

The bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) provides that debts of a bankrupt may be proved and allowed against his estate which are (1) a fixed liability as evidenced by judgment or an instrument in writing absolutely owing at the time of filing the petition against him, whether then payable or not, with any interest thereon which may have been recovered. As used in this act, the word "debt" differs from the same word as used in the bankruptcy acts which have preceded it, in that it has not the limited or restricted meaning which has been given to it in text-books. The act itself defines the word, and carries it beyond a certain sum of money due by certain and express agreement, and declares that for the purpose of the act it shall include any fixed liability evidenced by judgment. "Liability" is a term of broader significance than "debt." Liability is responsibility. In *Joslin v. New Jersey Car-Spring Co.*, 36 N. J. Law (7 Vroom) 141, "liability" is defined to be a state of being bound or obliged in law or justice. It signifies that condition of affairs which gives rise to an obligation to do a particular thing, to be enforced by action. *Haywood v. Shreve*, 44 N. J. Law (15 Vroom) 94, 104; In *re Van Orden* (U. S.) 96 Fed. 86, 88.

Disputed obligation.

"Liability" is defined to be a state of being bound or obliged in law or justice, and a promise to pay all liabilities of an employé includes a disputed claim for the salary of a foreman of the factory, and the term "liability" cannot be confined to include only such arrearages of wages as were admitted, and not those which were disputed. *Joslin v. New Jersey Car-Spring Co.*, 36 N. J. Law (7 Vroom) 141, 145.

As any expense.

"Liability," as used in a bond given by a person to a certain town, in which it is agreed that the person should save the town harmless from all damages, costs, and charges that shall accrue or happen to said town for or on account of liability to be called upon to support and provide for poor persons, does not mean a legal liability to a recovery of damages, but is used in its popular sense; that is, the bond is so construed as to save the town from the expenses of suits brought against it relative to the support of poor persons, whether the suits are successful or not. *Inhabitants of Saco v. Osgood*, 5 Me. (5 Greenl.) 237, 238.

Partner's individual debts.

In a bond executed on the dissolution of a partnership, whereby the retiring member agreed to pay his proportion of the "partnership liabilities," that term does not cover the individual debts of the retiring partner. *McCormack v. Sweeney*, 35 N. E. 45, 47, 7 Ind. App. 671.

Judgment.

In Code Civ. Proc. § 339, subd. 1, providing that an action on an obligation or liability not founded on an instrument in writing must be commenced within two years etc., the word "liability" includes the procuring of a levy of an execution to be issued on a satisfied judgment. *Wood v. Currey*, 57 Cal. 208, 209.

As all obligations.

The term "liabilities of ours," in a pledge of collaterals for the payment of certain notes "or any other unsecured liability or liabilities of ours," includes any liabilities existing in favor of the pledgee. *Wilson v. Carothers* (Ky.) 43 S. W. 684.

"Liability," as used in the act of 1874 relating to limited partnerships, which provides that no association organized thereunder shall incur a liability exceeding \$500 in amount, unless, etc., expresses in the broadest and most comprehensive manner any form of obligation, certainly all such as are measured by money values. *Pittsburg Melting Co. v. Reese*, 12 Atl. 362, 365, 118 Pa. 355.

The word "liability" is a very broad one, and the words "liability existing at the time of such transfer," as used in St. 1890, § 549, relating to a double liability on corporation stockholders, means the same thing as "all contracts and liabilities of a corporation." So, under the Iowa statute providing that transfers of shares in corporations should not exempt a stockholder from any corporate liability created prior thereto, it was held in *White v. Green*, 105 Iowa, 176, 181, 74 N. W. 928, 929, that the word "liability" was much more comprehensive than "debts." The court said: "The liabilities contemplated by the statute are not merely obligations which are due and payable when the transfer is made. 'Liability,' in a legal sense, is the state or condition of one who is under obligation to do at once, or at some future time, something which may be enforced by action. It may exist without the right of immediate enforcement." *Hyatt v. Anderson's Trustee*, 74 S. W. 1094, 1096, 25 Ky. Law Rep. 132.

Outstanding stock.

The term "liabilities," as used in the definition of "insolvency" as that condition when the assets are not sufficient to pay the liabilities, when used with reference to a corporation, does not include par value of the outstanding capital stock. *Shaw v. Gilbert*, 86 N. W. 188, 192, 111 Wis. 165 (citing *Hamilton v. Menominee Falls Quarry Co.*, 106 Wis. 352, 81 N. W. 876).

Penalty.

"Liability," as used in Const. art. 4, § 100, providing that no obligation or liability of any person held or owned by the state shall be remitted or released by the Legislature, nor shall such liability or obligation be extinguished except by payment thereof into the proper treasury, means a pecuniary or commercial liability, being used in the same sense as "obligation," and does not include a liability on a penalty for violation of a law. *Adams v. Fragiaco*, 15 South. 798, 800, 71 Miss. 417.

A "liability" created by the statute is in the nature of a punishment for a violation of its provisions, and is therefore a penalty for wrong done. *Rogers v. Bonnett*, 37 Pac. 1078, 1080, 2 Okl. 553 (citing *Bouv. Law Dict.* p. 318).

As private rights.

"Liability or contract," as used in 64 Ohio Laws, p. 285, providing that a certain canal company on certain conditions might abandon a portion of its canal, but that such abandonment should not be construed to release the company from any "liability or contract" incurred or entered into, nor defeat the rights of any person or persons, company

or corporations, should be construed to mean only private rights, and not such duties as are owing to the public. *Pennsylvania & O. Canal Co. v. Portage County Com'rs*, 27 Ohio St. 14, 21.

As punishment.

"Penalty," "liability," and "forfeiture" are synonymous with "punishment" in connection with crimes of the highest grade. *Featherstone v. People*, 62 N. E. 684, 687, 194 Ill. 325 (citing *United States v. Reisinger*, 128 U. S. 398, 9 Sup. Ct. 99, 32 L. Ed. 480).

"Penalty, forfeiture, or liability," as used in Rev. St. § 13 [U. S. Comp. St. 1901, p. 6], relating to punishments of a crime, and providing that the repeal of any statute shall not have the effect to release or extinguish any "penalty, forfeiture, or liability" under the statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such "penalty, forfeiture, or liability," include all forms of punishment for crime. The words are intended to cover every form of punishment to which a man subjects himself by violating the common laws of the country. *United States v. Ulrich* (U. S.) 28 Fed. Cas. 328, 329.

Tax.

Under Laws 1893, p. 50, § 1, providing that an action for "liability created by statute," other than a penalty or forfeiture, shall be commenced within two years, a tax is included. *Board of Com'rs of Custer County v. Story*, 69 Pac. 56, 57, 26 Mont. 517.

Where a conditional sale of the properties of a corporation, made on March 23d, provided that all its "liabilities" should be liquidated or provided for by the company, a lien for taxes fixed by statute as of February 1st was included within the term "liabilities," though the amount was not ascertained by the authorities until the following September. *Vicksburg Waterworks Co. v. Vicksburg Water Supply Co.*, 31 South. 535, 80 Miss. 68.

Liability for torts.

The word "liability" has always been held to apply to responsibility for torts as well as for breach of contracts. *Miller & Lux v. Kern County Land Co.*, 66 Pac. 856, 857, 134 Cal. 586.

"Liability," as used in Laws 1869, p. 2383, chartering a city, which provides that no action against the city on a contract, obligation, or liability, express or implied, shall be commenced except within one year after the cause of action shall have accrued, only includes such claims, accounts, or demands as are required to be presented for audit. It

does not include liability for torts, such as personal injuries. *McGaffin v. City of Cohoes*, 74 N. Y. 387, 388, 30 Am. Rep. 307.

The word "liability," as used in Code Civ. Proc. § 339, providing that an action on contract, obligation, or liability not founded on an instrument in writing must be brought within two years, includes responsibility for torts, and is applicable to all actions at law not specifically mentioned in other general statutes. *Lowe v. Ozmun*, 70 Pac. 87, 137 Cal. 257.

"Liability, express or implied," as used in *Cohoes City Charter* (Laws 1869, c. 912, tit. 13, § 5), declaring that no action against the city on a contract or liability, express or implied, shall be commenced except in one year after the cause of action shall have accrued, means obligation or liability arising from contract only, and hence does not apply to an action for damages by reason of a defective sidewalk. *McGaffin v. City of Cohoes*, 74 N. Y. 387, 391, 30 Am. Rep. 307.

Temporarily unenforceable obligation.

"Liability" is the state or condition of one who is under obligation to do at once, or at some future time, something which may be enforced by action. It may exist without the right of immediate enforcement. *White v. Green*, 74 N. W. 928, 929, 105 Iowa, 176 (citing *Pittsburgh & C. R. Co. v. Clarke*, 29 Pa. [5 Casey] 146).

LIABILITY CREATED BY LAW.

The Code of Civil Procedure provides that actions against stockholders of a corporation to enforce a "liability created by law" must be brought within three years after the liability was created. Held, that the words "liability created by law" include a stockholder's liability for the debts of the corporation. *Green v. Beckman*, 59 Cal. 545, 547; *Moore v. Boyd*, 74 Cal. 167, 15 Pac. 670, 671 (cited in *Hunt v. Ward*, 34 Pac. 335, 336, 99 Cal. 612, 37 Am. St. Rep. 87).

"Liability created by statute," as used in Act 1852 (Swan & C. Rev. St. p. 948), providing that an action on "a liability created by statute" shall be barred within six years, means a liability which would not exist but for the statute. *Hawkins v. Iron Valley Furnace Co.*, 40 Ohio St. 507, 514.

Proceedings to enforce the collection of taxes against real estate are an action upon "a liability created by statute," within Gen. St. 1878, c. 66, § 12, relating to limitation of actions. *Pine County v. Lambert*, 57 Minn. 203, 58 N. W. 990.

LIAR.

See "Notorious Liar."

LIBEL

See "Actionable Per Se"; "Criminal Libel."

In its most general and comprehensive sense, any publication injurious to the reputation of another is a "libel." *Commonwealth v. McClure* (Pa.) 3 Kulp, 464, 468.

A malicious publication tending to expose a person to ridicule, contempt, hatred, or degradation of character is "libelous." *Byrnes v. Matthews*, 12 N. Y. St. Rep. 74, 79.

A "libel" is any malicious printed slander which tends to expose a man to ridicule, contempt, or hatred. *McCorkle v. Binns* (Pa.) 5 Bin. 340, 348, 6 Am. Dec. 420; *Struthers v. Peacock* (Pa.) 11 Phila. 287, 288; *Commonwealth v. McClure* (Pa.) 3 Kulp, 464, 468; *Cooper v. Stone* (N. Y.) 24 Wend. 434 (cited in *Geisler v. Brown*, 6 Neb. 254, 259); *Solverman v. Peterson*, 25 N. W. 14, 15, 64 Wis. 198, 54 Am. Rep. 607; *Palmer v. City of Concord*, 48 N. H. 211, 214, 215, 97 Am. Dec. 605; *Giles v. John B. Clarke Co.*, 36 Atl. 876, 877, 69 N. H. 92; *Keemle v. Sass*, 12 Mo. 499, 504.

A "libel" is a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals. *Steele v. Southwick* (N. Y.) 9 Johns. 214, 215 (citing *People v. Croswell* [N. Y.] 3 Johns. Cas. 337, 354; *Moore v. Francis*, 3 N. Y. Supp. 162, 50 Hun, 604); *State v. Farley* (S. C.) 4 McCord, 317, 321; *Cooper v. Greeley* (N. Y.) 1 Denio, 347, 359; *Cole v. Neustadter*, 29 Pac. 550, 552, 22 Or. 191; *Tappan v. Wilson*, 7 Ohio (7 Ham.) 190, 191, 193, pt. 1.

It has always seemed strange to lawyers that some text-writers and judges, in defining "libel," in reference to civil actions, should quote Hamilton's definition of a "criminal libel" in his argument in the criminal case of *People v. Croswell*, 3 Johns. Cas. 337, 354, viz: "A libel is a censorious or ridiculous writing, picture, or sign, made with a mischievous and malicious intent toward government, magistrates, or individuals." See incorrect quotation of it in *Moore v. Francis*, 121 N. Y. 199, 204, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810. A libel, to be a criminal offense, must be published with a mischievous and malicious intent, or maliciously, but not so in order to sustain an action for damages, and Hamilton never thought of saying so, much less as forever being quoted as having said so. Failure to keep in mind the difference between a criminal and a civil action for libel on this question of malice has led to most of the vexations and confusion about malice in civil actions; a like failure to observe such difference as between qualifiedly privileged and unprivileged items and publications is responsible

for the rest of it. *Cady v. Brooklyn Union Pub. Co.*, 51 N. Y. Supp. 198, 201, 23 Misc. Rep. 409.

False and defamatory words, if written and published, constitute a libel. *Gambrill v. Schooley*, 48 Atl. 730, 93 Md. 48, 52 L. R. A. 87, 86 Am. St. Rep. 414 (citing *Odgers, L. & Sland*. 150).

Words that impute to a party dishonest, dishonorable, immoral, and degrading conduct constitute a libel. *Shanks v. Stumpf*, 51 N. Y. Supp. 154, 157, 23 Misc. Rep. 264.

Every willful and unauthorized publication, written or printed, which imputes to a merchant or other business man conduct which is injurious to his character and standing as a merchant or business man, is a libel, and implies malice. *Minter v. Bradstreet Co.*, 73 S. W. 668, 679, 174 Mo. 444.

Libel is a malicious defamation of any person made public by writing, printing, signs, or pictures. *Sharff v. Commonwealth (Pa.)* 2 Bin. 514, 517; *White v. Nicholls*, 44 U. S. (3 How.) 266, 284, 11 L. Ed. 591; *People v. Crosswell (N. Y.)* 3 Johns. Cas. 337, 377; *Gambrill v. Schooley*, 48 Atl. 730, 93 Md. 48, 52 L. R. A. 87, 86 Am. St. Rep. 414; *Clark v. Binney*, 19 Mass. (2 Pick.) 113, 115.

A libel does not necessarily charge the plaintiff with a crime, for if its design be wanton and malicious ridicule, and the tendency of the publication to hold up the plaintiff to the sneers of society, to degrade him and lessen his standing, an action may be sustained. *Tappan v. Wilson*, 7 Ohio (7 Ham.) 190, 191, 193, pt. 1.

A "libel" is defined by Blackstone to be a malicious defamation of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, or ridicule. *Root v. King (N. Y.)* 7 Cow. 613, 620; *Moore v. Francis*, 3 N. Y. Supp. 162, 50 Hun, 604 (citing 4 Bl. Comm. 150; *Hawk. P. C. c. 73, § 1*).

Libel is a publication, without justification or lawful excuse, of words calculated to injure the reputation of another and expose him to hatred or contempt. *Whitney v. Janesville Gazette (U. S.)* 29 Fed. Cas. 1091; *Negley v. Farrow*, 60 Md. 158, 175, 45 Am. Rep. 715; *Miller v. Donovan*, 39 N. Y. Supp. 820, 16 Misc. Rep. 453; *Armentrout v. Moranda (Ind.)* 8 Blackf. 426, 427; *Patchell v. Jaqua*, 33 N. E. 132, 133, 6 Ind. App. 70.

Any defamatory words calculated to degrade or injure the reputation of a person in society, when written or published maliciously, constitutes a libel. *Browning v. Commonwealth*, 76 S. W. 19, 20, 25 Ky. Law Rep. 482.

A libel is any malicious publication, expressed either in printing or writing, or by

signs and pictures, tending either to blacken the memory of one dead or the reputation of one who is alive, and expose him to public hatred, contempt, and ridicule. *Commonwealth v. Clap*, 4 Mass. 163, 168, 3 Am. Dec. 212; *Clark v. Binney*, 19 Mass. (2 Pick.) 113, 115; *Goldberger v. Philadelphia Grocer Pub. Co. (U. S.)* 42 Fed. 42, 43; *Hillhouse v. Dunning*, 6 Conn. 391, 407; *State v. Avery*, 7 Conn. 266, 268, 18 Am. Dec. 105; *Stow v. Converse*, 3 Conn. 325, 341, 8 Am. Dec. 189; *Root v. King (N. Y.)* 7 Cow. 613, 620; *Moore v. Francis*, 3 N. Y. Supp. 162, 50 Hun, 604; *Ryckman v. Delavan (N. Y.)* 25 Wend. 186, 198; *Weston v. Weston*, 82 N. Y. Supp. 351, 352, 83 App. Div. 520; *Finch v. Vifquain*, 9 N. W. 43, 11 Neb. 280; *Collins v. Dispatch Pub. Co.*, 25 Atl. 546, 547, 152 Pa. 187, 34 Am. St. Rep. 636; *Stewart v. Swift Specific Co.*, 76 Ga. 280, 283, 2 Am. St. Rep. 40; *Price v. Whitely*, 50 Mo. 439, 440; *Minter v. Bradstreet Co.*, 73 S. W. 668, 672, 174 Mo. 444; *Republican Pub. Co. v. Mosman*, 15 Colo. 399, 407, 408, 24 Pac. 1051, 1054; *Hartford v. State*, 96 Ind. 461, 463, 49 Am. Rep. 185; *Cole v. Neustadter*, 29 Pac. 550, 552, 22 Or. 191.

A publication is libelous on its face when the words impute to the plaintiff the commission of a crime or a contagious disorder tending to exclude him from society, or when the injurious words are spoken or published with respect to his profession or trade, or to disparage him in a public office, or tend to bring him into ridicule and contempt. *McFadden v. Morning Journal Ass'n*, 51 N. Y. Supp. 275, 281, 28 App. Div. 508.

The term "libel" includes "every written publication which implies or may be generally understood to imply reproach, dishonor, scandal, or ridicule to any person. Such written publication, though not charging a punishable offense, is nevertheless libelous if it tends to subject the party to whom it refers to social disgrace, public distrust, hatred, ridicule, or contempt." *Bradley v. Kramer*, 18 N. W. 268, 269, 59 Wis. 309, 48 Am. Rep. 511; *Witcher v. Jones*, 17 N. Y. Supp. 491, 493; *Shea v. Sun Printing & Publishing Ass'n*, 35 N. Y. Supp. 703, 14 Misc. Rep. 415; *Barr v. Moore*, 87 Pa. 385, 390, 30 Am. Rep. 367; *Regensperger v. Kiefer (Pa.)* 7 Atl. 724, 725; *Patchell v. Jaqua*, 33 N. E. 132, 133, 6 Ind. App. 70; *Hatt v. Evening News Ass'n*, 53 N. W. 952, 953, 94 Mich. 114; *Brown v. Boynton*, 80 N. W. 1099, 122 Mich. 251; *Palmer v. City of Concord*, 48 N. H. 211, 214, 97 Am. Dec. 605.

Any written or printed words constitute libel where they tend to injure the reputation or the standing of a person, or expose him to public hatred, contempt, or ridicule, or tend to degrade him in society, lessen him in public esteem, or lower him in the confidence of the community, though the words do not impute to him the commission of a crime

or immoral conduct. Every false and malicious publication which naturally tends to injure a person's character or lower him in the confidence and respect of his neighbors is libelous. *Davis v. Hamilton*, 88 N. W. 744, 745, 85 Minn. 209; *Croasdale v. Bright* (Del.) 6 Houst. 52, 57; *Croasdale v. Tantom* (Del.) 6 Houst. 60, 61; *Delaware State Fire & Marine Ins. Co. v. Croasdale* (Del.) 6 Houst. 181, 190. A libel is a malicious publication in print, writing, or by signs and pictures, imputing to another something which has a tendency to injure his reputation, to disgrace or degrade him in society, lower him in the esteem and opinion of the world, or bring him into public hatred, contempt, or ridicule. *Layton v. Harris* (Del.) 3 Har. 406, 407; *Riley v. Lee*, 11 S. W. 713, 714, 88 Ky. 603, 21 Am. St. Rep. 358; *Stone v. Cooper* (N. Y.) 2 Denio, 293, 303; *Moore v. Francis*, 3 N. Y. Supp. 162, 163, 50 Hun, 604; *Cole v. Neustader*, 29 Pac. 550, 552, 22 Or. 191.

Bishop defines "libel" as any representation in writing calculated to create disturbances of the peace, to corrupt public morals, or to lead to any act which, when done, is indictable. 2 Bish. Cr. Law, § 709. The gist of the offense of libel is the publication of something which tends in contemplation of law to affect injuriously the peace and good order of society, because it injuriously affects the reputation, memory, or business of individuals. *State v. Hoskins*, 62 N. W. 270, 271, 60 Minn. 168, 27 L. R. A. 412.

A libel is any publication, whether in writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, ridicule, or obloquy, or which causes him to be shunned, or which has a tendency to injure him in his occupation. *Weil v. Israel*, 8 South. 826, 828, 42 La. Ann. 955; *Staub v. Van Benthuyssen*, 36 La. Ann. 467, 468; *Oles v. Pittsburg Times*, 2 Pa. Super. Ct. 130, 140.

Chief Justice Lumkin said, in *Giles v. State*, 6 Ga. 276, 283, that "at common law any publication is a libel the tendency of which is to degrade and injure another person, or to bring him in contempt, hatred, or ridicule, or which accuses him of a crime punishable by law, as by an act odious and disgraceful in society." Parke, B., in *O'Brien v. Clement*, 15 Mees. & W. 435, said: "Everything printed or written which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been." *Stewart v. Swift Specific Co.*, 76 Ga. 280, 283, 2 Am. St. Rep. 40; *McDonald v. Woodruff* (U. S.) 16 Fed. Cas. 49, 50.

A "libel" is defined to be a malicious publication by writing, printing, pictures, effigy, sign, or otherwise than mere speech, which exposes any living person, or the memory of

any person deceased, to hatred, contempt, ridicule, or obloquy, which causes or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation, or association of persons in his or their business or occupation. *Miller v. Donovan*, 39 N. Y. Supp. 820, 16 Misc. Rep. 453; *People v. Sherlock*, 68 N. Y. Supp. 74, 75, 56 App. Div. 422; *Taylor v. Hearst*, 46 Pac. 392, 393, 107 Cal. 262.

Any publication, the tendency of which is to degrade and injure another person or to bring him into contempt, ridicule, and hatred, or which accuses him or her of a crime punishable by law, or of an act odious and disgraceful in society is a libel. *Dexter v. Spear* (U. S.) 7 Fed. Cas. 624; *Goldberger v. Philadelphia Grocer Pub. Co.* (U. S.) 42 Fed. 42, 43; *Benton v. State*, 36 Atl. 1041, 1043, 59 N. J. Law, 551; *Commonwealth v. McClure* (Pa.) 3 Kulp. 464, 468.

A libel is any false and malicious publication, when expressed in printing or writing, or by signs or pictures, which charges an offense punishable by indictment, or which tends to bring an individual into public hatred, contempt, or ridicule, or charges an act odious and disgraceful in society. It includes whatever tends to injure the character of an individual, blacken his reputation, or imputes fraud, dishonesty, or other moral turpitude, or reflects shame, or tends to put him without the pale of social intercourse. *Iron Age Pub. Co. v. Crudup*, 5 South. 332, 333, 85 Ala. 519; *Ivey v. Pioneer Saving & Loan Co.*, 21 South. 531, 533, 113 Ala. 349; *Schomberg v. Walker*, 64 Pac. 290, 291, 132 Cal. 224; *Cole v. Neustadter*, 29 Pac. 550, 552, 22 Or. 191.

A libel is a false and malicious writing published of another, which renders him contemptible or ridiculous in public estimation, or exposes him to public hatred or contempt, or hinders virtuous men from associating with him. *Lindley v. Horton*, 27 Conn. 58, 61; *Donaghue v. Gaffy*, 54 Conn. 257, 268, 7 Atl. 552; *Williams v. Fuller* (Neb.) 94 N. W. 118, 119.

Any written or printed words are actionable which tend to blacken the memory of one who is dead, or to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt, or ridicule, degrade him in society, lessen him in public esteem, or lower him in the confidence of the community, even though the words do not impute to him criminality or immorality. It is impossible, as well as impolitic, to lay down any more definite rule than such general statement of the law, and then make a common-sense application of it to the facts of each case as it arises. On the other hand, it will not do to hold that everything published in disparagement of a person is actionable, or to adopt Bentham's sarcastic

definition of "libel" as "anything of which any one thinks proper to complain." But, on the other hand, everything falsely and maliciously published of another which necessarily or naturally tends to injure his standing and good name in the community, or lower him in the confidence and respect of his neighbors, ought to be held actionable. *McDermott v. Union Credit Co.*, 78 N. W. 967, 968, 76 Minn. 84.

"It has been held that in order to constitute language libelous per se, it must be either such as necessarily in fact, or by presumption of evidence, occasions damage to him of whom or whose affairs it is spoken." Townsh. Sland. & L. (4th Ed.) § 146; Newell, Defam. p. 181, § 14. "Such language confers a prima facie right of action, and is prima facie a wrong, and injurious per se; and the law will presume damage, without proof, merely from implication or presumption from the publication." Townsh. Sland. & L. (4th Ed.) § 147. "Language which, however, does not, as a necessary consequence, occasion damage to the party published, is not per se libelous, and in such cases a right of action exists only when, as a necessary and proximate consequence of the publication, special damage ensued to the party published." Id. §§ 146-148. We think a statement in substance and effect the same, but in different language, is that words which upon their face, and without the aid of extrinsic proof, are injurious, are libelous per se; but if the injurious character of the words appear, not from their face, in their usual and natural signification, but only in consequence of extrinsic circumstances, they are not libelous per se." *Fry v. McCord*, 33 S. W. 568-570, 95 Tenn. (11 Pickle) 678.

In the case of *Cropp v. Tilney*, 3 Salk. 228, Holt, C. J., said: "Scandalous matter is not necessary to make a libel; it is enough if the defendant induces an ill opinion to be held of the plaintiff, or to make him contemptible or ridiculous." *Cooper v. Greeley* (N. Y.) 1 Denio, 347, 359.

"It is not necessary that words should be slanderous to sustain an action for libel. Any publication which tends to degrade, disgrace, or injure the character of a person, or bring him into contempt, hatred, or ridicule, is as much a libel as though it contains charges of infamy or crime." *Johnson v. Stebbins*, 5 Ind. 364, 366 (citing *Dexter v. Spear* [U. S.] 7 Fed. Cas. 624; *Commonwealth v. Clap*, 4 Mass. 163, 168, 3 Am. Dec. 212; *Steele v. Southwick* [N. Y.] 9 Johns. 214; *Cooper v. Greeley* [N. Y.] 1 Denio, 347; *White v. Nicholls*, 44 U. S. [3 How.] 266, 11 L. Ed. 591).

There are many definitions of "libel." The one by Hamilton, in his argument in *People v. Croswell* (N. Y.) 3 Johns. Cas. 337, 5 Wds. & P.—13

354, viz., "a censorious or ridiculing writing, picture, or sign, made with mischievous and malicious intent towards government, magistrates, or individuals," has often been referred to with approval. But unless the word "censorious" is given a much broader signification than strictly belongs to it, the definition would not seem to comprehend all cases of libelous words. The word "libel," as expounded in the cases, is not limited to written or printed words which defame a man, in the ordinary sense, or which impute blame or moral turpitude, or which criticize or censure him. *Moore v. Francis*, 23 N. E. 1127, 1129, 121 N. Y. 199, 8 L. R. A. 214, 18 Am. St. Rep. 810. It may be said generally that language in writing is libelous which denies to a man the possession of some such worthy quality as every man is, a priori, to be taken to possess, or which tends to bring the party into public hatred or disgrace, or to degrade him in society. *Collins v. Dispatch Pub. Co.*, 25 Atl. 546, 547, 152 Pa. 187, 34 Am. St. Rep. 636.

Statutory definitions.

A libel is the malicious defamation of a person made public by printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any malicious defamation made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends. Gen. St. Kan. 1901, § 2271; Crimes and Punishments Act, § 270; *State v. Mayberry*, 6 Pac. 553, 555, 33 Kan. 441. An essential to the commission of libel is its tendency to provoke to wrath or expose to hatred or contempt. Not only is its tendency in that respect made essential by the statute quoted, but it is essential at common law. *State v. Grinstead*, 64 Pac. 49, 52, 62 Kan. 593. So by statute in Iowa. *State v. Keenan*, 82 N. W. 792, 794, 111 Iowa, 286; *Wallace v. Homestead Co.*, 90 N. W. 835, 840, 117 Iowa, 348; *Mosnat v. Snyder*, 105 Iowa, 500, 504, 75 N. W. 356; *Shannon's Code Tenn.* 1896, §§ 6658, 6659.

Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy, or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule, or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends. Rev. St. Okl. 1903, § 2237.

Libel is a false and unprivileged publication by writing, printing, picture, effigy, or

other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. Civ. Code Mont. 1895, § 32.

A libel is a malicious defamation, expressed either by printing, or by signs, or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural defects, of one who is alive, and thereby expose him to public hatred, contempt, or ridicule. Rev. St. Utah 1898, § 4196; Mills' Ann. St. Colo. 1891, § 1313.

A libel is a malicious defamation of a living person, made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath, expose him to public hatred, contempt, or ridicule, or deprive him of the benefit of public confidence or social intercourse; or of a deceased person, thus making public a design to blacken and vilify his memory, or tending to provoke his friends and relatives. But nothing shall be deemed a libel unless there is a publication thereof: and the delivery, selling, reading, or otherwise communicating a libel, directly or indirectly, to any person, or to the party libeled, is a publication. Rev. St. Me. 1883, p. 926, c. 129, § 1; State v. Robbins, 66 Me. 324, 325.

Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. Civ. Code Cal. 1903, § 45; Rev. Codes N. D. 1899, § 2715; Civ. Code S. D. 1903, § 29; Rev. St. Okl. 1903, § 3926. This definition, says the court, is very broad, and includes almost any language which upon its face has the natural tendency to injure a man's reputation either generally or with respect to his occupation. Tonini v. Cevasco, 46 Pac. 103, 104, 114 Cal. 266.

He is guilty of libel who, with intent to injure, makes, writes, prints, publishes, sells, or circulates any malicious statement affecting the reputation of another in respect to any matter or thing pointed out in the statute. Pen. Code Tex. 1895, art. 721.

A libel is defined by Pen. Code, § 242, to be a malicious publication by writing, printing, picture, effigy, sign, or otherwise than by mere speech, which exposes any living person, or the memory of one dead, to hatred, contempt, or ridicule, or which causes any person to be shunned or avoided, or which has a tendency to injure any person in their business or occupation. Shea v. Sun Printing & Publishing Ass'n, 70 N.

Y. St. Rep. 438, 439, 35 N. Y. Supp. 703; People v. Stark, 12 N. Y. Supp. 688, 691, 59 Hun, 51, 35 N. Y. St. Rep. 150, 152; Cornish v. Bennett, 38 Misc. Rep. 688, 689, 78 N. Y. Supp. 244.

A libel is a false and malicious defamation of another, expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt, or ridicule. Civ. Code Ga. 1895, § 3832; Behre v. National Cash Register Co., 27 S. E. 986, 987, 100 Ga. 213, 62 Am. St. Rep. 320. Under this definition it is held that to write and publish of another that he is a liar is libelous. Colvard v. Black, 110 Ga. 642, 645, 36 S. E. 80.

By Pen. Code, § 248, libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or impeach the honesty, virtue, or integrity of one who is alive, and thereby expose him to public hatred, contempt, or ridicule. In re Kowalsky, 14 Pac. 399, 73 Cal. 120; People v. Seeley, 72 Pac. 834, 835, 139 Cal. 118.

Libel is defined in Laws 27th Leg. p. 30, as a defamation expressed in printing or writing, by signs and pictures or drawings, tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt, or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue, or reputation of any one, or to publish the natural defects of anyone, and thereby expose such person to public hatred, ridicule, or financial injury. Walker v. San Antonio Light Pub. Co., 70 S. W. 555, 557, 30 Tex. Civ. App. 165.

General abuse.

Terms of mere general abuse, published in a newspaper, are not libelous. Tappan v. Wilson, 7 Ohio (7 Ham.) 190, pt. 1.

Any publication which tends to disgrace a man, or bring him into contempt or ridicule, is a libel. But a degrading imputation must appear on the face of the libel, or by necessary inference from it. Hence mere scurrility or abuse, without point or specific imputation, is not actionable. Rice v. Simmons (Del.) 2 Har. 417.

Injury in business or trade.

Words which naturally tend to injure a man in his office trade, business, or profession are libelous in themselves, without alleging any special damage. Harris v. Burley, 8 N. H. 216, 218.

Imputations applicable to class.

A declaration in libel cannot be adjudged insufficient by reason of the accusation

being directed against a class of society, unless it is manifest and unquestionable that the charge is clearly made against a class of society, or an order or body of men as such, and cannot possibly import any personal application tending to private injury. If to the common understanding of men the description evidently points to several individuals, or if on the face of the declaration it appears that the words are capable of being so meant and understood, then the fact that a person is defamed under a description of office or of profession common to himself and other individuals included in the same libel cannot take away the right of private action. So, there being six firms, composed of two or more partners each, owning and conducting malhousen on the hill in a city, a publication that "there are several malhousen on the hill, all of which rely on water taken from such places," which were previously described in the article as being filthy, and that "the facts stated are known to hundreds residing in the neighborhood of the malting establishments," constitutes a libel against the plaintiff, who was one of two partners owning and operating one of such malhousen. *Ryckman v. Delavan* (N. Y.) 25 Wend. 186, 197.

It is the malicious intention of the libeler toward the injured individual that authorizes the latter to seek redress. A general censure or reproof, satire, or invective, directed against large classes of society, whether on moral, theological, or political grounds, cannot ordinarily be prompted by individual malice, or intended to produce personal injury. *Ryckman v. Delavan* (N. Y.) 25 Wend. 186, 198.

Construction of language.

The fact that supersensitive and morbid imaginations may be able by reading between the lines of an article to discover some defamatory meaning therein, is not sufficient to make it libelous. In other words, if the language is not reasonably capable of conveying to the ordinary mind the defamatory meaning alleged in the innuendo, it is the province and duty of the court to so declare, and to deny the right to maintain an action thereon. *Reid v. Providence Journal Co.*, 37 Atl. 637, 20 R. I. 120.

Briefly defined, "libel" is the malicious defamation of a person, made public by any printing, writing, effigy, or pictorial representation. For a written or printed article to be defamatory, the language of the document must be such that, when given its natural and ordinary meaning, it imputes to the person thus assailed some act or attribute or character which tends to expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or, if the language upon its face does not bear such

injurious significance, then there must be shown extrinsic facts and circumstances by which it is made to appear that the writing, though innocent and unobjectionable in form, is intended to convey and does convey to its readers a defamatory meaning. *Quinn v. Prudential Ins. Co.*, 90 N. W. 349, 350, 116 Iowa, 522.

A publication without justification or lawful excuse, which is calculated to injure the reputation of another by exposing him to hatred or contempt, is a libel. The effect of the words used is the test of whether they are actionable or not, for the injury caused depends on the meaning which any reasonable man would give to the words on reading them. The ordinary sense of the words is to be taken as the meaning of the party who employs them. To say of a person that he is a professional swindler is actionable, because every person would understand that the charge was that he made a practice of defrauding others by imposition; and to charge a man with bringing another to financial ruin by his mechanisms is libelous. *Whitney v. Janesville Gazette* (U. S.) 29 Fed. Cas. 1091.

Words which are clearly not defamatory cannot have their meaning enlarged by innuendo. Between these extremes lies the case of ambiguous language, where it is for the jury to say whether, in view of all the facts charged, the publication amounted to a libel. *Central of Georgia Ry. Co. v. Sheftall*, 45 S. E. 687, 118 Ga. 865.

An article is libelous which imputes in slang terms dishonest or dishonorable conduct. *Byrnes v. Mathews*, 12 N. Y. St. Rep. 74, 79.

As a crime.

The term "making a libel," used in a charge that another has made a libel, and is a dirty creature, etc., may be fairly understood to mean such a making as constitutes a complete indictable offense. In common parlance, "making" includes publishing, and words are to be taken according to common understanding. Such a charge is slanderous. *Andres v. Koppenheaver* (Pa.) 3 Serg. & R. 255, 256, 8 Am. Dec. 647.

Libel, both at common law and under the statute, is a crime, and for it the offender may be prosecuted civilly or criminally. Also both at common law and by Pen. Code, § 243, a libel on the memory of the dead is punishable as a crime; and, speaking of this rule, Mr. Odgers says: "The criminal remedy for libel, as it is the earlier, so it is the more extensive, remedy. A libel may be indictable though it be not actionable. Thus in neither of the above cases [a libel on a deceased person] would an action lie, for the want of a proper plaintiff." So

renson v. Balaban, 42 N. Y. Supp. 654, 657, 11 App. Div. 164.

Imputation of crime.

Any publication which imputes to a person the commission of a criminal offense, which will, in case the imputation or charge is true, subject the party charged to punishment for a crime involving moral turpitude, or subject such party to an infamous punishment, is actionable in itself, when published orally, and hence, when expressed otherwise than by oral language, is a libel. *Boucher v. Clark Pub. Co.*, 84 N. W. 237, 238, 14 S. D. 72.

Defamatory publications of an officer with respect to his office are actionable per se, if untrue. It is not necessary that the language of the alleged libel should in terms charge that the plaintiff has committed crime, naming it, but it will be actionable if calculated to induce persons who read it to believe that the plaintiff was guilty of acts which would constitute a crime. *Houston Printing Co. v. Moulden*, 41 S. W. 381, 386, 15 Tex. Civ. App. 574.

A publication, to be libelous per se, because charging another with the commission of a crime, does not need to contain the technical statutory language and phrases essential to a good indictment for the crime charged; but any language the nature and obvious meaning of which is to impute to a person the commission of a crime, or to subject him to public ridicule, ignominy, or disgrace, is libelous. *World Pub. Co. v. Mullen*, 43 Neb. 126, 61 N. W. 108, 47 Am. St. Rep. 737.

Where in an action for libel the words set forth in their ordinary sense import a charge of crime, so as to be libelous, yet if they are spoken in connection with other words, so as to rebut the idea of criminality, there is no libel. *Edgerley v. Swain*, 32 N. H. 478, 482.

It is not necessary that a crime should be charged in technical language in a written or printed publication to constitute it a libel. But any such publication which holds the plaintiff up to scorn or ridicule, or to contempt, or execution, or impairs his enjoyment of general society, or implies his commission of the crime, is a libelous publication. *Bain v. Myrick*, 88 Ind. 137, 138.

It is not necessary that words, to be actionable per se, should make a charge of crime in express terms. They are actionable if they consist of a statement of facts which would naturally and presumably be understood by the hearers as a charge of crime. *Belo v. Fuller*, 84 Tex. 450, 19 S. W. 616, 617, 31 Am. St. Rep. 75.

Imputation of being diseased.

"The definition of libel embraces not only all slanders if written or printed, but

much else. Any written or printed words which expose one to hatred, contempt, ridicule, or obloquy, or which tend to injure him in his profession or trade, or cause him to be shunned or avoided by his neighbors, is a libel per se. *Odgers, Lib. & Sland. 21.*" That which is a slander if spoken is a libel if written or printed; but to say of one that he has consumption is no slander. A complaint for libel in charging that defendant published the charge that plaintiff had consumption is not sufficient unless special damages are alleged. *Rade v. Press Pub. Co.*, 75 N. Y. Supp. 298, 37 Misc. Rep. 254.

Injury to feelings.

Injury to feelings alone is not a basis for an action for libel. There must be an injury to character. *Samuels v. Evening Mail Ass'n (N. Y.)* 6 Hun, 5, 9.

Imputation of former corruption in office.

Words which tend to expose the character of the plaintiff to the ridicule and contempt of the community, whether they impute a punishable offense or not, are actionable when put forth in the shape of written or printed slander. The proposition that the imputation of a previous vicious and corrupt life tends necessarily and directly to degrade the individual in the estimation of the community at the time of the publication of the libel, is too obvious to require argument. Where a libel was published imputing corrupt conduct to the plaintiff in his office of a senator of the state, his term of office having expired, it is a mistake to suppose that the ground of the action is the libel upon his official character. It is the calumny against his private character, charging him with having been guilty of previous conduct seriously impeaching his integrity and honor, and which tends to degrade him in the opinion of the public of which he complains. *Cramer v. Riggs (N. Y.)* 17 Wend. 209, 210.

Imputation of fraud.

A writing which imputes, and is understood by the readers to impute, that plaintiff was a person engaged in making accounts which he never paid or intended to pay, and was wholly unworthy of credit, is libelous. *Ingraham v. Lyon*, 105 Cal. 254, 38 Pac. 892.

Imputation of indebtedness.

Written or printed words which are injurious to a person in his office, profession, or calling, or which impeach the credit of any merchant or trader by imputing to him insolvency, or even embarrassment, are libelous. The law carefully guards the credit of merchants and traders. Imputations of their solvency, or suggestions that they are in pecuniary difficulties, etc., are, as a general rule, actionable. *Wood v. Boyle*, 35 Atl. 833, 854, 177 Pa. 620, 55 Am. St. Rep. 747.

A libel is a malicious publication expressed either in printing or writing, or by signs or pictures, tending to either blacken the memory of the dead or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. Every willful and unauthorized publication, written or printed, which imputes to a merchant or other business man conduct which is injurious to his character and standing as a merchant and business man, is a libel. For a mercantile commercial agency to publish a statement concerning a firm that they had assigned, being false, is a libel. *Mitchell v. Bradstreet Co.*, 22 S. W. 358, 359, 116 Mo. 226, 20 L. R. A. 133, 38 Am. St. Rep. 592.

The publication of a false statement that plaintiff had executed a mortgage on his stock of goods, which statement was circulated throughout the country, was a libel per se. *Smith v. Bradstreet Co.*, 41 S. E. 763, 764, 63 S. C. 525.

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The sending through the mail of envelopes with the clause "For Collecting Bad Debts" printed on them, and the distribution of books containing a list of persons not worthy of credit, and containing plaintiff's name among the list, constitutes a libel. *Muetz v. Tuteur*, 77 Wis. 236, 46 N. W. 123, 9 L. R. A. 86, 20 Am. St. Rep. 115.

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Publishing one's name in a list of "dead-beats and delinquents," for circulation among business men, is libelous per se. *Nettles v. Somervell*, 6 Tex. Civ. App. 627, 25 S. W. 658.

"Every publication in writing or in print, which charges on or imputes to a merchant or business man insolvency or bankruptcy, or conduct which would prejudice him in his business or trade, or by injuries to his standing and credit as a merchant or business man, is a libel." *Erber v. Dun* (U. S.) 12 Fed. 526, 532.

To publish of a trader that he is insolvent injuriously affects him, and special circumstances need not be shown to entitle him to recover damages. *Woodruff v. Bradstreet Co.* (N. Y.) 35 Hun, 16, 17.

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A publication which renders a person ridiculous and exposes him to contempt; which tends to render his situation in society uncomfortable and irksome; which re-

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An article charging that plaintiff had been arrested with a married woman was held libelous, as tending to expose plaintiff to public ridicule and contempt. *O'Brien v. Bennett*, 76 N. Y. Supp. 498, 499, 72 App. Div. 367.

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A newspaper article is libelous which contains an imputation on plaintiff's honesty and integrity and tends to expose him to public hatred and contempt. *Huse v. Inter-Ocean Pub. Co.*, 12 Ill. App. (12 Bradw.) 627, 630.

It is libelous per se to write concerning defendant that he is "unreliable," that "he cannot tell the truth," and that "he does not regard his financial obligations." *Rider v. Rullson*, 74 Hun, 239, 26 N. Y. Supp. 234.

A publication of one who had been a witness in court, representing him as "swearing terribly," and as being "no slouch at swearing to an old story," imports that he swore with levity, and rashly and inconsiderately, without due regard to the solemnity of the oath, or to the truth and accuracy of what he said. Though the words did not import perjury in the legal sense, they held him up to contempt and ridicule, as being so thoughtless or so immoral as to be regardless of the obligations becoming a witness, and therefore to be utterly unworthy of credit. In this view the words are actionable, for a writing published maliciously with a view to expose a person to contempt and ridicule is undoubtedly actionable. *Steele v. Southwick* (N. Y.) 9 Johns. 214, 215.

A letter written to C. by H. concerning B. was as follows: "I was unfortunate enough to have him in my employ at one time as a bookkeeper. He is a liar. I would not believe him under oath." Held, that each of the sets of words constitutes a libel, as written or printed matter may be libelous without charging a crime. *Hake v. Brames*, 95 Ind. 161, 162.

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Intent.

The intent with which a publication is made, rather than its truth or falsity, is the correct criterion by which the jury is to determine whether such a publication is a libel. *State v. Nichols*, 45 Pac. 647, 648, 15 Wash. 1.

Joint act.

It has been held that several defendants might be joined in one and the same indictment or information for a libel, if the offense wholly arises from such a joint act as is criminal in itself, without any regard to any particular fault of the defendant which is peculiar to himself. The making and publishing a libel are matters susceptible of a joint concern and undertaking, as much as a trespass, or falsely and maliciously procuring another to be indicted. It is not like an action against several persons for speaking the same words. Such an action cannot be maintained, because the words of one are not the words of another. But with respect to libels, if one repeat and another write and a third approve what is written, they are all makers of the libel, for all persons who concur and show their assent or approbation to the doing of an unlawful act are guilty; and in this respect the murdering a man's reputation by a scandalous libel has been compared to murdering his person, where all who are assisting and encouraging in the act are guilty of homicide, though the stroke be given by one only. *Thomas v. Rumsey* (N. Y.) 6 Johns. 26, 31.

Malice.

Malice is said to be essential to an action for libel, but it is malice in a special technical sense which exists in the absence of lawful excuse, and where there may be no spite or ill will or disposition to injure others. Every publication having the other qualities of a libel, if willful and unprivileged, is in law malicious. The publication of words actionable in themselves is sufficient evidence of legal malice. Legal malice exists where a wrongful act is done intentionally. *Neeb v. Hope*, 2 Atl. 568, 570, 111 Pa. 145.

"A libel is both a public wrong and a private wrong. The remedy for the public wrong is by indictment or other criminal proceeding, while the remedy for the private wrong is by a civil action at common law, which is classed and known as a tort action. One of the essential elements of every libel is malice. And no declaration which should fail to charge that the publication complained of was malicious would state a cause of action." *McDonald v. Brown*, 51 Atl. 213, 23 R. I. 546, 58 L. R. A. 768, 91 Am. St. Rep. 659.

The right to an action of libel (where special damages are not sought) depends on

a publication of matter affecting the reputation of the plaintiff of that character which is defined by law as necessarily causing actionable damage, made by the defendant in violation of a legal duty. The two main elements are injury to the plaintiff and a wrongful act; i. e., an act in violation of a legal duty by the defendant. The first element involves the definition of a defamatory publication; the second, of the duties imposed by law in respect to such publications. These duties are well settled. They are restrictive and permissive. The general duty which binds every one to absolutely refrain from the publication of defamatory matter, unless he possesses evidences of its truth so certain that he can successfully establish his charge in a court of justice; and the special duty to communicate such matter in good faith upon any subject in which one has an interest, or has, or honestly believes he has, a duty (including certain moral and social duties), to a person having a corresponding interest or duty. An act by which another must be injured, intentionally done, in violation of legal duty, is in law maliciously done; and so it is held that the wrongful act of the defendant essential to actionable libel must be malicious, and this essential element of libel is briefly expressed in the rule, "Malice is the gist of the action of libel." *Atwater v. Morning News Co.*, 34 Atl. 865, 866, 67 Conn. 504.

The essence of this offense is malice, which is a question of fact for the jury. *Rice v. Simmons* (Del.) 2 Har. 309, 310, 31 Am. Dec. 766.

As personal injury.

See "Personal Injury."

Slander distinguished.

Libel is the printed or written declarations of one person against another, while slander is defined to be oral or spoken defamatory words used by one person against another. *Woodruff v. Woodruff*, 72 N. Y. Supp. 39, 40, 36 Misc. Rep. 15.

False, defamatory words, when written, constitute a libel, and, when spoken, a slander. *Gambrill v. Schooley*, 48 Atl. 730, 93 Md. 48, 52 L. R. A. 87, 86 Am. St. Rep. 414.

There is a material difference between words spoken and words written. To be actionable, the former must tend to bring a man into danger of punishment, exclude him from society, or injure him in his occupation; but it is enough if the latter induce an ill opinion to be had of the party, or make him contemptible and ridiculous. *Hillhouse v. Dunning*, 6 Conn. 391, 407.

"Every slander is a libel if published by writing, but there are many libels which are not slander. Any false publication by writing, which exposes one to ridicule, hatred, contempt, or obloquy, or causes him to be

shunned or avoided, is a libel per se, though, if spoken, it may be no slander. The definition of slander per se is not general, like that of libel, but is restricted and specific. To falsely charge one in writing with having any repulsive disease or condition which would necessarily cause him to be shunned or avoided, would be a libel, but it would not be slander if spoken, unless it was of one of the diseases embraced within the definition of slander." A false charge that plaintiff has the leprosy is libelous per se, though science may have established that the disease is not contagious, but only hereditary, as it tends to cause plaintiff to be shunned and excluded from society. *Simpson v. Press Pub. Co.*, 67 N. Y. Supp. 401, 402, 33 Misc. Rep. 223.

Libel, at the common law, was any false and malicious writing published of another, and having a tendency to render him contemptible or ridiculous in public estimation, or expose him to public contempt, or hinder a virtuous man from associating with him. There is a difference between slander and libel as to what is required to constitute an actionable charge. It is perfectly reasonable to allow greater liberty of vocal speech than of a writing or printing for the reasons that vocal utterance does not imply the same degree of deliberation, and is more likely to be the expression of momentary passion or excitement, and is not so open to the implication of settled malice. Therefore to such oral expressions little importance is generally attached. On the other hand, the same words deliberately written or printed, and afterwards placed before the public, justify an inference that they are the expression of settled conviction, and they affect the public mind greatly. Second. An oral charge is merely heard, while a written or printed charge may be passed from hand to hand indefinitely, for many years, constituting all the time a continuous condemnation. *Republican Pub. Co. v. Mosman*, 24 Pac. 1051, 1054, 15 Colo. 399.

Libel is a malicious defamation of a person otherwise than by words, as by writing, printing, figures, signs, or any other symbol. *Rosewater v. Hoffman*, 24 Neb. 222, 38 N. W. 857, 860.

In order to support an action for oral slander something criminal must have been imputed; but in libel any tendency to bring a party into contempt or ridicule is actionable, and in general any charge of immoral conduct, although in matters not punishable by law. *Feder v. Herrick*, 43 N. J. Law (14 Vroom) 24, 27.

LIBEL (In Practice)

The term "libel," as used in admiralty, is pleading, which occupies a similar place in admiralty pleadings to that of the declaration

in an action at law. It is the first pleading of the libellant. *Phoenix Ins. Co. v. The Atlas*, 93 U. S. 302, 316, 23 L. Ed. 863.

The term "information" is not exclusively applied to a proceeding at common law. A libel on a seizure is in its terms and essence an information. So it is held that, where the cause is of admiralty jurisdiction, and the proceeding is by information, the suit is not withdrawn by the nature of the remedy from the jurisdiction to which it otherwise belongs. *The Samtel*, 14 U. S. (1 Wheat.) 9, 14, 4 L. Ed. 23.

LIBERAL

An agreement by a person "to pay as well or as liberal as he had paid for certain other land," means the same price in proportion to the value, and not the same price per acre. *Cooper v. Carlisle*, 17 N. J. Eq. (2 C. E. Green) 525, 533.

LIBERAL ART.

A polite or "liberal art" is that in which the mind or imagination is chiefly concerned, as poetry, music, and painting, as distinguished from a useful or mechanical art, which is one in which the hands and body are more concerned than the brain. *City of New Orleans v. Robira*, 8 South. 402, 403, 42 La. Ann. 1098, 11 L. R. A. 141.

LIBERAL CONSTRUCTION.

Chancellor Kent, in his Commentaries, lays down the rule that a guaranty is to receive a "liberal construction" for the purpose of ascertaining its latitude, or the interests of the party to it. Held, that the words "liberal construction," as so used, do not mean that the words shall be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation, so as to attain the object for which the instrument is designed and the purpose to which it is applied. *Lawrence v. McCalmont*, 43 U. S. (2 How.) 426, 449, 11 L. Ed. 326 (cited in *Crist v. Burlingame* [N. Y.] 62 Barb. 351, 355).

Liberal construction does not mean enlargement or restriction of any plain provision of law. If a statutory provision is plain and unambiguous, it is the duty of the court to enforce it as it is written. If it is ambiguous or doubtful, or susceptible of different constructions or interpretations, then such liberality of construction may be indulged in as, within the fair interpretation of its language, will effect its apparent object and promote justice. In *re Johnson's Estate*, 33 Pac. 460, 466, 96 Cal. 531, 21 L. R. A. 380; In *re Jessup*, 22 Pac. 742, 745, 81 Cal. 408, 6 L. R. A. 594.

The liberal construction of a statute is such construction as does not presume that the Legislature intended the very least innovation on previous law, but, looking primarily at the intent of the Legislature, endeavors to fulfill it at any cost of innovation. Liberal construction looks to the intent to determine the amount of innovation. *Shorey v. Wyck-off*, 1 Wash. T. 348, 351.

LIBERAL INTERPRETATION.

"Liberal interpretation," as used in the statement that certain statutes should receive a liberal interpretation, does not mean that "the words should be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purpose to which it is applied." *Lawrence v. McCalmont*, 43 U. S. (2 How.) 426, 449, 11 L. Ed. 326.

LIBERAL REWARD.

The liberal reward offered for information leading to the apprehension of a fugitive from justice does not require that the specific sum offered for his apprehension should be paid, unless the party claiming it apprehended the fugitive, or the arrest was made by his agent. *Shuey v. United States*, 92 U. S. 73, 76, 23 L. Ed. 697.

LIBERALITY.

A bequest in trust for such business of benevolence and "liberality" as the trustee shall approve cannot be supported as a charitable legacy. If the word "benevolence" means charity, and "liberality" means something different from that idea, which a court of justice is obliged to apply to that word "charity," there is no ground for the application of the bequest partially, if it cannot be wholly, to charity. *Morice v. Bishop of Durham*, 10 Ves. 522, 524.

LIBERALLY.

The word "liberally," as used in a provision in a will for paying the executors liberally, means no more than compensation that is fair and just. *Kenan v. Graham*, 33 South. 699, 702, 135 Ala. 585.

"Liberally," as used in Code, § 159, requiring pleadings to be liberally construed with a view to substantial justice between the parties, means that if, from the whole pleading, it can be seen that a party has a cause of action or defense, he shall not be deprived of it because he has stated it in an improper or informal manner; but it does not mean that substantial averments may be omitted, and the omission disregarded. *Koenig v. Nott* (N. Y.) 8 Abb. Prac. 384, 393.

LIBERTY.

See "At Liberty"; "Civil Liberty"; "Free Liberty"; "Jail Liberties"; "Moral and Natural Liberty"; "Personal Liberty"; "Religious Liberty"; "Right to Liberty."

A vote of a town providing that certain persons have the "liberty to make a road from," etc., "over the public land," is to be construed as a mere license, which must be executed and the road made in a reasonable time and manner for the public travel, in order to have any efficacy. *Curtiss v. Hoyt*, 19 Conn. 154, 169, 48 Am. Dec. 149.

"Liberty," as used in the Constitution of the United States, does not mean mere freedom from arrest and restraint, but means liberty in a broader and more comprehensive sense, embracing freedom of action, freedom in the selection of a business calling or avocation, freedom in the control and use of one's property so far as its use does not infringe the rights of others, freedom in exercising the rights, privileges, and immunities that belong to the citizen generally, and freedom in the pursuit of any lawful business selected by the citizen. *State v. Scougal* (S. D.) 51 N. W. 858, 861; *People v. Warden of City Prison*, 51 N. E. 1006, 1010, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763; *People v. Marx*, 3 N. Y. Cr. R. 200, 207; *People v. Marx*, 2 N. E. 29, 33, 99 N. Y. 377, 52 Am. Rep. 34; *People v. Rosenberg*, 22 N. Y. Supp. 56, 57, 67 Hun, 52; *Wilson v. Telegram Co.*, 3 N. Y. Supp. 633, 638, 18 N. Y. St. Rep. 78; *Bell v. Gaynor*, 36 N. Y. Supp. 122, 123, 14 Misc. Rep. 334; *People v. Gillson*, 17 N. E. 343, 345, 109 N. Y. 389, 4 Am. St. Rep. 465; *State v. Loomis*, 22 S. W. 350, 351, 115 Mo. 307, 21 L. R. A. 789; *State v. Julow*, 31 S. W. 781, 782, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443; *Allgeyer v. Louisiana*, 17 Sup. Ct. 427, 431, 165 U. S. 578, 41 L. Ed. 832; *Booth v. Illinois*, 22 Sup. Ct. 425, 426, 184 U. S. 425, 46 L. Ed. 623; *Ex parte Virginia*, 100 U. S. 339, 344, 25 L. Ed. 676; *Munn v. Illinois*, 94 U. S. 113, 142, 24 L. Ed. 77; *Lansburgh v. District of Columbia*, 11 App. D. C. 512, 521; *Bessette v. People*, 62 N. E. 215, 218, 193 Ill. 334; *Low v. Rees Printing Co.*, 59 N. W. 362, 366, 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670; *Kuhn v. Common Council of City of Detroit*, 38 N. W. 470, 471, 70 Mich. 534; *City of Helena v. Dwyer*, 42 S. W. 1071, 1072, 64 Ark. 424, 39 L. R. A. 266, 62 Am. St. Rep. 206. "Sir W. Blackstone says that every man, when he enters into society, gives up a part of his natural liberty as the price of so valuable a purchase as the acquisition of social and municipal relations. Mr. Jefferson denies this doctrine, because he was of the opinion that no man had a natural right to commit aggression on the equal rights of another, and that every man is under the

natural duty of contributing to the interests of society, and that no man had a natural right to be the judge between himself and another, but was bound to submit to the umpirage of an impartial third. This contrariety of opinion between Judge Blackstone and the American statesman is rather apparent than real, for Blackstone's definition of natural rights is far more comprehensive than Mr. Jefferson's. The former supposes natural liberty to consist properly in the power of acting as one thinks fit, without any restraint or control, unless by the law of nature. If this law of nature, as Mr. Jefferson thinks, comprehends those restrictions which the equal rights of others, the duty of contributing to the interest of society, and submitting to the decision of impartial judges in disputes between individuals would imply, there is no essential difference between the opinions alluded to." *Snyder v. Warford*, 11 Mo. 513, 515, 49 Am. Dec. 94; *State v. Dalton*, 22 R. I. 77, 86, 46 Atl. 234, 237, 48 L. R. A. 775, 84 Am. St. Rep. 818; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 345, 4 Am. St. Rep. 465; *Bessette v. People*, 62 N. E. 215, 218, 193 Ill. 334 (citing *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206), *Allgeyer v. Louisiana*, 17 Sup. Ct. 427, 431, 165 U. S. 578, 41 L. Ed. 832.

The term "liberty," as used in the constitutional declarations, means more than freedom of locomotion. It includes and comprehends, among other things, freedom of speech, the right to self-defense against unlawful violence, and the right to freely buy and sell as others may. *State ex inf. Crow v. Continental Tobacco Co.*, 75 S. W. 737, 747, 177 Mo. 1 (citing *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789).

The "liberty" of the Constitution has been defined, and it will be continued to be defined, by some as the right of an individual to keep out of prison excepting for crime committed. Others will define liberty as also including the right to earn a livelihood, acquire property, perform services for another, employ others, make contracts not tainted with an illegal or immoral consideration, and those not injurious to the health or welfare of people. *Greenwich Ins. Co. v. Carroll* (U. S.) 125 Fed. 121, 129.

Liberty is nothing more than mere freedom from physical restraint. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as one's judgment may dictate for the promotion of one's happiness; that is, to pursue such callings and avocations as may be most suitable to develop one's capacities and to give them their highest enjoyment. *Kuhn v. City of Detroit Common Council*, 70 Mich. 534, 537, 38 N. W. 470.

"Liberty" is a constitutional term, embodying a practical idea. It means the enjoyment of the rights which belong to us as individuals. To secure this to every human being is the object of social organization and the end of government. The law defines, regulates, and secures the rights of each individual, and upon this supremacy depends the existence of civil liberty. In the practical sense, therefore, in which we understand liberty, there is nothing imaginative or utopian about it. It implies the duty of obedience to laws, which, if unsuited to our condition, we have the right to change, but which, while in force, we are bound to obey. *People v. Judson* (N. Y.) 11 Daly, 1, 11, 12.

A convict pardoned by the executive on condition that he shall depart from the state and remain away therefrom is restrained in his liberty by such condition within the meaning of the Constitution providing that no man can be deprived of his liberty unless by the judgment of his peers or the law of the land. The restraint is one voluntarily substituted by the convict and the executive in lieu of that which had been imposed upon him by law, but it is nevertheless a restraint of personal liberty. He is by the condition, if it is binding, restrained of his liberty in some degree. *Commonwealth v. Hatsfield*, 2 Pa. Law J. 37, 40.

As franchise

"Blackstone says that 'liberty' and 'franchise' are used as synonymous terms, and their definition is a real privilege or branch of the King's prerogative subsisting in the hands of a subject." *Spring Valley Water Works v. Schottler*, 62 Cal. 69, 106 (quoting 2 Bl. Comm. 37).

In a legal sense "franchise" and "liberty" are used as synonymous terms, and the kinds of them are various, and almost infinite. 2 Bl. Comm. 37. A franchise is defined by Webster as a particular privilege or right granted by a prince or sovereign to an individual or to a number of persons; an exemption from a burden or duty to which others are subject. *Central R. & Banking Co. v. State*, 54 Ga. 401, 409.

"Liberty," as used in the colony ordinance of 1647, commonly known as the "Ordinance of 1641," providing that in all creeks, coves, and other places by and on salt water where the sea ebbs and flows the proprietor of the land adjoining shall have propriety to the low-water mark, provided that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, is synonymous with "right," "franchise," and "privilege," and does not mean only the license or permission. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 70.

Right to contract.

The term "liberty" in the constitutional provision against the deprivation of life, liberty, etc., without due process of law, includes the right to make all proper contracts in relation thereto, and to enjoy the legitimate fruits thereof. *Harbison v. Knoxville Iron Co.*, 53 S. W. 955, 957, 103 Tenn. 421, 56 L. R. A. 316, 76 Am. St. Rep. 682.

"Liberty," as used in Const. art. 1, § 8, declaring that no man shall be deprived of his life, liberty, or property but by the law of the land, should be construed to include the right of contract. It is an inherent part of the right of liberty. *State v. Schlitz Brewing Co.*, 59 S. W. 1033, 1040, 104 Tenn. 715, 78 Am. St. Rep. 941.

The efforts to prevent competition, to restrict individual effort and freedom of action in trade or commerce, are restrictions hostile to the public welfare, and not consonant with the spirit of our institutions, and in violation of law. It was held in *Fraser v. People*, 140 Ill. 171, 31 N. E. 395, 16 L. R. A. 492, that the privilege of contracting is both a liberty and a property right, and, if A. is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law and B., C., and D. are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract. *People v. Chicago Live Stock Exchange*, 48 N. E. 1062, 1065, 170 Ill. 556, 39 L. R. A. 373, 62 Am. St. Rep. 404.

"Liberty," as used in the first section of the Bill of Rights, does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by the Creator, subject only to such restraints as are necessary for the common welfare. Contracts and compacts have been entered into between men and women, tribes and nations, during all time, from the earliest dawn of history, and the life and liberty of contract is one of those inalienable rights of man fully secured and protected by our Constitution, and it can only be restrained so far as is necessary for the common welfare and the equal protection and benefit of the people. *Palmer v. Tingle*, 45 N. E. 313, 314, 55 Ohio St. 423.

"Liberty," as used in Const. U. S. Amend. 14, providing that no state shall deprive any person of life, liberty, or property without due process of law, means more than freedom of locomotion. It includes and comprehends, among other things, freedom of speech, the right of self-defense against unlawful violence, and the right to freely buy and sell as others may. It includes the right to contract as others may; and to take

away that right from a class of persons following lawful pursuits is simply depriving such persons of a time-honored right, which the Constitution undertakes to secure to every citizen. *State v. Loomis*, 22 S. W. 350, 351, 115 Mo. 307, 21 L. R. A. 789 (citing *Story*, Const. [5th Ed.] § 1590).

"Liberty" includes the right of private contract. In a constitutional sense it means only civil liberty; that is, that measure of freedom which may be enjoyed in a civilized community consistently with peaceful enjoyment of like freedom in others. Thus an act forbidding the discharge of an employé because he was a member of a labor organization is void for imposing a restraint on individual freedom guaranteed by the state and federal Constitutions. *State v. Kreutzberg*, 90 N. W. 1098, 1101, 114 Wis. 530, 58 L. R. A. 748, 91 Am. St. Rep. 934.

"Liberty," as that term is used in the Constitution, includes the right of lawful contract. *Maupin v. Scottish Union & Nat. Ins. Co.*, 45 S. E. 1003, 1009, 53 W. Va. 557.

"Liberty," in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. The term "liberty," as used in the Constitution of New York, is not dwarfed into mere freedom from physical restraint of the person as by incarceration, but embraces the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Laws 1887, c. 691, providing that no person shall sell, exchange, or dispose of any article of food, or offer or attempt to do so, upon any representation, advertisement, or inducement that anything other than what is specifically stated to be the subject of the sale or exchange is or is to be delivered or received as a part of the transaction as a gift, prize, premium, or reward to the purchaser, and providing that any person violating the provision of the section shall be deemed guilty of a misdemeanor, is an infringement on the liberty of the citizens as guaranteed by the Constitution. *People v. Gillson*, 16 N. Y. St. Rep. 185, 189, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465.

Right to choose employment.

"Liberty," as used in the provision of the federal Constitution declaring that persons shall not be deprived of liberty, etc., without due process of law, includes the right to adopt a lawful employment in choice of occupation; and hence a city ordinance that makes it an offense for any person to carry on a laundry where clothes are washed

for pay, within the habitable portion of the city, is a deprivation of a liberty within the meaning of the federal Constitution. The Stockton Laundry Case (U. S.) 26 Fed. 611, 614.

So much of the different acts of the assembly regulating peddling as makes physical disability on the part of an applicant for a peddler's license one of the tests of his eligibility, is unconstitutional and void as interfering with the liberty guaranteed by the Constitution. Such a requirement is not a police regulation, but is in the nature of class legislation, intending to restrict to a few a right which under proper regulations should be given to all. In re Brittain's Application, 5 Pa. Co. Ct. R. 318, 320.

The word "liberty," as used in the Constitution of the United States and of the several states, is deemed to embrace the right of a citizen to be free in the employment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purpose above mentioned. Young v. Commonwealth (Va.) 45 S. E. 327.

Liberty includes the right to contract as others may, and to take a right away from the class of persons following lawful pursuits is simply depriving such persons of a time-honored right, which the Constitution undertakes to secure to every citizen. State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789. All laws which impair or trammel the rights to contract or to earn a livelihood in any lawful calling or pursue any lawful trade or vocation, which limit one in his choice of a trade or vocation, or confine him to work or live in a specified locality, or restrain his otherwise lawful movements, except such as may be passed in the exercise by the Legislature of the police power, are infringements upon his fundamental rights of liberty. Marshall & Bruce Co. v. City of Nashville, 71 S. W. 815, 818, 109 Tenn. 495 (citing In re Jacobs, 98 N. Y. 98, 106, 50 Am. Rep. 636).

As individual liberty.

Under a provision of the treaty with the Creek Indian Nation to the effect that in their property rights and liberty they shall never be disturbed, it is held that by the words "rights and liberty" is not meant rights claimed by the Indian nation to the destruction of the rights of the United States, nor a liberty to do every imaginable act unrestrained by law, but that the word "liberty" has regard to individual liberty, and did not confer upon them any rights as a nation. Caldwell v. State (Ala.) 1 Stew. & P. 327, 442.

Right to labor.

"Liberty," within the meaning of Const. art. 1, cl. 1, declaring that all men have the right to enjoy life and liberty, and to acquire possession and protect property, includes the right to labor and transact business. State v. Cadigan, 50 Atl. 1079, 1081, 73 Vt. 245, 57 L. R. A. 666, 87 Am. St. Rep. 714.

The right to liberty embraces the right of a man to exercise his faculties, and to follow a lawful avocation for the support of his life. There is no proposition more firmly fixed than that it is one of the fundamental rights and privileges of an American citizen to follow and adopt such lawful industrial pursuits not injurious to the community as he may see fit. City of Helena v. Dwyer, 42 S. W. 1071, 1072, 64 Ark. 424, 39 L. R. A. 266, 62 Am. St. Rep. 206.

Laws 1895, c. 283, § 1, prohibiting barbers from carrying on their business on Sunday, is within the police powers of the Legislature, and is not void as being in violation of the provision of the Constitution that no person shall be deprived of life, liberty, or property without due process of law. People v. Havnor, 11 N. Y. Cr. R. 35, 36, 37 N. Y. Supp. 314.

"Liberty" includes the right to make and enforce contracts, because the right to make and enforce contracts is included in the right to acquire property. Labor is property. To deprive the laborer and employer of this right to contract with one another is to violate Const. art. 2, § 2, providing that no person shall be deprived of liberty or property without due process of law. Mathews v. People, 67 N. E. 28, 32, 202 Ill. 389, 63 L. R. A. 73, 95 Am. St. Rep. 241.

Right to deal in options.

"Liberty" and "property," within the meaning of Const. 1870, art. 2, § 2, providing that no person can be deprived without due process of law, includes the right to acquire property, and that means and includes the privilege of contracting and making and enforcing contracts. The right, however, does not preclude the exercise of the police power of the state, and therein Cr. Code, § 130, making it a misdemeanor to purchase options on commodities for future delivery is not in violation of the constitutional provision, as such act is designed to prevent gambling in any commodities. Booth v. People, 57 N. E. 798, 799, 186 Ill. 43, 50 L. R. A. 762, 78 Am. St. Rep. 229.

A statute containing prohibitions against options to buy and sell grain or other commodities at a certain time does not invade the liberty granted to every citizen by the United States Constitution, Amend. 14. Booth v. Illinois, 22 Sup. Ct. 425, 426, 184 U. S. 425, 46 L. Ed. 623.

Restraint by law implied.

Under our government the only liberty we know anything about is liberty regulated by law. *United States v. Hudson* (U. S.) 65 Fed. 68, 74.

The word "liberty," as used in the fourteenth amendment of the federal Constitution, is freedom from all restraints but such as are imposed by law. In *re Marshall* (U. S.) 102 Fed. 323, 324.

"Liberty," as used in the federal Constitution, guarantying every person liberty and equal protection of the law, etc., means freedom from all restraints but such as are justly imposed by law. *Slaughter House Cases*, 83 U. S. (16 Wall.) 36, 127, 21 L. Ed. 394.

"Liberty, as understood in this country, is not license, but liberty regulated by law. The personal property of every man is subject to such reasonable regulations as in the wisdom of the Legislature are considered necessary to promote not only the peace and good order of society, but its well-being. Thus the statute prohibiting Sunday baseball is not a violation of Bill of Rights, § 1, guarantying personal liberty." *State v. Powell*, 50 N. E. 900, 902, 58 Ohio St. 324, 41 L. R. A. 854.

"The words 'liberties of the people' in a judicial sense mean the aggregate political rights and franchises of the people of the state at large. The liberties of the people here and elsewhere are not only essentially subject to the ordinary jurisdiction of the courts, not only unimpaired by them, but are absolutely dependent upon them. The supremacy of original judicial process enters into the liberties of the people, and is essential to them. Order is essential to all liberty, and judicial supremacy is essential to order." In *re Pierce*, 44 Wis. 411, 431, 443 (cited in *State v. Cunningham*, 51 N. W. 724, 735, 81 Wis. 440, 15 L. R. A. 561).

In a broad sense, whatever prevents a man from following a useful calling is an invasion of his liberty. Yet many laws have been passed which, to some extent, have interfered with the right to liberty and property, but their accord with the Constitution has seldom been questioned, and when questioned has been generally sustained. The power of taxation, the right to preserve the public health, to protect the public morals, and to provide for the public safety, may interfere somewhat with both liberty and property, yet proper statutes to effect these ends have never been held to invade the guaranties of the Constitution. Thus Laws 1895, c. 823, § 1, prohibiting barbers from carrying on their business on Sunday, is within the police powers of the Legislature, which include the enactment of legislation adapted to the promotion of health by enforcing the

observance of a day of rest. *People v. Havnor*, 43 N. E. 541, 542, 149 N. Y. 195, 31 L. R. A. 689, 52 Am. St. Rep. 707.

Liberty, the greatest of all rights, is not unrestricted license to act, according to one's own will. It is only freedom from restraint under conditions essential to equal enjoyment of the same right by others. It is then liberty regulated by law. *Kentucky Board of Pharmacy v. Cassidy*, 74 S. W. 730, 732, 25 Ky. Law Rep. 102 (citing *Crowley v. Christensen*, 137 U. S. 86, 89, 11 Sup. Ct. 13, 34 L. Ed. 620).

Right to attend school.

The provision of the fourteenth amendment of the federal Constitution that no state shall deprive any person of life, liberty, or property without due process of law, has no reference to the privilege accorded by the law of the state of attending public schools maintained at the expense of the state, and no person can be said to have been deprived of either life, liberty, or property because denied the right to attend as a pupil at school, however obviously insufficient and untenable be the ground upon which the exclusion is put. *Ward v. Flood*, 48 Cal. 36, 50, 17 Am. Rep. 405.

Right to keep secret books and papers.

Under Const. art. 1, § 6, providing that no person shall be deprived of life, liberty, or property without due process of law, the word "liberty" includes liberty of action, and embraces the right to keep secret one's books and papers, his business methods, and his knowledge of his own affairs. Organized society, however, requires some sacrifice of personal liberty of its members, and the Constitution, which organized the state government, makes liberty subject to due process of law. The anti-monopoly act (Laws 1899, c. 690), authorizing the court to appoint a referee to take testimony on the petition of the attorney general preparatory to action by him for violation of said law, would not be infringing upon the personal liberty of the person to be examined without due process of law. There must be reasonable protection against danger of abuse. No general inquiry into private affairs should be allowed. The testimony must be material, and his vested rights should not be interfered with. In *re Davies*, 61 N. E. 118, 122, 168 N. Y. 89, 56 L. R. A. 855.

Right to transfer property.

The right to sell or transfer one's property is as much an inalienable right as that of enjoyment of property free from unnecessary restrictions. *Beil v. Gaynor*, 36 N. Y. Supp. 122, 123, 14 Misc. Rep. 334.

An act making it a misdemeanor for any person who sells food to give away therewith as a part of the transaction of sale

any other thing as a premium, gift, etc., interferes with a person's liberty. *People v. Gillson*, 17 N. E. 343, 345, 109 N. Y. 389, 4 Am. St. Rep. 465.

LIBERTY OF THE GLOBE.

A marine policy providing that the vessel may have the "liberty of the globe" means that she may go to any part of the world. *Eyre v. Marine Ins. Co. (Pa.)* 6 Whart. 247, 254.

LIBERTY OF A PORT.

"Liberty of a port," in marine insurance, is a power subordinate to the general course of the voyage. It does not necessarily import an intention to trade. It may, and ordinarily is, granted for other and different purposes. It is not an assurance or intimation to the underwriters that the assured looks to the port of privilege, under any circumstances in the contemplation of the parties, as that at which the voyage was to terminate. The knowledge of the nature of the cargo is not to be imputed to underwriters because they gave the assured the liberty of a certain port, which conferred the license to trade there. *Allegre's Adm'r's v. Maryland Ins. Co. (Md.)* 8 Gill & J. 190, 200, 29 Am. Dec. 536.

LIBERTY OF SPEECH AND THE PRESS.

Judge Cooley in speaking of the constitutional provisions relating to liberty of speech and of the press, says: "We understand 'liberty of speech and of the press' to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords." *Cooper v. People*, 22 Pac. 790-798, 13 Colo. 337, 6 L. R. A. 430; *State ex rel. Crow v. Shepherd*, 76 S. W. 79-91, 177 Mo. 205.

"Liberty of the press," as used in the provision of the federal Constitution guarantying the liberty of the press, etc., means a right in the conductor of a newspaper to print whatever he chooses without any previous license, but subject to be held responsible therefor to exactly the same extent that any one else would be responsible for the publication. *Sweeney v. Baker*, 13 W. Va. 158, 182, 31 Am. Rep. 757; *Negley v. Farrow*, 60 Md. 158, 175, 45 Am. Rep. 715; *Jones v. Townsend's Adm'r*, 21 Fla. 431, 450, 58 Am. Rep. 676; *Upton v. Hume*, 33 Pac. 810, 812, 24 Or. 420, 21 L. R. A. 493, 41 Am. St. Rep. 863; *Fitzpatrick v. Daily States Pub. Co.*, 20 South. 173, 179, 48 La. Ann. 1116; *Commonwealth v. Buckingham (Mass.) Thacher, Cr. Cas.* 29, 39.

The liberty of the press was said by Blackstone to consist "in laying no previous restraints upon publication, and not in freedom from censure for a criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public. To forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity." *Morton v. State*, 3 Tex. App. 510, 516 (citing 4 Bl. Comm., side p. 152).

"Liberty of the press," as used in Const. art. 16, which declares that the "liberty of the press is essential to the security of freedom in a state; it ought not therefore to be restrained in this commonwealth"—is used for the purpose of preventing all such restraints on publications as had previously been practiced by other governments, and in this country, before the adoption of this Constitution, to stifle the efforts of patriots towards enlightening their fellow subjects on their rights and the duties of rulers. It does not affect the right to prosecute for the abuse of such liberty. *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 313, 15 Am. Dec. 214.

By the provisions of the federal and state Constitutions, guarantying the "freedom of the press," it was simply intended to secure to the conductors of the press the same rights and immunities as are enjoyed by the public at large. The citizen has the right to speak the truth in reference to the acts of government, public officials, or individuals. The press is guarantied the same right, but no greater right. The citizen has the right to criticise the acts of the government, provided it is with a good motive of correcting what he believes to be existing evils, and of bringing about a more efficient or honest administration of government. For a like purpose and like motive he may criticise the acts of public officials, and for the honest purpose of better subserving the public interests he may criticise the fitness and qualifications of candidates for office, not only in respect to their ability, fidelity, and experience, but in respect to their personal habits. The press has precisely the same rights, but no more. The citizen may, in what he honestly believes to be in the interest of morals and good order, and the suppression of immorality and disorder, criticise the acts of other individuals; so may the press. *Riley v. Lee*, 11 S. W. 713, 714, 88 Ky. 603, 21 Am. St. Rep. 358.

In its broadest sense, "freedom of the press" includes not only exemption from censorship, but security against laws enacted by the legislative department of the government, or measures resorted to by either of the branches for the purpose of stifling just

other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. Civ. Code Mont. 1895, § 32.

A libel is a malicious defamation, expressed either by printing, or by signs, or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural defects, of one who is alive, and thereby expose him to public hatred, contempt, or ridicule. Rev. St. Utah 1898, § 4196; Mills' Ann. St. Colo. 1891, § 1313.

A libel is a malicious defamation of a living person, made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath, expose him to public hatred, contempt, or ridicule, or deprive him of the benefit of public confidence or social intercourse; or of a deceased person, thus making public a design to blacken and vilify his memory, or tending to provoke his friends and relatives. But nothing shall be deemed a libel unless there is a publication thereof; and the delivery, selling, reading, or otherwise communicating a libel, directly or indirectly, to any person, or to the party libeled, is a publication. Rev. St. Me. 1883, p. 926, c. 129, § 1; State v. Robbins, 66 Me. 324, 325.

Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. Civ. Code Cal. 1903, § 45; Rev. Codes N. D. 1899, § 2715; Civ. Code S. D. 1903, § 29; Rev. St. Okl. 1903, § 3926. This definition, says the court, is very broad, and includes almost any language which upon its face has the natural tendency to injure a man's reputation either generally or with respect to his occupation. Tonini v. Cevasco, 46 Pac. 103, 104, 114 Cal. 266.

He is guilty of libel who, with intent to injure, makes, writes, prints, publishes, sells, or circulates any malicious statement affecting the reputation of another in respect to any matter or thing pointed out in the statute. Pen. Code Tex. 1895, art. 721.

A libel is defined by Pen. Code, § 242, to be a malicious publication by writing, printing, picture, effigy, sign, or otherwise than by mere speech, which exposes any living person, or the memory of one dead, to hatred, contempt, or ridicule, or which causes any person to be shunned or avoided, or which has a tendency to injure any person in their business or occupation. Shea v. Sun Printing & Publishing Ass'n, 70 N.

Y. St. Rep. 438, 439, 35 N. Y. Supp. 703; People v. Stark, 12 N. Y. Supp. 688, 691, 59 Hun, 51, 35 N. Y. St. Rep. 150, 152; Cornish v. Bennett, 38 Misc. Rep. 688, 689, 78 N. Y. Supp. 244.

A libel is a false and malicious defamation of another, expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt, or ridicule. Civ. Code Ga. 1895, § 3832; Behre v. National Cash Register Co., 27 S. E. 986, 987, 100 Ga. 213, 62 Am. St. Rep. 320. Under this definition it is held that to write and publish of another that he is a liar is libelous. Colvard v. Black, 110 Ga. 642, 645, 36 S. E. 80.

By Pen. Code, § 248, libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or impeach the honesty, virtue, or integrity of one who is alive, and thereby expose him to public hatred, contempt, or ridicule. In re Kowalsky, 14 Pac. 399, 73 Cal. 120; People v. Seeley, 72 Pac. 834, 835, 139 Cal. 118.

Libel is defined in Laws 27th Leg. p. 30, as a defamation expressed in printing or writing, by signs and pictures or drawings, tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt, or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue, or reputation of any one, or to publish the natural defects of anyone, and thereby expose such person to public hatred, ridicule, or financial injury. Walker v. San Antonio Light Pub. Co., 70 S. W. 555, 557, 30 Tex. Civ. App. 165.

General abuse.

Terms of mere general abuse, published in a newspaper, are not libelous. Tappan v. Wilson, 7 Ohio (7 Ham.) 190, pt. 1.

Any publication which tends to disgrace a man, or bring him into contempt or ridicule, is a libel. But a degrading imputation must appear on the face of the libel, or by necessary inference from it. Hence mere scurrility or abuse, without point or specific imputation, is not actionable. Rice v. Simmons (Del.) 2 Har. 417.

Injury in business or trade.

Words which naturally tend to injure a man in his office trade, business, or profession are libelous in themselves, without alleging any special damage. Harris v. Burley, 8 N. H. 216, 218.

Imputations applicable to class.

A declaration in libel cannot be adjudged insufficient by reason of the accusation

being directed against a class of society, unless it is manifest and unquestionable that the charge is clearly made against a class of society, or an order or body of men as such, and cannot possibly import any personal application tending to private injury. If to the common understanding of men the description evidently points to several individuals, or if on the face of the declaration it appears that the words are capable of being so meant and understood, then the fact that a person is defamed under a description of office or of profession common to himself and other individuals included in the same libel cannot take away the right of private action. So, there being six firms, composed of two or more partners each, owning and conducting malhouses on the hill in a city, a publication that "there are several malhous- es on the hill, all of which rely on water taken from such places," which were previously described in the article as being filthy, and that "the facts stated are known to hundreds residing in the neighborhood of the malting establishments," constitutes a libel against the plaintiff, who was one of two partners owning and operating one of such malhouses. *Ryckman v. Delavan* (N. Y.) 25 Wend. 186, 197.

It is the malicious intention of the libeler toward the injured individual that authorizes the latter to seek redress. A general censure or reproof, satire, or invective, directed against large classes of society, whether on moral, theological, or political grounds, cannot ordinarily be prompted by individual malice, or intended to produce personal injury. *Ryckman v. Delavan* (N. Y.) 25 Wend. 186, 198.

Construction of language.

The fact that supersensitive and morbid imaginations may be able by reading between the lines of an article to discover some defamatory meaning therein, is not sufficient to make it libelous. In other words, if the language is not reasonably capable of conveying to the ordinary mind the defamatory meaning alleged in the innuendo, it is the province and duty of the court to so declare, and to deny the right to maintain an action thereon. *Reid v. Providence Journal Co.*, 37 Atl. 637, 20 R. I. 120.

Briefly defined, "libel" is the malicious defamation of a person, made public by any printing, writing, effigy, or pictorial representation. For a written or printed article to be defamatory, the language of the document must be such that, when given its natural and ordinary meaning, it imputes to the person thus assailed some act or attribute or character which tends to expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or, if the language upon its face does not bear such

injurious significance, then there must be shown extrinsic facts and circumstances by which it is made to appear that the writing, though innocent and unobjectionable in form, is intended to convey and does convey to its readers a defamatory meaning. *Quinn v. Prudential Ins. Co.*, 90 N. W. 349, 350, 116 Iowa, 522.

A publication without justification or lawful excuse, which is calculated to injure the reputation of another by exposing him to hatred or contempt, is a libel. The effect of the words used is the test of whether they are actionable or not, for the injury caused depends on the meaning which any reasonable man would give to the words on reading them. The ordinary sense of the words is to be taken as the meaning of the party who employs them. To say of a person that he is a professional swindler is actionable, because every person would understand that the charge was that he made a practice of defrauding others by imposition; and to charge a man with bringing another to financial ruin by his mechanisms is libelous. *Whitney v. Janesville Gazette* (U. S.) 29 Fed. Cas. 1091.

Words which are clearly not defamatory cannot have their meaning enlarged by innuendo. Between these extremes lies the case of ambiguous language, where it is for the jury to say whether, in view of all the facts charged, the publication amounted to a libel. *Central of Georgia Ry. Co. v. Sheftall*, 45 S. E. 687, 118 Ga. 865.

An article is libelous which imputes in slang terms dishonest or dishonorable conduct. *Byrnes v. Mathews*, 12 N. Y. St. Rep. 74, 79.

As a crime.

The term "making a libel," used in a charge that another has made a libel, and is a dirty creature, etc., may be fairly understood to mean such a making as constitutes a complete indictable offense. In common parlance, "making" includes publishing, and words are to be taken according to common understanding. Such a charge is slanderous. *Andres v. Koppenhefer* (Pa.) 3 Serg. & R. 255, 256, 8 Am. Dec. 647.

Libel, both at common law and under the statute, is a crime, and for it the offender may be prosecuted civilly or criminally. Also both at common law and by Pen. Code, § 243, a libel on the memory of the dead is punishable as a crime; and, speaking of this rule, Mr. Odgers says: "The criminal remedy for libel, as it is the earlier, so it is the more extensive, remedy. A libel may be indictable though it be not actionable. Thus in neither of the above cases [a libel on a deceased person] would an action lie, for the want of a proper plaintiff." So-

renson v. Balaban, 42 N. Y. Supp. 654, 657, 11 App. Div. 164.

Imputation of crime.

Any publication which imputes to a person the commission of a criminal offense, which will, in case the imputation or charge is true, subject the party charged to punishment for a crime involving moral turpitude, or subject such party to an infamous punishment, is actionable in itself, when published orally, and hence, when expressed otherwise than by oral language, is a libel. *Boucher v. Clark Pub. Co.*, 84 N. W. 237, 238, 14 S. D. 72.

Defamatory publications of an officer with respect to his office are actionable *per se*, if untrue. It is not necessary that the language of the alleged libel should in terms charge that the plaintiff has committed crime, naming it, but it will be actionable if calculated to induce persons who read it to believe that the plaintiff was guilty of acts which would constitute a crime. *Houston Printing Co. v. Moulden*, 41 S. W. 381, 386, 15 Tex. Civ. App. 574.

A publication, to be libelous *per se*, because charging another with the commission of a crime, does not need to contain the technical statutory language and phrases essential to a good indictment for the crime charged; but any language the nature and obvious meaning of which is to impute to a person the commission of a crime, or to subject him to public ridicule, ignominy, or disgrace, is libelous. *World Pub. Co. v. Mullen*, 43 Neb. 126, 61 N. W. 108, 47 Am. St. Rep. 737.

Where in an action for libel the words set forth in their ordinary sense import a charge of crime, so as to be libelous, yet if they are spoken in connection with other words, so as to rebut the idea of criminality, there is no libel. *Edgerley v. Swain*, 32 N. H. 478, 482.

It is not necessary that a crime should be charged in technical language in a written or printed publication to constitute it a libel. But any such publication which holds the plaintiff up to scorn or ridicule, or to contempt, or execution, or impairs his enjoyment of general society, or implies his commission of the crime, is a libelous publication. *Bain v. Myrick*, 88 Ind. 137, 138.

It is not necessary that words, to be actionable *per se*, should make a charge of crime in express terms. They are actionable if they consist of a statement of facts which would naturally and presumably be understood by the hearers as a charge of crime. *Belo v. Fuller*, 84 Tex. 450, 19 S. W. 616, 617, 31 Am. St. Rep. 75.

Imputation of being diseased.

"The definition of libel embraces not only all slanders if written or printed, but

much else. Any written or printed words which expose one to hatred, contempt, ridicule, or obloquy, or which tend to injure him in his profession or trade, or cause him to be shunned or avoided by his neighbors, is a libel *per se*. *Odgers, Lib. & Sland. 21.*" That which is a slander if spoken is a libel if written or printed; but to say of one that he has consumption is no slander. A complaint for libel in charging that defendant published the charge that plaintiff had consumption is not sufficient unless special damages are alleged. *Rade v. Press Pub. Co.*, 75 N. Y. Supp. 298, 37 Misc. Rep. 254.

Injury to feelings.

Injury to feelings alone is not a basis for an action for libel. There must be an injury to character. *Samuels v. Evening Mail Ass'n (N. Y.)* 6 Hun, 5, 9.

Imputation of former corruption in office.

Words which tend to expose the character of the plaintiff to the ridicule and contempt of the community, whether they impute a punishable offense or not, are actionable when put forth in the shape of written or printed slander. The proposition that the imputation of a previous vicious and corrupt life tends necessarily and directly to degrade the individual in the estimation of the community at the time of the publication of the libel, is too obvious to require argument. Where a libel was published imputing corrupt conduct to the plaintiff in his office of a senator of the state, his term of office having expired, it is a mistake to suppose that the ground of the action is the libel upon his official character. It is the calumny against his private character, charging him with having been guilty of previous conduct seriously impeaching his integrity and honor, and which tends to degrade him in the opinion of the public of which he complains. *Cramer v. Riggs (N. Y.)* 17 Wend. 209, 210.

Imputation of fraud.

A writing which imputes, and is understood by the readers to impute, that plaintiff was a person engaged in making accounts which he never paid or intended to pay, and was wholly unworthy of credit, is libelous. *Ingraham v. Lyon*, 105 Cal. 254, 38 Pac. 892.

Imputation of indebtedness.

Written or printed words which are injurious to a person in his office, profession, or calling, or which impeach the credit of any merchant or trader by imputing to him insolvency, or even embarrassment, are libelous. The law carefully guards the credit of merchants and traders. Imputations of their solvency, or suggestions that they are in pecuniary difficulties, etc., are, as a general rule, actionable. *Wood v. Boyle*, 35 Atl. 853, 854, 177 Pa. 620, 55 Am. St. Rep. 747.

A libel is a malicious publication expressed either in printing or writing, or by signs or pictures, tending to either blacken the memory of the dead or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. Every willful and unauthorized publication, written or printed, which imputes to a merchant or other business man conduct which is injurious to his character and standing as a merchant and business man, is a libel. For a mercantile commercial agency to publish a statement concerning a firm that they had assigned, being false, is a libel. *Mitchell v. Bradstreet Co.*, 22 S. W. 358, 359, 116 Mo. 226, 20 L. R. A. 133, 38 Am. St. Rep. 592.

The publication of a false statement that plaintiff had executed a mortgage on his stock of goods, which statement was circulated throughout the country, was a libel per se. *Smith v. Bradstreet Co.*, 41 S. E. 763, 764, 63 S. C. 525.

To publish of one that he has for several years owed for medical services, and that finally, being sued therefor, he has cowardly slunk behind the statute of limitations, does not constitute a libel. *Hollenbeck v. Hall*, 72 N. W. 518, 519, 103 Iowa, 214, 39 L. R. A. 734, 64 Am. St. Rep. 175

The sending through the mail of envelopes with the clause "For Collecting Bad Debts" printed on them, and the distribution of books containing a list of persons not worthy of credit, and containing plaintiff's name among the list, constitutes a libel. *Muetz v. Tuteur*, 77 Wis. 236, 46 N. W. 123, 9 L. R. A. 86, 20 Am. St. Rep. 115.

Imputation of insolvency.

Publishing one's name in a list of "dead-beats and delinquents," for circulation among business men, is libelous per se. *Nettles v. Somervell*, 6 Tex. Civ. App. 627, 25 S. W. 658.

"Every publication in writing or in print, which charges on or imputes to a merchant or business man insolvency or bankruptcy, or conduct which would prejudice him in his business or trade, or by injuries to his standing and credit as a merchant or business man, is a libel." *Erber v. Dun* (U. S.) 12 Fed. 528, 532.

To publish of a trader that he is insolvent injuriously affects him, and special circumstances need not be shown to entitle him to recover damages. *Woodruff v. Bradstreet Co.* (N. Y.) 35 Hun, 16, 17.

Imputation of lasciviousness.

A publication which renders a person ridiculous and exposes him to contempt; which tends to render his situation in society uncomfortable and irksome; which re-

fects a moral turpitude upon the party, and holds him up as a dishonest and mischievous member of society, and disgraces him in a scurrilous and ignominious manner; which tends to impair his standing in society as a man of rectitude and principle, or unfit him for the society and intercourse of honest and honorable men—is libelous. Judged by this standard, a portion of a letter which alleged that a party's conduct with a certain woman was unbecoming of him as a married man and as a minister of the gospel was certainly libelous, as it would tend to lower him in the opinion of his friends and acquaintances, and would have material effect in regard to him as a married man and a minister of the gospel. *Jones v. Roberts*, 50 Atl. 1071, 1072, 73 Vt. 201.

An article charging that plaintiff had been arrested with a married woman was held libelous, as tending to expose plaintiff to public ridicule and contempt. *O'Brien v. Bennett*, 78 N. Y. Supp. 498, 499, 72 App. Div. 367.

Imputation of untruthfulness.

A newspaper article is libelous which contains an imputation on plaintiff's honesty and integrity and tends to expose him to public hatred and contempt. *Huse v. Inter-Ocean Pub. Co.*, 12 Ill. App. (12 Bradw.) 627, 630.

It is libelous per se to write concerning defendant that he is "unreliable," that "he cannot tell the truth," and that "he does not regard his financial obligations." *Rider v. Rulison*, 74 Hun, 239, 26 N. Y. Supp. 234.

A publication of one who had been a witness in court, representing him as "swearing terribly," and as being "no slouch at swearing to an old story," imports that he swore with levity, and rashly and inconsiderately, without due regard to the solemnity of the oath, or to the truth and accuracy of what he said. Though the words did not import perjury in the legal sense, they held him up to contempt and ridicule, as being so thoughtless or so immoral as to be regardless of the obligations becoming a witness, and therefore to be utterly unworthy of credit. In this view the words are actionable, for a writing published maliciously with a view to expose a person to contempt and ridicule is undoubtedly actionable. *Steele v. Southwick* (N. Y.) 9 Johns. 214, 215.

A letter written to C. by H. concerning B. was as follows: "I was unfortunate enough to have him in my employ at one time as a bookkeeper. He is a liar. I would not believe him under oath." Held, that each of the sets of words constitutes a libel, as written or printed matter may be libelous without charging a crime. *Hake v. Brames*, 95 Ind. 161, 162.

Intent.

The intent with which a publication is made, rather than its truth or falsity, is the correct criterion by which the jury is to determine whether such a publication is a libel. *State v. Nichols*, 45 Pac. 647, 648, 15 Wash. 1.

Joint act.

It has been held that several defendants might be joined in one and the same indictment or information for a libel, if the offense wholly arises from such a joint act as is criminal in itself, without any regard to any particular fault of the defendant which is peculiar to himself. The making and publishing a libel are matters susceptible of a joint concern and undertaking, as much as a trespass, or falsely and maliciously procuring another to be indicted. It is not like an action against several persons for speaking the same words. Such an action cannot be maintained, because the words of one are not the words of another. But with respect to libels, if one repeat and another write and a third approve what is written, they are all makers of the libel, for all persons who concur and show their assent or approbation to the doing of an unlawful act are guilty; and in this respect the murdering a man's reputation by a scandalous libel has been compared to murdering his person, where all who are assisting and encouraging in the act are guilty of homicide, though the stroke be given by one only. *Thomas v. Rumsey* (N. Y.) 6 Johns. 26, 31.

Malice.

Malice is said to be essential to an action for libel, but it is malice in a special technical sense which exists in the absence of lawful excuse, and where there may be no spite or ill will or disposition to injure others. Every publication having the other qualities of a libel, if willful and unprivileged, is in law malicious. The publication of words actionable in themselves is sufficient evidence of legal malice. Legal malice exists where a wrongful act is done intentionally. *Neeb v. Hope*, 2 Atl. 568, 570, 111 Pa. 145.

"A libel is both a public wrong and a private wrong. The remedy for the public wrong is by indictment or other criminal proceeding, while the remedy for the private wrong is by a civil action at common law, which is classed and known as a tort action. One of the essential elements of every libel is malice. And no declaration which should fail to charge that the publication complained of was malicious would state a cause of action." *McDonald v. Brown*, 51 Atl. 213, 23 R. I. 546, 58 L. R. A. 768, 91 Am. St. Rep. 659.

The right to an action of libel (where special damages are not sought) depends on

a publication of matter affecting the reputation of the plaintiff of that character which is defined by law as necessarily causing actionable damage, made by the defendant in violation of a legal duty. The two main elements are injury to the plaintiff and a wrongful act; i. e., an act in violation of a legal duty by the defendant. The first element involves the definition of a defamatory publication; the second, of the duties imposed by law in respect to such publications. These duties are well settled. They are restrictive and permissive. The general duty which binds every one to absolutely refrain from the publication of defamatory matter, unless he possesses evidences of its truth so certain that he can successfully establish his charge in a court of justice; and the special duty to communicate such matter in good faith upon any subject in which one has an interest, or has, or honestly believes he has, a duty (including certain moral and social duties), to a person having a corresponding interest or duty. An act by which another must be injured, intentionally done, in violation of legal duty, is in law maliciously done; and so it is held that the wrongful act of the defendant essential to actionable libel must be malicious, and this essential element of libel is briefly expressed in the rule, "Malice is the gist of the action of libel." *Atwater v. Morning News Co.*, 34 Atl. 865, 866, 67 Conn. 504.

The essence of this offense is malice, which is a question of fact for the jury. *Rice v. Simmons* (Del.) 2 Har. 309, 310, 31 Am. Dec. 766.

As personal injury.

See "Personal Injury."

Slander distinguished.

Libel is the printed or written declarations of one person against another, while slander is defined to be oral or spoken defamatory words used by one person against another. *Woodruff v. Woodruff*, 72 N. Y. Supp. 39, 40, 36 Misc. Rep. 15.

False, defamatory words, when written, constitute a libel, and, when spoken, a slander. *Gambrill v. Schooley*, 48 Atl. 730, 93 Md. 48, 52 L. R. A. 87, 86 Am. St. Rep. 414.

There is a material difference between words spoken and words written. To be actionable, the former must tend to bring a man into danger of punishment, exclude him from society, or injure him in his occupation; but it is enough if the latter induce an ill opinion to be had of the party, or make him contemptible and ridiculous. *Hillhouse v. Dunning*, 6 Conn. 391, 407.

"Every slander is a libel if published by writing, but there are many libels which are not slander. Any false publication by writing, which exposes one to ridicule, hatred, contempt, or obloquy, or causes him to be

shunned or avoided, is a libel per se, though, if spoken, it may be no slander. The definition of slander per se is not general, like that of libel, but is restricted and specific. To falsely charge one in writing with having any repulsive disease or condition which would necessarily cause him to be shunned or avoided, would be a libel, but it would not be slander if spoken, unless it was of one of the diseases embraced within the definition of slander." A false charge that plaintiff has the leprosy is libelous per se, though science may have established that the disease is not contagious, but only hereditary, as it tends to cause plaintiff to be shunned and excluded from society. *Simpson v. Press Pub. Co.*, 67 N. Y. Supp. 401, 402, 83 Misc. Rep. 228.

Libel, at the common law, was any false and malicious writing published of another, and having a tendency to render him contemptible or ridiculous in public estimation, or expose him to public contempt, or hinder a virtuous man from associating with him. There is a difference between slander and libel as to what is required to constitute an actionable charge. It is perfectly reasonable to allow greater liberty of vocal speech than of a writing or printing for the reasons that vocal utterance does not imply the same degree of deliberation, and is more likely to be the expression of momentary passion or excitement, and is not so open to the implication of settled malice. Therefore to such oral expressions little importance is generally attached. On the other hand, the same words deliberately written or printed, and afterwards placed before the public, justify an inference that they are the expression of settled conviction, and they affect the public mind greatly. Second. An oral charge is merely heard, while a written or printed charge may be passed from hand to hand indefinitely, for many years, constituting all the time a continuous condemnation. *Republican Pub. Co. v. Mosman*, 24 Pac. 1051, 1054, 15 Colo. 399.

Libel is a malicious defamation of a person otherwise than by words, as by writing, printing, figures, signs, or any other symbol. *Rosewater v. Hoffman*, 24 Neb. 222, 38 N. W. 857, 860.

In order to support an action for oral slander something criminal must have been imputed; but in libel any tendency to bring a party into contempt or ridicule is actionable, and in general any charge of immoral conduct, although in matters not punishable by law. *Feder v. Herrick*, 43 N. J. Law (14 Vroom) 24, 27.

LIBEL (In Practice)

The term "libel," as used in admiralty, is pleading, which occupies a similar place in admiralty pleadings to that of the declaration

in an action at law. It is the first pleading of the libellant. *Phoenix Ins. Co. v. The Atlas*, 93 U. S. 302, 316, 23 L. Ed. 863.

The term "information" is not exclusively applied to a proceeding at common law. A libel on a seizure is in its terms and essence an information. So it is held that, where the cause is of admiralty jurisdiction, and the proceeding is by information, the suit is not withdrawn by the nature of the remedy from the jurisdiction to which it otherwise belongs. *The Samuel*, 14 U. S. (1 Wheat.) 9, 14, 4 L. Ed. 23.

LIBERAL

An agreement by a person "to pay as well or as liberal as he had paid for certain other land," means the same price in proportion to the value, and not the same price per acre. *Cooper v. Carlisle*, 17 N. J. Eq. (2 C. E. Green) 525, 533.

LIBERAL ART.

A polite or "liberal art" is that in which the mind or imagination is chiefly concerned, as poetry, music, and painting, as distinguished from a useful or mechanical art, which is one in which the hands and body are more concerned than the brain. *City of New Orleans v. Robira*, 8 South. 402, 403, 42 La. Ann. 1098, 11 L. R. A. 141.

LIBERAL CONSTRUCTION.

Chancellor Kent, in his Commentaries, lays down the rule that a guaranty is to receive a "liberal construction" for the purpose of ascertaining its latitude, or the interests of the party to it. Held, that the words "liberal construction," as so used, do not mean that the words shall be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation, so as to attain the object for which the instrument is designed and the purpose to which it is applied. *Lawrence v. McCalmont*, 43 U. S. (2 How.) 426, 449, 11 L. Ed. 326 (cited in *Crist v. Burlingame* [N. Y.] 62 Barb. 351, 355).

Liberal construction does not mean enlargement or restriction of any plain provision of law. If a statutory provision is plain and unambiguous, it is the duty of the court to enforce it as it is written. If it is ambiguous or doubtful, or susceptible of different constructions or interpretations, then such liberality of construction may be indulged in as, within the fair interpretation of its language, will effect its apparent object and promote justice. In *re Johnson's Estate*, 33 Pac. 460, 466, 98 Cal. 531, 21 L. R. A. 380; In *re Jessup*, 22 Pac. 742, 745, 81 Cal. 408, 6 L. R. A. 594.

The liberal construction of a statute is such construction as does not presume that the Legislature intended the very least innovation on previous law, but, looking primarily at the intent of the Legislature, endeavors to fulfill it at any cost of innovation. Liberal construction looks to the intent to determine the amount of innovation. *Shorey v. Wyckoff*, 1 Wash. T. 348, 351.

LIBERAL INTERPRETATION.

"Liberal interpretation," as used in the statement that certain statutes should receive a liberal interpretation, does not mean that "the words should be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purpose to which it is applied." *Lawrence v. McCalmont*, 43 U. S. (2 How.) 426, 449, 11 L. Ed. 326.

LIBERAL REWARD.

The liberal reward offered for information leading to the apprehension of a fugitive from justice does not require that the specific sum offered for his apprehension should be paid, unless the party claiming it apprehended the fugitive, or the arrest was made by his agent. *Shuey v. United States*, 92 U. S. 73, 76, 23 L. Ed. 697.

LIBERALITY.

A bequest in trust for such business of benevolence and "liberality" as the trustee shall approve cannot be supported as a charitable legacy. If the word "benevolence" means charity, and "liberality" means something different from that idea, which a court of justice is obliged to apply to that word "charity," there is no ground for the application of the bequest partially, if it cannot be wholly, to charity. *Morice v. Bishop of Durham*, 10 Ves. 522, 524.

LIBERALLY.

The word "liberally," as used in a provision in a will for paying the executors liberally, means no more than compensation that is fair and just. *Kenan v. Graham*, 33 South. 699, 702, 135 Ala. 585.

"Liberally," as used in Code, § 159, requiring pleadings to be liberally construed with a view to substantial justice between the parties, means that if, from the whole pleading, it can be seen that a party has a cause of action or defense, he shall not be deprived of it because he has stated it in an improper or informal manner; but it does not mean that substantial averments may be omitted, and the omission disregarded. *Koenig v. Nott* (N. Y.) 8 Abb. Prac. 384, 393.

LIBERTY.

See "At Liberty"; "Civil Liberty"; "Free Liberty"; "Jail Liberties"; "Moral and Natural Liberty"; "Personal Liberty"; "Religious Liberty"; "Right to Liberty."

A vote of a town providing that certain persons have the "liberty to make a road from," etc., "over the public land," is to be construed as a mere license, which must be executed and the road made in a reasonable time and manner for the public travel, in order to have any efficacy. *Curtiss v. Hoyt*, 19 Conn. 154, 169, 48 Am. Dec. 149.

"Liberty," as used in the Constitution of the United States, does not mean mere freedom from arrest and restraint, but means liberty in a broader and more comprehensive sense, embracing freedom of action, freedom in the selection of a business calling or avocation, freedom in the control and use of one's property so far as its use does not infringe the rights of others, freedom in exercising the rights, privileges, and immunities that belong to the citizen generally, and freedom in the pursuit of any lawful business selected by the citizen. *State v. Scougal* (S. D.) 51 N. W. 858, 861; *People v. Warden of City Prison*, 51 N. E. 1006, 1010, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763; *People v. Marx*, 3 N. Y. Cr. R. 200, 207; *People v. Marx*, 2 N. E. 29, 33, 99 N. Y. 377, 52 Am. Rep. 34; *People v. Rosenberg*, 22 N. Y. Supp. 56, 57, 67 Hun, 52; *Wilson v. Telegram Co.*, 3 N. Y. Supp. 633, 638, 18 N. Y. St. Rep. 78; *Bell v. Gaynor*, 36 N. Y. Supp. 122, 123, 14 Misc. Rep. 334; *People v. Gillson*, 17 N. E. 343, 345, 109 N. Y. 389, 4 Am. St. Rep. 465; *State v. Loomis*, 22 S. W. 350, 351, 115 Mo. 307, 21 L. R. A. 789; *State v. Julow*, 31 S. W. 781, 782, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443; *Allgeyer v. Louisiana*, 17 Sup. Ct. 427, 431, 165 U. S. 578, 41 L. Ed. 832; *Booth v. Illinois*, 22 Sup. Ct. 425, 426, 184 U. S. 425, 46 L. Ed. 623; *Ex parte Virginia*, 100 U. S. 339, 344, 25 L. Ed. 676; *Munn v. Illinois*, 94 U. S. 113, 142, 24 L. Ed. 77; *Lansburgh v. District of Columbia*, 11 App. D. C. 512, 521; *Bessette v. People*, 62 N. E. 215, 218, 193 Ill. 334; *Low v. Rees Printing Co.*, 59 N. W. 362, 366, 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670; *Kuhn v. Common Council of City of Detroit*, 38 N. W. 470, 471, 70 Mich. 534; *City of Helena v. Dwyer*, 42 S. W. 1071, 1072, 64 Ark. 424, 39 L. R. A. 266, 62 Am. St. Rep. 206. "Sir W. Blackstone says that every man, when he enters into society, gives up a part of his natural liberty as the price of so valuable a purchase as the acquisition of social and municipal relations. Mr. Jefferson denies this doctrine, because he was of the opinion that no man had a natural right to commit aggression on the equal rights of another, and that every man is under the

natural duty of contributing to the interests of society, and that no man had a natural right to be the judge between himself and another, but was bound to submit to the umpirage of an impartial third. This contrariety of opinion between Judge Blackstone and the American statesman is rather apparent than real, for Blackstone's definition of natural rights is far more comprehensive than Mr. Jefferson's. The former supposes natural liberty to consist properly in the power of acting as one thinks fit, without any restraint or control, unless by the law of nature. If this law of nature, as Mr. Jefferson thinks, comprehends those restrictions which the equal rights of others, the duty of contributing to the interest of society, and submitting to the decision of impartial judges in disputes between individuals would imply, there is no essential difference between the opinions alluded to." *Snyder v. Warford*, 11 Mo. 513, 515, 49 Am. Dec. 94; *State v. Dalton*, 22 R. I. 77, 86, 46 Atl. 234, 237, 48 L. R. A. 775, 84 Am. St. Rep. 818; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 345, 4 Am. St. Rep. 465; *Bessette v. People*, 62 N. E. 215, 218, 193 Ill. 334 (citing *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206). *Allgeyer v. Louisiana*, 17 Sup. Ct. 427, 431, 165 U. S. 578, 41 L. Ed. 832.

The term "liberty," as used in the constitutional declarations, means more than freedom of locomotion. It includes and comprehends, among other things, freedom of speech, the right to self-defense against unlawful violence, and the right to freely buy and sell as others may. *State ex inf. Crow v. Continental Tobacco Co.*, 75 S. W. 737, 747, 177 Mo. 1 (citing *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789).

The "liberty" of the Constitution has been defined, and it will be continued to be defined, by some as the right of an individual to keep out of prison excepting for crime committed. Others will define liberty as also including the right to earn a livelihood, acquire property, perform services for another, employ others, make contracts not tainted with an illegal or immoral consideration, and those not injurious to the health or welfare of people. *Greenwich Ins. Co. v. Carroll* (U. S.) 125 Fed. 121, 129.

Liberty is nothing more than mere freedom from physical restraint. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as one's judgment may dictate for the promotion of one's happiness; that is, to pursue such callings and avocations as may be most suitable to develop one's capacities and to give them their highest enjoyment. *Kuhn v. City of Detroit Common Council*, 70 Mich. 534, 537, 38 N. W. 470.

"Liberty" is a constitutional term, embodying a practical idea. It means the enjoyment of the rights which belong to us as individuals. To secure this to every human being is the object of social organization and the end of government. The law defines, regulates, and secures the rights of each individual, and upon this supremacy depends the existence of civil liberty. In the practical sense, therefore, in which we understand liberty, there is nothing imaginative or utopian about it. It implies the duty of obedience to laws, which, if unsuited to our condition, we have the right to change, but which, while in force, we are bound to obey. *People v. Judson* (N. Y.) 11 Daly, 1, 11, 12.

A convict pardoned by the executive on condition that he shall depart from the state and remain away therefrom is restrained in his liberty by such condition within the meaning of the Constitution providing that no man can be deprived of his liberty unless by the judgment of his peers or the law of the land. The restraint is one voluntarily substituted by the convict and the executive in lieu of that which had been imposed upon him by law, but it is nevertheless a restraint of personal liberty. He is by the condition, if it is binding, restrained of his liberty in some degree. *Commonwealth v. Hatsfield*, 2 Pa. Law J. 37, 40.

As franchise

"Blackstone says that 'liberty' and 'franchise' are used as synonymous terms, and their definition is a real privilege or branch of the King's prerogative subsisting in the hands of a subject." *Spring Valley Water Works v. Schottler*, 62 Cal. 69, 106 (quoting 2 Bl. Comm. 37).

In a legal sense "franchise" and "liberty" are used as synonymous terms, and the kinds of them are various, and almost infinite. 2 Bl. Comm. 37. A franchise is defined by Webster as a particular privilege or right granted by a prince or sovereign to an individual or to a number of persons; an exemption from a burden or duty to which others are subject. *Central R. & Banking Co. v. State*, 54 Ga. 401, 409.

"Liberty," as used in the colony ordinance of 1647, commonly known as the "Ordinance of 1641," providing that in all creeks, coves, and other places by and on salt water where the sea ebbs and flows the proprietor of the land adjoining shall have propriety to the low-water mark, provided that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, is synonymous with "right," "franchise," and "privilege," and does not mean only the license or permission. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 70.

Right to contract.

The term "liberty" in the constitutional provision against the deprivation of life, liberty, etc., without due process of law, includes the right to make all proper contracts in relation thereto, and to enjoy the legitimate fruits thereof. *Harbison v. Knoxville Iron Co.*, 53 S. W. 955, 957, 103 Tenn. 421, 56 L. R. A. 316, 76 Am. St. Rep. 682.

"Liberty," as used in Const. art. 1, § 8, declaring that no man shall be deprived of his life, liberty, or property but by the law of the land, should be construed to include the right of contract. It is an inherent part of the right of liberty. *State v. Schlitz Brewing Co.*, 59 S. W. 1033, 1040, 104 Tenn. 715, 78 Am. St. Rep. 941.

The efforts to prevent competition, to restrict individual effort and freedom of action in trade or commerce, are restrictions hostile to the public welfare, and not consonant with the spirit of our institutions, and in violation of law. It was held in *Fraser v. People*, 140 Ill. 171, 31 N. E. 393, 16 L. R. A. 492, that the privilege of contracting is both a liberty and a property right, and, if A. is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law and B., C., and D. are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract. *People v. Chicago Live Stock Exchange*, 48 N. E. 1062, 1065, 170 Ill. 556, 39 L. R. A. 373, 62 Am. St. Rep. 404.

"Liberty," as used in the first section of the Bill of Rights, does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by the Creator, subject only to such restraints as are necessary for the common welfare. Contracts and compacts have been entered into between men and women, tribes and nations, during all time, from the earliest dawn of history, and the life and liberty of contract is one of those inalienable rights of man fully secured and protected by our Constitution, and it can only be restrained so far as is necessary for the common welfare and the equal protection and benefit of the people. *Palmer v. Tingle*, 45 N. E. 313, 314, 55 Ohio St. 423.

"Liberty," as used in Const. U. S. Amend. 14, providing that no state shall deprive any person of life, liberty, or property without due process of law, means more than freedom of locomotion. It includes and comprehends, among other things, freedom of speech, the right of self-defense against unlawful violence, and the right to freely buy and sell as others may. It includes the right to contract as others may; and to take

away that right from a class of persons following lawful pursuits is simply depriving such persons of a time-honored right, which the Constitution undertakes to secure to every citizen. *State v. Loomis*, 22 S. W. 350, 351, 115 Mo. 307, 21 L. R. A. 789 (citing *Story*, Const. [5th Ed.] § 1590).

"Liberty" includes the right of private contract. In a constitutional sense it means only civil liberty; that is, that measure of freedom which may be enjoyed in a civilized community consistently with peaceful enjoyment of like freedom in others. Thus an act forbidding the discharge of an employé because he was a member of a labor organization is void for imposing a restraint on individual freedom guaranteed by the state and federal Constitutions. *State v. Kreutzberg*, 90 N. W. 1098, 1101, 114 Wis. 530, 58 L. R. A. 748, 91 Am. St. Rep. 934.

"Liberty," as that term is used in the Constitution, includes the right of lawful contract. *Maupin v. Scottish Union & Nat. Ins. Co.*, 45 S. E. 1003, 1009, 53 W. Va. 557.

"Liberty," in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. The term "liberty," as used in the Constitution of New York, is not dwarfed into mere freedom from physical restraint of the person as by incarceration, but embraces the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Laws 1887, c. 691, providing that no person shall sell, exchange, or dispose of any article of food, or offer or attempt to do so, upon any representation, advertisement, or inducement that anything other than what is specifically stated to be the subject of the sale or exchange is or is to be delivered or received as a part of the transaction as a gift, prize, premium, or reward to the purchaser, and providing that any person violating the provision of the section shall be deemed guilty of a misdemeanor, is an infringement on the liberty of the citizens as guaranteed by the Constitution. *People v. Gillson*, 16 N. Y. St. Rep. 185, 189, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465.

Right to choose employment.

"Liberty," as used in the provision of the federal Constitution declaring that persons shall not be deprived of liberty, etc., without due process of law, includes the right to adopt a lawful employment in choice of occupation; and hence a city ordinance that makes it an offense for any person to carry on a laundry where clothes are washed

for pay, within the habitable portion of the city, is a deprivation of a liberty within the meaning of the federal Constitution. The *Stockton Laundry Case* (U. S.) 26 Fed. 611, 614.

So much of the different acts of the assembly regulating peddling as makes physical disability on the part of an applicant for a peddler's license one of the tests of his eligibility, is unconstitutional and void as interfering with the liberty guaranteed by the Constitution. Such a requirement is not a police regulation, but is in the nature of class legislation, intending to restrict to a few a right which under proper regulations should be given to all. In *re Brittain's Application*, 5 Pa. Co. Ct. R. 318, 320.

The word "liberty," as used in the Constitution of the United States and of the several states, is deemed to embrace the right of a citizen to be free in the employment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purpose above mentioned. *Young v. Commonwealth* (Va.) 45 S. E. 327.

Liberty includes the right to contract as others may, and to take a right away from the class of persons following lawful pursuits is simply depriving such persons of a time-honored right, which the Constitution undertakes to secure to every citizen. *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789. All laws which impair or trammel the rights to contract or to earn a livelihood in any lawful calling or pursue any lawful trade or vocation, which limit one in his choice of a trade or vocation, or confine him to work or live in a specified locality, or restrain his otherwise lawful movements, except such as may be passed in the exercise by the Legislature of the police power, are infringements upon his fundamental rights of liberty. *Marshall & Bruce Co. v. City of Nashville*, 71 S. W. 815, 818, 109 Tenn. 495 (citing *In re Jacobs*), 98 N. Y. 98, 106, 50 Am. Rep. 636.

As individual liberty.

Under a provision of the treaty with the Creek Indian Nation to the effect that in their property rights and liberty they shall never be disturbed, it is held that by the words "rights and liberty" is not meant rights claimed by the Indian nation to the destruction of the rights of the United States, nor a liberty to do every imaginable act unrestrained by law, but that the word "liberty" has regard to individual liberty, and did not confer upon them any rights as a nation. *Caldwell v. State* (Ala.) 1 Stew. & P. 327, 442.

Right to labor.

"Liberty," within the meaning of Const. art. 1, cl. 1, declaring that all men have the right to enjoy life and liberty, and to acquire possession and protect property, includes the right to labor and transact business. *State v. Cadigan*, 50 Atl. 1079, 1081, 73 Vt. 245, 57 L. R. A. 666, 87 Am. St. Rep. 714.

The right to liberty embraces the right of a man to exercise his faculties, and to follow a lawful avocation for the support of his life. There is no proposition more firmly fixed than that it is one of the fundamental rights and privileges of an American citizen to follow and adopt such lawful industrial pursuits not injurious to the community as he may see fit. *City of Helena v. Dwyer*, 42 S. W. 1071, 1072, 64 Ark. 424, 39 L. R. A. 266, 62 Am. St. Rep. 206.

Laws 1895, c. 283, § 1, prohibiting barbers from carrying on their business on Sunday, is within the police powers of the Legislature, and is not void as being in violation of the provision of the Constitution that no person shall be deprived of life, liberty, or property without due process of law. *People v. Havnor*, 11 N. Y. Cr. R. 35, 36, 37 N. Y. Supp. 314.

"Liberty" includes the right to make and enforce contracts, because the right to make and enforce contracts is included in the right to acquire property. Labor is property. To deprive the laborer and employer of this right to contract with one another is to violate Const. art. 2, § 2, providing that no person shall be deprived of liberty or property without due process of law. *Mathews v. People*, 67 N. E. 28, 32, 202 Ill. 389, 63 L. R. A. 73, 95 Am. St. Rep. 241.

Right to deal in options.

"Liberty" and "property," within the meaning of Const. 1870, art. 2, § 2, providing that no person can be deprived without due process of law, includes the right to acquire property, and that means and includes the privilege of contracting and making and enforcing contracts. The right, however, does not preclude the exercise of the police power of the state, and therein Cr. Code, § 130, making it a misdemeanor to purchase options on commodities for future delivery is not in violation of the constitutional provision, as such act is designed to prevent gambling in any commodities. *Booth v. People*, 57 N. E. 798, 799, 186 Ill. 43, 50 L. R. A. 762, 78 Am. St. Rep. 229.

A statute containing prohibitions against options to buy and sell grain or other commodities at a certain time does not invade the liberty granted to every citizen by the United States Constitution, Amend. 14. *Booth v. Illinois*, 22 Sup. Ct. 425, 426, 184 U. S. 425, 46 L. Ed. 623.

Restraint by law implied.

Under our government the only liberty we know anything about is liberty regulated by law. *United States v. Hudson* (U. S.) 65 Fed. 68, 74.

The word "liberty," as used in the fourteenth amendment of the federal Constitution, is freedom from all restraints but such as are imposed by law. In *re Marshall* (U. S.) 102 Fed. 323, 324.

"Liberty," as used in the federal Constitution, guarantying every person liberty and equal protection of the law, etc., means freedom from all restraints but such as are justly imposed by law. *Slaughter House Cases*, 83 U. S. (16 Wall.) 36, 127, 21 L. Ed. 394.

"Liberty, as understood in this country, is not license, but liberty regulated by law. The personal property of every man is subject to such reasonable regulations as in the wisdom of the Legislature are considered necessary to promote not only the peace and good order of society, but its well-being. Thus the statute prohibiting Sunday baseball is not a violation of Bill of Rights, § 1, guarantying personal liberty." *State v. Powell*, 50 N. E. 900, 902, 58 Ohio St. 324, 41 L. R. A. 854.

"The words 'liberties of the people' in a judicial sense mean the aggregate political rights and franchises of the people of the state at large. The liberties of the people here and elsewhere are not only essentially subject to the ordinary jurisdiction of the courts, not only unimpaired by them, but are absolutely dependent upon them. The supremacy of original judicial process enters into the liberties of the people, and is essential to them. Order is essential to all liberty, and judicial supremacy is essential to order." In *re Pierce*, 44 Wis. 411, 431, 443 (cited in *State v. Cunningham*, 51 N. W. 724, 735, 81 Wis. 440, 15 L. R. A. 561).

In a broad sense, whatever prevents a man from following a useful calling is an invasion of his liberty. Yet many laws have been passed which, to some extent, have interfered with the right to liberty and property, but their accord with the Constitution has seldom been questioned, and when questioned has been generally sustained. The power of taxation, the right to preserve the public health, to protect the public morals, and to provide for the public safety, may interfere somewhat with both liberty and property, yet proper statutes to effect these ends have never been held to invade the guaranties of the Constitution. Thus Laws 1895, c. 823, § 1, prohibiting barbers from carrying on their business on Sunday, is within the police powers of the Legislature, which include the enactment of legislation adapted to the promotion of health by enforcing the

observance of a day of rest. *People v. Havnor*, 43 N. E. 541, 542, 149 N. Y. 195, 31 L. R. A. 689, 52 Am. St. Rep. 707.

Liberty, the greatest of all rights, is not unrestricted license to act, according to one's own will. It is only freedom from restraint under conditions essential to equal enjoyment of the same right by others. It is then liberty regulated by law. *Kentucky Board of Pharmacy v. Cassidy*, 74 S. W. 730, 732, 25 Ky. Law Rep. 102 (citing *Crowley v. Christensen*, 137 U. S. 86, 89, 11 Sup. Ct. 13, 34 L. Ed. 620).

Right to attend school.

The provision of the fourteenth amendment of the federal Constitution that no state shall deprive any person of life, liberty, or property without due process of law, has no reference to the privilege accorded by the law of the state of attending public schools maintained at the expense of the state, and no person can be said to have been deprived of either life, liberty, or property because denied the right to attend as a pupil at school, however obviously insufficient and untenable be the ground upon which the exclusion is put. *Ward v. Flood*, 48 Cal. 36, 50, 17 Am. Rep. 405.

Right to keep secret books and papers.

Under Const. art. 1, § 6, providing that no person shall be deprived of life, liberty, or property without due process of law, the word "liberty" includes liberty of action, and embraces the right to keep secret one's books and papers, his business methods, and his knowledge of his own affairs. Organized society, however, requires some sacrifice of personal liberty of its members, and the Constitution, which organized the state government, makes liberty subject to due process of law. The anti-monopoly act (Laws 1890, c. 690), authorizing the court to appoint a referee to take testimony on the petition of the attorney general preparatory to action by him for violation of said law, would not be infringing upon the personal liberty of the person to be examined without due process of law. There must be reasonable protection against danger of abuse. No general inquiry into private affairs should be allowed. The testimony must be material, and his vested rights should not be interfered with. In *re Davies*, 61 N. E. 118, 122, 168 N. Y. 89, 56 L. R. A. 855.

Right to transfer property.

The right to sell or transfer one's property is as much an inalienable right as that of enjoyment of property free from unnecessary restrictions. *Bell v. Gaynor*, 36 N. Y. Supp. 122, 123, 14 Misc. Rep. 334.

An act making it a misdemeanor for any person who sells food to give away there-with as a part of the transaction of sale

any other thing as a premium, gift, etc., interferes with a person's liberty. *People v. Gillson*, 17 N. E. 343, 345, 100 N. Y. 389, 4 Am. St. Rep. 465.

LIBERTY OF THE GLOBE.

A marine policy providing that the vessel may have the "liberty of the globe" means that she may go to any part of the world. *Eyre v. Marine Ins. Co. (Pa.)* 6 Whart. 247, 254.

LIBERTY OF A PORT.

"Liberty of a port," in marine insurance, is a power subordinate to the general course of the voyage. It does not necessarily import an intention to trade. It may, and ordinarily is, granted for other and different purposes. It is not an assurance or intimation to the underwriters that the assured looks to the port of privilege, under any circumstances in the contemplation of the parties, as that at which the voyage was to terminate. The knowledge of the nature of the cargo is not to be imputed to underwriters because they gave the assured the liberty of a certain port, which conferred the license to trade there. *Allegre's Adm'r's v. Maryland Ins. Co. (Md.)* 8 Gill & J. 190, 200, 29 Am. Dec. 536.

LIBERTY OF SPEECH AND THE PRESS.

Judge Cooley in speaking of the constitutional provisions relating to liberty of speech and of the press, says: "We understand 'liberty of speech and of the press' to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords." *Cooper v. People*, 22 Pac. 790-798, 13 Colo. 337, 6 L. R. A. 430; *State ex rel. Crow v. Shepherd*, 76 S. W. 79-91, 177 Mo. 205.

"Liberty of the press," as used in the provision of the federal Constitution guarantying the liberty of the press, etc., means a right in the conductor of a newspaper to print whatever he chooses without any previous license, but subject to be held responsible therefor to exactly the same extent that any one else would be responsible for the publication. *Sweeney v. Baker*, 13 W. Va. 158, 182, 31 Am. Rep. 757; *Negley v. Farrow*, 60 Md. 158, 175, 45 Am. Rep. 715; *Jones v. Townsend's Adm'r's*, 21 Fla. 431, 450, 58 Am. Rep. 676; *Upton v. Hume*, 33 Pac. 810, 812, 24 Or. 420, 21 L. R. A. 493, 41 Am. St. Rep. 863; *Fitzpatrick v. Daily States Pub. Co.*, 20 South. 173, 179, 48 La. Ann. 1116; *Commonwealth v. Buckingham (Mass.)* Thacher, Cr. Cas. 29, 39.

The liberty of the press was said by Blackstone to consist "in laying no previous restraints upon publication, and not in freedom from censure for a criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public. To forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity." *Morton v. State*, 3 Tex. App. 510, 516 (citing 4 Bl. Comm., side p. 152).

"Liberty of the press," as used in Const. art. 16, which declares that the "liberty of the press is essential to the security of freedom in a state; it ought not therefore to be restrained in this commonwealth"—is used for the purpose of preventing all such restraints on publications as had previously been practiced by other governments, and in this country, before the adoption of this Constitution, to stifle the efforts of patriots towards enlightening their fellow subjects on their rights and the duties of rulers. It does not affect the right to prosecute for the abuse of such liberty. *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 313, 15 Am. Dec. 214.

By the provisions of the federal and state Constitutions, guarantying the "freedom of the press," it was simply intended to secure to the conductors of the press the same rights and immunities as are enjoyed by the public at large. The citizen has the right to speak the truth in reference to the acts of government, public officials, or individuals. The press is guarantied the same right, but no greater right. The citizen has the right to criticise the acts of the government, provided it is with a good motive of correcting what he believes to be existing evils, and of bringing about a more efficient or honest administration of government. For a like purpose and like motive he may criticise the acts of public officials, and for the honest purpose of better subserving the public interests he may criticise the fitness and qualifications of candidates for office, not only in respect to their ability, fidelity, and experience, but in respect to their personal habits. The press has precisely the same rights, but no more. The citizen may, in what he honestly believes to be in the interest of morals and good order, and the suppression of immorality and disorder, criticise the acts of other individuals; so may the press. *Riley v. Lee*, 11 S. W. 713, 714, 88 Ky. 603, 21 Am. St. Rep. 358.

In its broadest sense, "freedom of the press" includes not only exemption from censorship, but security against laws enacted by the legislative department of the government, or measures resorted to by either of the branches for the purpose of stifling just

criticism or muzzling public opinion. It will not apply to a contract for the sale of a newspaper, whereby it was agreed that the seller would not edit, print, or conduct a newspaper, or be connected with one in the state, without consent of the purchaser. *Cowan v. Fairbrother*, 24 S. E. 212, 215, 118 N. C. 406.

The constitutional provision guarantying the liberties of the speech or the press does not give the right to publish articles inciting a murder. What it does permit is liberty of action to the extent that such liberty does not interfere with or deprive others of an equal right. In the eye of the law each citizen has an equal right to live and act, and to enjoy the benefits of the laws of the state under which he lives. But no one has the right to use the privileges thus conferred in such a way as to injure his fellow citizen, and one who imagines that he has, labors under a serious misconception, not only of the true meaning of the constitutional provision referred to, but of his duty and obligations to his fellow citizens and to the state itself. *People v. Most*, 75 N. Y. Supp. 501, 592, 71 App. Div. 160.

"Freedom of the press" does not mean "a press wholly beyond the reach of the law, for this would be emphatically Pandora's Box, the source of every evil. The founders of our governments were too wise and too just ever to have intended by the freedom of the press a right to circulate falsehood as well as truth, or that the press should be the lawful vehicle of malicious defamation, or an engine for evil and designing men to cherish, for malicious purposes, sedition, irreligion, and impurity. I adopt in this case as perfectly correct the comprehensive and accurate definition of one of the counsel at the bar (General Hamilton), that the liberty of the press consists in the right to publish with impunity truth, with good motives and for justifiable ends, whether it respects government, magistracy, or individuals." *People v. Croswell*, 3 Johns. Cas. 337, 393; *State v. Meyers*, 21 Wkly. Law Bul. 302, 10 Ohio Dec. 238.

Liberty of speech and of the press is guarantied by the supreme law of the land, and will be zealously guarded, preserved, and enforced by the courts. The provisions of the federal and state Constitutions were designed to secure rights of the people and of the press for the public good, and they do not license the utterance of false, slanderous, or libelous matter. Individuals are free to talk, and the press is at liberty to publish, and neither may be restrained by injunction, but they are answerable for the abuse of this privilege in an action for libel and slander under the common law, except where by that law, or by statute enacted in the interest of public policy, the publication is privileged and deemed for the general good,

even though it works a private injury. *Stuart v. Press Pub. Co.*, 82 N. Y. Supp. 401, 408, 83 App. Div. 467.

The "liberty of the press consists in the right to publish with impunity the truth, with good motives and for justifiable ends, whether it respects governments or individuals; the right freely to publish whatever the citizen may please, and to be protected against any responsibility for so doing, except in so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing and reputation, or pecuniary interests, of individuals." *State ex inf. Crow v. Shepherd*, 76 S. W. 79, 91, 177 Mo. 205.

The "liberty of the press," as Chancellor Kent declared in a celebrated case, "consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects governments, magistracy, or individuals." *People v. Croswell* (N. Y.) 3 Johns. Cas. 337, 393. Mr. Justice Story defined the phrase to mean "that every man shall have a right to speak, write, and print his opinion upon any subject whatsoever without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation, and so always that he does not thereby disturb the public peace or attempt to subvert the government." Story, Comm. § 1874. The publisher of an article which instigates revolution and murder, and suggests the persons to be murdered, through the positions occupied, and which denounces those who spare the ministers of public justice as guilty of a crime, is not protected by a provision of the Constitution respecting the liberty of the speech and of the press. *People v. Most*, 64 N. E. 175, 178, 171 N. Y. 423, 58 L. R. A. 509.

The constitutional guaranty of freedom of speech and liberty of the press were designed to secure constitutional immunity for the expression of opinion; but that does not mean unrestrained license, nor does it confer the right upon the editor of the newspapers to write or publish whatever he may choose, no matter how false, malicious, or injurious it may be, without full responsibility for the damage it may cause. *Fitzpatrick v. Daily States Pub. Co.*, 20 South. 173, 179, 48 La. Ann. 1116.

"Freedom of speech," within the meaning of Bill of Rights, § 7, prohibiting any law impairing the freedom of speech, and providing that every person shall be free to say, privately or publicly, whatever he will, being responsible for all abuse of that liberty, does not include the right of publishing or disseminating a paper devoted mainly

to scandal and immoral conduct, and therefore a statute prohibiting such an act is not in violation of the clause. *State v. Van Wye*, 37 S. W. 938, 136 Mo. 227, 58 Am. St. Rep. 627.

The administration of the law of libel is concerned with two important rights, the rights of an individual to reparation for malicious injuries to his reputation, and the rights of the people to liberty of speech and of the press. The two rights are not inconsistent, but interdependent. Freedom of the press is the offspring of law, and its primary meaning excludes all notion of malicious injury. Indeed, any true freedom of the press becomes impossible where malicious injuries are not forbidden and punished, and the strongest guaranty of that freedom lies in the impartial administration of the law, that distinguishes the performance of a public or social duty from the infliction of a malicious injury. *Atwater v. Morning News Co.*, 34 Atl. 865, 868, 67 Conn. 504.

LIBRARY.

See "Family Library"; "Public Libraries."

"The term 'library' may mean either the room or place where books are kept, or the books in the aggregate." So that to say "the library has been plundered" is not equivalent to saying that "the books have been stolen from it." *Carter v. Andrews*, 33 Mass. (16 Pick.) 1, 9.

As charity.

See "Ocharity"; "Public Charity."

LICENSE.

See "Exclusive License"; "Executed License"; "Implied License"; "Mere License"; "Necessary Licenses"; "Simple License."

Any license, see "Any."

"A 'license in respect to real estate' is defined to be an authority to do a particular act or series of acts on another's land without possessing any estate therein." *Emerson v. Bergin*, 18 Pac. 264, 266, 76 Cal. 197 (citing 1 Washb. Real Prop. p. 398); *Eckert v. Peters*, 36 Atl. 491, 493, 55 N. J. Eq. 379 (citing *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. [5 Stew.] 253); *Bundschuh v. Mayer*, 30 N. Y. Supp. 622, 623, 81 Hun, 111; *Babcock v. Utter* (N. Y.) 1 Abb. Dec. 27, 47; *Bagg v. Robinson*, 34 N. Y. Supp. 37, 40, 12 Misc. Rep. 299; *Badger Lumber Co. v. Malone*, 54 Pac. 692, 693, 8 Kan. App. 121; *Baldwin v. Taylor*, 31 Atl. 250, 251, 166 Pa. 507; *Sullivan Timber Co. v.*

City of Mobile (U. S.) 110 Fed. 186, 195; *Moore v. Stetson*, 52 Atl. 767, 769, 96 Me. 197; *Crane v. Patton*, 21 S. W. 466, 57 Ark. 340; *Weldon v. Philadelphia, W. & B. R. Co.* (Del.) 43 Atl. 156, 159, 2 Pennewill, 1 (citing *Cook v. Stearns*, 11 Mass. 533); *Augusta & S. R. Co. v. Augusta S. R. Co.*, 23 S. E. 501, 502, 96 Ga. 562. It is founded on personal confidence, and is not assignable or within the statute of frauds. *Sampson v. Burnside*, 13 N. H. 264, 265; *Dolittle v. Eddy* (N. Y.) 7 Barb. 74, 78 (citing *Mumford v. Whitney* [N. Y.] 15 Wend. 380, 30 Am. Dec. 60); *Wolfe v. Frost* (N. Y.) 4 Sandf. Ch. 72, 73; *Greenwood Lake & P. L. R. Co. v. New York & G. L. R. Co.*, 31 N. E. 874, 875, 134 N. Y. 435; *Hazelton v. Putnam* (Wis.) 3 Pin. 107, 115, 54 Am. Dec. 158. It may be created by parol, and is generally revocable at the will of the licensor. *Wessels v. Colebank*, 51 N. E. 639, 640, 174 Ill. 618; *Jamieson v. Millemann*, 10 N. Y. Super. Ct. (3 Duer) 255, 258; *Cary Hardware Co. v. McCarty*, 50 Pac. 744, 746, 10 Colo. App. 200.

A "license" is described by Jones in his book on Easements as a personal and revocable privilege to do some act or series of acts upon the lands of another without possessing any estate therein, and may be created by parol. It gives immunity to the licensee while acting under the privilege, but confers no vested right by which he can rightfully enjoy it contrary to the will of the grantor. *Great Falls Waterworks Co. v. Great Northern Ry. Co.*, 54 Pac. 963, 966, 21 Mont. 487.

A "license," in the law of real property, is an authority to do an act or a series of acts upon the land of the person granting the license, without, however, conferring on the licensee any estate in the land. It does not create an easement nor give rise to an interest in land, and hence it is not within the statute of frauds, and need not be in writing, although it may be in writing and under seal. The form of the authority, however, does not affect its nature, and a written license, even though under seal, has only the same effect as an oral license. *Price & Baker Co. v. Madison* (S. D.) 95 N. W. 933, 934.

The word "license" means permission or authority, and a license to do any particular thing is a permission or authority to do that thing, and, if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license. *United States v. The James Morrison*, 4 N. Y. Leg. Obs. 333, 338 (citing *Gibbons v. Ogden*, 22 U. S. [9 Wheat.] 193, 6 L. Ed. 23).

A license grants authority to do a particular thing. *United States v. Planter* (U. S.) 27 Fed. Cas. 544, 546.

A license is merely a permission to do an act that, without such permission, would amount to a trespass, and such permission, when relating to real estate, is not equivalent to an easement, nor will the continuous enjoyment of the privilege, conferred for any period of time, cause it to ripen into a tangible interest in the land affected. A parol license to do an act upon the land of the licensor is revocable at the option of the licensor, though it may have been his intention to confer a continuing right, and money is expended by the licensee. *Clifford v. O'Neil*, 42 N. Y. Supp. 607, 609, 12 App. Div. 17.

A license is, technically, an authority to do some one act or a series of acts on the land of another without passing any estate in the land, such as a license to hunt in another's land, or to cut down a certain number of trees. These are held to be revocable when executory, unless a definite time is fixed, but irrevocable when executed. *Davis v. Townsend* (N. Y.) 10 Barb. 333, 343.

License to the use of land is a mere power or authority founded on personal confidence, not assignable, and revocable at pleasure, unless subsidiary to a valid grant, to the beneficial enjoyment of which its exercise is necessary, or unless executed under such circumstances as to warrant the interposition of equity. *Johnson v. Skillman*, 20 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192.

A "license" is defined as an authority to do a private act upon another's land without possessing any estate therein. It may be granted by parol, and needs no consideration to support it. An executed license exists when the licensed act has been done. *Wiseman v. Eastman*, 57 Pac. 398, 404, 21 Wash. 163.

A license is an authority to enter upon the lands of another and do a particular act or series of acts without possessing any interest in the lands. It does not include a right to enter upon lands and to erect and maintain a dam as long as there shall be employment for the water power thus created. *Mumford v. Whitney* (N. Y.) 15 Wend. 380, 390, 30 Am. Dec. 60.

A "license," as relating to occupation or use of real estate, is defined in *Morrill v. Mackman*, 24 Mich. 282, 9 Am. Rep. 124. The court said a license is a permission to do some act or series of acts on the land of the licensor without having any permanent interest in it. It is founded on personal confidence, and is not assignable. It may be given in writing or by parol. It may be with or without consideration, but in either case it is subject to revocation, though constituting a protection to the party acting under it until the revocation takes place. Where nothing beyond a mere license is

contemplated, and no interest in the land is proposed to be created, the statute of frauds has no application, and the observance of no formality is important. But there may also be a license where the understanding of the parties has in view a privilege of a less precarious nature, where something beyond the mere temporary use of the land is promised; where the promise apparently is not founded on personal confidence, but has reference to the ownership and occupancy of other lands, and is made to facilitate the use of those lands in a particular manner and for an indefinite period, and where the right to revoke at any time would be inconsistent with the evident purpose of the permission; wherever, in short, the purpose has been to give an interest in the land, there may be a license, but there will be something more than a license if the proper formalities for the conveyance of the proposed interest have been observed. *Stewart v. Cincinnati, W. & M. Ry. Co.*, 50 N. W. 852, 854, 89 Mich. 315, 17 L. R. A. 539.

A license is a grant of permission or authority, and the word "license" in Rev. St. § 1211, requiring every railroad to apply for a license to operate the road, means a permission or authority to operate the road. *State v. McFetridge*, 56 Wis. 256, 259, 14 N. W. 185.

A simple or voluntary license is merely an authority, without reward or consideration, to do a particular act or series of acts on another's land, without passing any interest or estate in the soil, and need not be in writing. Such license is revocable at the pleasure of the grantor, but its revocation will not be allowed, where the grantee has been induced to expend his means or money towards its enjoyment, without reimbursing him in the amount expended. *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190.

A license, which is an authority given to do some one act or a series of acts on the land of another without possessing any estate in the land, is in its nature countermandable. Still the distinction between a "license executed" and a "license executory" is obvious and well-founded in law. To say that an executed license cannot be revoked is saying only in other words that an act, lawful when it was done by virtue of a license and permission of the owner of the land, cannot be unlawful by a subsequent revocation of such authority. And the license which legalizes the act itself renders lawful also its necessary circumstances. But where it extended further, it would be a right to use the land of another without his consent, which is an interest in the lands. *Cheever v. Pearson*, 33 Mass. (16 Pick.) 266-273.

A license pure and simple is a mere personal privilege extending only to the person

to whom it was given, and it cannot be granted over, even when money has been paid for it. It is revocable at law at pleasure of the licensor. The death of either of the parties will terminate it, and when it affects lands a conveyance of them will revoke it. A license to work a mine simply confers a right of property in the minerals when they have been severed from the freehold, while a lease is an actual interest in the thing demised. *East Jersey Iron Co. v. Wright*, 82 N. J. Eq. (5 Stew.) 248, 253.

As a chattel.

See "Chattel."

Contract distinguished.

See "Contract."

As incapable of countermand.

"A license is a power or authority given to a man to do a lawful act. Unquestionably no countermand can make an act done under it illegal." *Bridges v. Purcell*, 18 N. C. 492, 493.

Easement distinguished.

A license, unlike an easement, is not an interest in land, but only a privilege to go on the land for a specific purpose, and is revocable at the will of the owner, whilst an easement is irrevocable. *Forbes v. Balenseifer*, 74 Ill. 183, 185 (citing Washb. Easem. 23).

A "license" is distinguished from an "easement," which must be created by grant or prescription, in the fact that the latter always implies an interest in the land upon which it is imposed, while a dispensation or license passes no interest, nor does it alter or transfer property in anything, but only makes an action lawful which without it would have been unlawful. *Baldwin v. Taylor*, 31 Atl. 250, 251, 166 Pa. 507.

An "easement" always implies an interest in the land, while the mere "license" does not. The former passes by grant, while the latter is generally unassignable. A right to which premises are subject in favor of adjoining premises, to continue until the servient premise is destroyed in any manner or torn down for the purpose of building, is an easement, and not a license. *Schaeffer v. Miehl*, 34 N. Y. Supp. 693, 13 Misc. Rep. 520.

An easement implies an interest in the land which can only be created by writing, or, constructively its equivalent, prescription. A license may be created by parol. A license is authority to do particular acts or series of acts on another's land without possessing any estate therein, and hence a "license" and "easement" are distinguished by the fact that it requires words of grant to

create an easement or permanent interest in realty; so that a writing signed by N., reciting that for a certain consideration he agrees to allow the W. Co. to pass the muddy water from its ore washers through a stream on his farm so long as the said W. Co. may wish to run or have run said washers, merely gives a license, and not an easement. *Nunnally v. Southern Iron Co.*, 29 S. W. 361, 365, 94 Tenn. 397, 28 L. R. A. 421.

An easement is a liberty, privilege, or advantage in land, without profit, existing distinct from the ownership of the soil; and because it is a permanent interest in another's land, with a right to enter at all times and enjoy it, it must be founded upon an agreement by writing, or upon prescription. But a license is an authority to do a particular act or series of acts upon another's land without possessing any estate therein. It is founded on personal confidence, and is not assignable nor within the statute of frauds. The distinction between a "license" and an "easement" is oftentimes very subtle and difficult to discern. *Cook v. Chicago, B. & Q. R. Co.*, 40 Iowa, 456. The right to use a stairway granted by the owner of the building to the owner of an adjoining building constitutes an easement. *Stokes v. Maxson*, 84 N. W. 949, 950, 113 Iowa, 122, 86 Am. St. Rep. 367; *Rochester Trust & Safe-Deposit Co. v. Rochester & I. R. Co.*, 60 N. Y. Supp. 409, 410, 29 Misc. Rep. 222.

A "license" is defined to be an authority given to do some act or a series of acts on the land of another, without passing any interest in the land, while an "easement" is a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a specific purpose not inconsistent with a general property in the owner—a right which one proprietor has to some profit, benefit, or beneficial use out of, in, or over the estate of another proprietor. It is well settled that an easement must pass by deed or by prescription, while a mere license to do a particular act or series of acts on the lands may be by parol. It is apparent that the distinction between an easement and a parol license cannot always be maintained either in respect to the extent of the privilege or its duration. *Clark v. Glidden*, 15 Atl. 358, 360, 60 Vt. 702.

Washburn, in discussing the distinction between an "easement" and a "license," says that "an easement always implies an interest in the land on or over which it is to be enjoyed. A license carries no such interest. The interest of an easement may be a freehold or a chattel one, according to its duration; an easement must be an interest in or over the soil. It lies not in livery, but in a grant, and a freehold interest in it cannot be created or passed otherwise than by deed." *Nellis v. Munson*, 13 N. Y. St. Rep. 823, 827.

As grant.

See, also, "Grant."

"License and empower," as used in an indenture relating to a patent, reciting that the patentee had agreed to license and empower certain parties to construct and use a certain number of the patented machines within a certain territory, should be construed to mean a grant. The words may be used in contradistinction to "grant," but it by no means follows that they are or must naturally or necessarily be so construed. In a broad and general sense, in common parlance, the words are used indiscriminately. A mere "license," properly so speaking, passes no interest in a thing, but only makes an action lawful which without it would have been unlawful; but if it passes an interest therein, then it is no longer a mere license, but a grant. *Washburn v. Gould* (U. S.) 29 Fed. Cas. 312, 826.

Invitation distinguished.

There is a clear distinction between a "license" and an "invitation" to enter premises, and an equally clear distinction as to the duty of an owner in the two cases. An owner owes to a licensee no duty as to the condition of premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or willfully cause him harm; while to one invited he is under obligation for reasonable security for the purposes of the invitation. It is held that a fireman entering a building in the course of his duty at a fire enters under a license, and not under invitation. *Beehler v. Daniels*, 29 Atl. 6, 7, 18 R. I. 563, 27 L. R. A. 512, 49 Am. St. Rep. 790.

Lease or grant distinguished.

See, also, "Lease"; "Mining Lease."

A written agreement by the owner of coal land, giving another the exclusive right to mine coal thereon for a term of years, is not a mere license, but a lease, which is assignable. *Consolidated Coal Co. v. Peers*, 37 N. E. 937, 938, 150 Ill. 344; *Crane v. Patton*, 21 S. W. 466, 57 Ark. 340; *Malcomson v. Wappoo Mills* (U. S.) 85 Fed. 907, 908.

If a person enter premises under an agreement for a lease, awaiting the execution of that agreement, his entry is one under a license, and if after being in possession of the premises he pays rent for the use of them in accordance with the agreement, which was to be reduced to writing, his relation is that of a tenant at will, and the relation between the parties cannot be other than that of landlord and tenant. *Huntington v. Parkhurst*, 49 N. W. 597, 598, 87 Mich. 38, 24 Am. St. Rep. 146.

"In both legal and popular sense, the term 'license' implies no right of estate con-

veyed or ceded, no binding contract between the parties, but mere leave and liberty, to be enjoyed as matter of indulgence at the will of the party who gives the license." *State v. Holmes*, 38 N. H. 225, 227.

Where the owners of a steamer, desiring to make repairs upon her, contracted with the owners of a marine railway to take the steamer out of the water on the railway for the purpose of repairs and return her to the water when the repairs were finished, and the owners of the steamer were to have the use and occupancy of the railway while the repairs were being made, the relation of the parties was that of licensor and licensee, and not that of lessor and lessee. *Moore v. Stetson*, 52 Atl. 767, 769, 96 Me. 197.

There is a clear distinction between the effect of a "license" to enter lands, uncoupled with an interest, and a "grant." A grant passes some estate of a greater or less degree, must be in writing, and is irrevocable unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act which without it would be unlawful, and, while it remains unrevoked, is a justification for the act which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it. *Jensen v. Hunter* (Cal.) 41 Pac. 14, 17.

A license is an authority to do some act or series of acts on the lands of another, for the benefit of the licensee, without passing any estate in the land; and, in a license to mine on the land of another, the right of property in the minerals, when they are severed from the soil, vests in the licensee. Licenses are, however, frequently granted with terms and conditions, and on considerations which ally them so closely to leases that it is frequently difficult to determine when the border line has been transcended, and whether they are in reality leases instead of licenses. A mere license, while it remains executory, is revocable at the pleasure of the licensor, indivisible, and nonassignable. But a license may confer either a sole or exclusive right, or simply a right in common, and it has been said that if it simply confers a right to take ore or to work in a mine it is not exclusive, and the licensor may himself take ore from the same land or mine, or license others to do so. *Stinson v. Hardy*, 41 Pac. 116, 118, 27 Or. 584.

A resolution by the trustees of a town, which gives a person "liberty to make a roadway and erect a bridge," was held not to be a license, because it is neither tempo-

rary nor personal, as the drawbridge and roadway authorized were substantially fixed and permanent improvements for the benefit of defendant's lands, and assignable therewith. *Trustees of Freeholders and Commonalty of Town of Southampton v. Jessup*, 56 N. E. 538, 539, 162 N. Y. 122.

As a revocable authority.

A bare authority to enter upon the land of another and take gravel is a privilege known in the law as a license, and is revocable at the pleasure of the party making it. It is not assignable, and it is inoperative if the owner of the land conveys the land to another, and is revoked by the death of either the licensor or the licensee. *Lambe v. Manning*, 49 N. E. 509, 512, 171 Ill. 612.

A license is an authority given to do some act or a series of acts on the land of another without possessing an estate therein. *Cook v. Stearns*, 11 Mass. 533; *Mumford v. Whitney* (N. Y.) 15 Wend. 380, 30 Am. Dec. 60. A mere license is revocable, but what is called a "license" is sometimes connected with the interest or grant, and then it cannot be revoked. A deed executed for a valuable consideration, giving the grantee the right to cut and remove timber from lands of the grantor for a certain length of time, is a license coupled with an interest, which is not revocable by the grantor. *McLeod v. Dial*, 37 S. W. 306, 63 Ark. 10.

Patents.

As the term "license" is used in the law of patents, it is an authority to exercise some of the privileges secured by the patent, but which still leaves an interest in the monopoly in the patentee. *Theberath v. Celluloid Mfg. Co.* (C. C.) 3 Fed. 143, 147 (citing *Curtis*, Patents, §§ 212, 213).

A license is a grant of a right to manufacture, use, or sell the thing patented, but does not imply a covenant that the licensor will protect the licensee in the full enjoyment of the monopoly. *McKay v. Smith* (U. S.) 39 Fed. 556, 558.

Same—As a vested right.

The right conferred by a contract to use a patent for making "self-rising flour" is held to be none the less a vested right because therein styled a "license." *Oliver v. Morgan*, 57 Tenn. (10 Heisk.) 322, 324.

A "license," as applied to a patent right, operates only as a waiver of the monopoly as to the licensee, and estops the licensor from exercising its prohibitory powers in derogation of the privileges conferred by him on the licensee. It has been settled that the sole matter conveyed in a license is the right not to be sued. *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* (U. S.) 77 Fed. 288, 290, 25 C. C. A. 267, 35 L. R. A. 728.

LICENSE (Governmental Regulation).

A "license," in its proper sense, is a permit to do business which could not be done without the license. *City of Sonora v. Curtin*, 70 Pac. 674, 675, 137 Cal. 583.

"License" means and is synonymous with "permission" or "authority." *Harmon v. City of Chicago* (Ill.) 26 N. E. 697, 700; *Village of Winooski v. Gokey*, 49 Vt. 282, 286; *San Francisco v. Liverpool & L. & G. Ins. Co.*, 15 Pac. 380, 383, 74 Cal. 113, 7 Am. St. Rep. 425; *Sinnot v. Davenport*, 63 U. S. (22 How.) 227, 240, 16 L. Ed. 243; *Neuman v. State*, 45 N. W. 30, 32, 76 Wis. 112.

"A license is a right granted by some competent authority to do an act which without such authority would be illegal." *Pullman Southern Car Co. v. Nolan* (U. S.) 22 Fed. 276, 279; *North Hudson County Ry. Co. v. City of Hoboken*, 41 N. J. Law (12 Vroom) 71, 75; *State v. Hardy*, 7 Neb. 377, 380; *State v. Hipp*, 38 Ohio St. 199, 226; *Anderson v. Brewster*, 9 N. E. 683, 689, 44 Ohio St. 576; *City of Leavenworth v. Booth*, 15 Kan. 627, 635; *Hackett v. Wilson*, 6 Pac. 652, 657, 12 Or. 25; *City of Savannah v. Charlton*, 36 Ga. 460, 461; *Home Ins. Co. of New York v. City Council of Augusta*, 50 Ga. 530, 537; *Shuman v. City of Ft. Wayne*, 26 N. E. 560, 561, 127 Ind. 109, 11 L. R. A. 378; *Caldwell v. Fulton*, 31 Pa. (7 Casey) 475, 477, 72 Am. Dec. 760; *Metcalfe v. Hart*, 27 Pac. 900, 905, 3 Wyo. 513, 31 Am. St. Rep. 122.

The popular understanding of the word "license" is a permission to do something which without the license would not be allowable, and such is the legal definition. *Youngblood v. Sexton*, 32 Mich. 406, 419, 20 Am. Rep. 654.

A license is essentially a grant of a special privilege to one or more persons, not enjoyed by citizens generally, or, at least, not enjoyed by a class of citizens to which the licensee belonged. *State v. Frame*, 39 Ohio St. 399, 413.

"License," as defined in its general sense by *Okey, J.*, in *State v. Hipp*, 38 Ohio St. 199, is a permission granted by some competent authority to do an act which without such permission would be illegal. In *Chilvers v. People*, 11 Mich. 43, it is said: "The object of a license is to confer a right that does not exist without a license." "The popular understanding of the word 'license' undoubtedly is, says *Cooley, J.*, in *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654, 'a permission to do something which, without a license, would not be allowed.' This is also the legal meaning. In *State v. Frame*, 39 Ohio St. 399, the language employed by *McIlvaine, J.*, is somewhat different, but the definition is in substance the same. He says: 'A license is essentially the granting of a special privilege to one or more persons, not enjoyed by the citizens generally, or, at least

not enjoyed by a class of citizens to which the licensee belongs. A common right is not the creation of a license.' Adler v. Whitbeck, 9 N. E. 672, 674, 44 Ohio St. 539.

A "license" obtained from a state for the sale of commercial fertilizers may be defined as the permission and authority of the state to carry on the particular business to which it refers. There is not in it, as there is not in such licenses generally, any element of transfer or assignability, and the privilege it confers is purely and strictly personal, yet there is no requirement that the licensee shall have any particular qualification. Whoever may have legal capacity to contract is entitled, as a matter of right, to the license on the payment of the prescribed fee. Furman Farm Imp. Co. v. Long, 21 South. 339, 340, 113 Ala. 203.

The "license" of an attorney is a general warrant to appear for any one who may engage his service, and his appearance is always presumed to be at the request of the person he professes to represent. Davis v. Cohn, 70 S. W. 727, 728, 96 Mo. App. 587.

Black on Intoxicating Liquors says: "A license is essentially the granting of a special privilege to one or more persons, not enjoyed by citizens generally, or, at least, not enjoyed by a class of citizens to which the licensee belongs. A common right is not the creature of a license law. In a general sense, a license is permission granted by some competent authority to do an act which without such permission would be illegal. The popular understanding of the word 'license' is undoubtedly a permission to do something which without the license would not be allowable. This is also the legal meaning. The object of a license is to confer a right which does not exist without a license. A license is a privilege granted by the state, usually on payment of a valuable consideration, though this is not essential. To constitute a privilege, the grant must confer authority to do something which without the grant would be illegal, for, if what is to be done under the license is open to every one without it, the grant would be merely idle and nugatory, conferring no privilege whatever. But the thing to be done may be something lawful in itself, and only prohibited for the purposes of the license; that is to say, prohibited in order to compel the taking out of a license. From these definitions, which are the best to be found in the books, it will be apparent that three leading ideas are involved in the definition of a 'license' under the liquor laws: First, it confers a special privilege or franchise upon selected persons to pursue a calling not open to all; second, it legalizes acts which, if done without its protection, would be offenses against the statute; third, it is a privilege granted as a part of a system of police regulations, and herein is distinguishable from 'taxation.'"

Section 117. As used in the liquor laws of this state, a license is a privilege granted by the county court, or other competent authority, to sell liquor. Such is the meaning of the term in Act April 3, 1889, prohibiting the sale of wine except as authorized by the act, and authorizing its sale in any place where the sale of intoxicating liquors is not licensed. Hubman v. State, 33 S. W. 843, 844, 61 Ark. 482; Silver v. City of Sparta, 33 S. E. 31, 33, 107 Ga. 275.

"Licenses are of two characters, one a license for revenue, and the second conferring authority to engage in vocations which need special surveillance." Cooley, Const. Lim. 586, 587. As used in Code 1891, c. 32, §§ 1, 2, requiring corporations chartered under the laws of the state to take out a state license before doing or attempting any business in the state, a "license" is defined to be "essentially the granting of a special privilege to one or more citizens not enjoyed by citizens generally, or, at least, not enjoyed by the class of citizens to which the licensee belongs." State v. Peel Splint Coal Co., 15 S. E. 1000, 1003, 38 W. Va. 802, 17 L. R. A. 385.

A license is a privilege granted by a state, usually on payment of a valuable consideration, though payment is not essential. To constitute a privilege, the grant must confer authority to do something which without the grant would be illegal; for if what is to be done under the license is open to every one without it the grant would be merely idle, and nugatory, conferring no privilege whatever. A license, therefore, implying a privilege, cannot possibly exist with reference to something which is a right free and open to all, as is the right of the citizen to ride and drive over the streets of the city without charge and without toll, provided he does so in a reasonable manner. Therefore a city, under its power to regulate the use of streets, is not impliedly authorized to impose a license fee for the use of streets by the owners of private conveyances, because the use of the streets is a right and not a privilege. City of Chicago v. Collins, 51 N. E. 907, 910, 175 Ill. 445, 49 L. R. A. 408, 67 Am. St. Rep. 224.

A license issued by a court to practice as an attorney and counselor at law in the several courts of the state constitutes no defense to an indictment for practicing law without paying a license, under a statute requiring such license to be paid. A license to practice law, granted by a judge of the court, is not a contract, but a mere naked grant of a privilege without consideration, and which the applicant may or may not avail himself of. Therefore the state may revoke the privilege granted, or may impose such conditions upon its exercise as may be proper or demanded by the public interest.

Simmons v. State, 12 Mo. 268, 269, 271, 49 Am. Dec. 131.

A license may be imposed as to a matter of regulation. It may be levied for income. It may be exacted in order to confer exclusive right and establish monopoly. It may be laid on for the purpose of bringing on prohibition. *State v. Hammond Packing Co.*, 34 South. 368, 371, 110 La. 180 (citing *Cooley on Taxation*).

The term "license" is defined by Webster as: "Authority or liberty given to do or forbear any act; especially a formal permission from the public authorities to perform certain acts; a grant or permission, as a license to preach, practice medicine, sell gunpowder, and the like." A license tax differs from other forms of taxation mainly in that it is imposed as a condition to entering upon the conduct of the business, and the authorities do not uphold the distinction between the power to impose a license tax on those callings which are regarded as altogether right and require no restriction or regulation, and those over which it is necessary to exercise supervision for police and sanitary purposes. *Yount v. Denning*, 35 Pac. 207, 208, 52 Kan. 629.

As a contract.

See "Contract."

As a written document.

A license is the evidence of permission to exercise a trade or calling in consequence of payment of a tax or duty imposed on persons carrying on such trade or calling. *United States v. Cutting* 70 U. S. (3 Wall.) 441, 443, 18 L. Ed. 241.

"License," as used in Rev. St. 1881, § 4425, providing that the county superintendent should license applicants for licenses as teachers for certain terms according to the ratio of correct answers, and other evidences of qualification, given on examination, means the written document by which a permission is conferred. The licensing authorized implies issuing to an applicant the written permission to teach in the public schools. Webster's Dictionary states the secondary meaning of the word "license" to be a written document by which a permission is conferred. *Elmore v. Overton*, 4 N. E. 197, 198, 104 Ind. 548, 54 Am. Rep. 343.

As right to charge fee implied.

"A license is merely a permission to do what is unlawful at common law, or is made so by some statute or ordinance, including the one authorizing or requiring the license. The power to license, as the means of regulating business, implies the power to charge a fee therefor sufficient to defray the expense of issuing the license." *The Laundry License Case* (U. S.) 22 Fed. 701, 703.

A statutory power to municipal corporations to license and regulate sales by transient merchants gives the municipalities the right to impose such a charge as would cover not only the necessary expenses of issuing it, but also the additional labor of officers and other expenses imposed by the public, but nothing beyond this. As said in *City of Burlington v. Putman Ins. Co.*, 31 Iowa, 103, licenses are a part of the police regulations of the city, and should be charged for as such, and only to such extent as may reasonably compensate the city for issuing and enforcing the license, and for the care exercised by the city under its police authority over any particular person licensed. *City of Ottumwa v. Zekind*, 64 N. W. 646, 647, 95 Iowa, 622, 29 L. R. A. 734, 58 Am. St. Rep. 447.

As lawful act.

"License," as used in Sp. Laws, 1870, p. 253, § 178, providing that if any person shall engage in any business, calling, avocation, or occupation in a certain city, which by ordinance is subject to a license tax, without having first obtained such license, he shall be liable to punishment, is not to be construed in its general sense as meaning an official permit to carry on a business or trade or perform other acts which are forbidden by law except to persons obtaining such permit; it may apply to a business or trade or other act which is not forbidden by law. *Hoefling v. City of San Antonio*, 20 S. W. 85, 86, 85 Tex. 228, 16 L. R. A. 608.

"License, appointment, or authority," as used in St. 1864, c. 121, § 1, declaring that in all criminal prosecutions for the illegal sale of liquor, in which the defendant relies for his justification on any license, appointment, or authority, he shall prove the same, and until such proof the presumption shall be that he is not authorized, means the right to sell in any mode permitted or not prohibited by law. *Commonwealth v. Carpenter*, 100 Mass. 204, 206.

As failure to object.

A complaint in an action for injuries averred that defendant city, its servants, etc., did license boys and girls to slide downhill in the city, and that under such license and permission the young men, boys, and youths in said city used the streets to slide downhill with sleds, etc. Held, that the word "license" should be construed as expressing only an omission of the officers to perform their police duty by restraining such youths on the street, and not in the sense that the boys and girls were authorized to use the street in such manner. *Schultz v. City of Milwaukee*, 5 N. W. 342, 346, 49 Wis. 254, 35 Am. Rep. 779.

As a personal trust.

A license to deal in intoxicating liquors is in the nature of a personal trust, and the

applicant for such privilege must be a person able, willing, and competent to carry out such trust, and not delegate it entirely to others, whose character may not be such as the law requires of the licensee. *Watkins v. Grieser*, 66 Pac. 332, 334, 11 Okl. 302.

A license to sell liquor is a personal privilege. It is not assignable by the holder, and at his death it does not go to his representatives. It is not an asset of his estate. *In re Buck's Estate*, 39 Atl. 821, 822, 185 Pa. 57, 64 Am. St. Rep. 818.

Authority to prohibit implied.

"The authority to license implies the power to prohibit, such being the meaning of the term; but it is now the generally received doctrine that in the case of useful employments prohibition cannot be exercised under authority to license. It may be different when the power is exercised upon exhibitions, theaters, and other public amusements and the like. It has been held in this state that under authority to license taxes cannot be imposed." *City of Burlington v. Bumgardner*, 42 Iowa, 673, 674 (citing *City of Burlington v. Putnam Ins. Co.*, 31 Iowa, 102; *State v. Herod*, 29 Iowa, 123).

Where a city charter gives the city power to license and regulate a certain business, it does not include the authority to prohibit it. *Ex parte Sikes*, 15 South. 522, 523, 102 Ala. 173, 24 L. R. A. 774.

As property.

See "Property."

Public duties not imposed.

"License to a person to follow any particular trade or business is not an appointment to office, nor does it confer any of the powers or privileges of a public officer. It is a mere license to follow his calling, whatever it may be. The duties to be performed are not public duties, and the public have no interest in their performance or omission. The object of the license is for the purpose of controlling the business and preventing its being conducted in a manner injurious to the public welfare. Beyond that the public interest is not affected, and, if the licensee neglects to act under his license, the public cannot complain." *People v. Board of Metropolitan Police* (N. Y.) 33 How. Prac. 52, 55; *People v. Acton* (N. Y.) 48 Barb. 524, 527.

As both right and instrument.

The term "license," as used in Act 1894, c. 128, authorizing the attachment and sale of liquor licenses and all rights and interests therein, includes both the certificate of license and the franchise or grant evidenced thereby. *Quinnipac Brewing Co. v. Hackbarth*, 50 Atl. 1023, 1024, 74 Conn. 392.

The term "liquor license" may be used to designate either the permission to sell in-

toxicating liquors or the paper writing which usually, but not necessarily, evidences such license. *Fiegenstan v. Mulligan*, 51 Atl. 191, 193, 63 N. J. Eq. 179.

As a mere receipt.

License means permission or authority; freedom to act; to be left free; allowable; and is so used in a charter giving a city the power to license tavern keepers and certain other occupations. The use of the word in an ordinance passed under the authority of such charter authorizing the city clerk to issue a license to an insurance company means no more than the receipt of payment, stating what it is for. It protects the person, agent, or solicitor against the penalty pronounced against him for not rendering an account or failing to make payment and the corporation from further liability. *Hartford Fire Ins. Co. v. City of Peoria*, 40 N. E. 967, 969, 156 Ill. 420.

Authority to tax implied.

A legislative grant of power to a municipal corporation to license certain companies may imply the power to tax when such is the manifest intention; but, taken disconnected and alone, they are not generally conferred with power. *City of St. Joseph v. Ernst*, 8 S. W. 558, 559, 95 Mo. 360.

In the case of *City of St. Joseph v. Ernst*, 95 Mo. 360, 8 S. W. 558, in construing the power given to the city by ordinance to tax and regulate insurance companies, the court said: "Even the words 'to license' may imply the power to tax when such is the manifest intention; but, taken disconnectedly and alone, they will not generally confer that authority." Hence, where a city was authorized to impose a license tax upon all merchants and their businesses, a city ordinance providing for public weighing, and fixing a scale of prices therefor, is not invalid for the reason that it was for the purpose of raising revenue. *City of St. Charles v. Elsner*, 56 S. W. 291, 293, 155 Mo. 671.

"License and regulate," as used in the charter of the city of San Jose authorizing the common council to license and regulate all and every kind of business authorized by law and transacted and carried on in such city, and to fix the rate of license tax on such business, authorizes licenses for purposes of revenue. It includes the power to raise revenue for municipal purposes by means of license fees as well as to obtain a sum reasonably sufficient to defray the expenses of granting the license. *City of San Jose v. San Jose & S. C. R. Co.*, 53 Cal. 475, 480.

A statutory power to municipal corporations to license and regulate sales by transient merchants does not give the municipalities power to tax such occupation. "The municipality, under the power given it to license, had the right to impose such a charge

as would cover not only the necessary expenses of issuing it, but also the additional labor of officers and other expenses imposed by the public, but nothing beyond this. As said in *City of Burlington v. Putnam Ins. Co.*, 31 Iowa, 102, 103, licenses are a part of the police regulations of the city, and should be charged for as such, and only to such extent as may reasonably compensate the city for issuing and enforcing the license, and for the care exercised by the city under its police authority over any particular person licensed. The amount of the license fee or charge is to be considered in determining whether the exactness is not really one of revenue or prohibition, instead of one of regulation under the police power. Thus the power does not warrant a municipality in imposing a license fee of \$250 per month, or \$25 per day if the license is issued for a shorter period, as it amounts to a prohibitory tax. *City of Ottumwa v. Zekind*, 64 N. W. 622, 646, 95 Iowa, 622, 29 L. R. A. 734, 58 Am. St. Rep. 447.

The "power to license" given to a city does not confer a power to tax, by which we understand to be meant the power to take from the citizen a sum for the support of the government, whether that be national, state, or municipal. *Hoefting v. City of San Antonio*, 20 S. W. 85, 87, 85 Tex. 228, 16 L. R. A. 608.

Tax distinguished.

Mr. Justice Cooley, in *Youngblood v. Sexton*, 32 Mich. 406, 419, 20 Am. Rep. 654, says: "The popular understanding of the word 'license' undoubtedly is a permission to do something which without the license would not be allowable. Within this definition a mere tax on the traffic cannot be a license of the traffic unless the tax confer some right to carry on the traffic which otherwise would not have existed." *People v. Lyng*, 42 N. W. 139, 141, 74 Mich. 579.

A "license," as the term is used in reference to a license for the sale of liquor, "is part of the police regulations of the country, and the fee is rather intended to prevent the indiscriminate opening of such establishments than to raise revenue by taxation." It is in no proper sense a tax. *Burch v. City of Savannah*, 42 Ga. 596, 598.

Temporary permit.

Rev. Code 1831, providing that every person not licensed according to law who shall barter or sell any spirituous liquors in less quantities than a quart at a time, may be fined, etc., includes not only the license granted by the board of county commissioners while in session, but also a permit given by the clerk to retail until the next meeting of the board, though the latter is called a "permit," to distinguish it from a permission giv-

en by the board. *State v. Watson (Ind.)* 5 Blackf. 155.

LICENSE COMMISSIONERS.

License commissioners provided by statute in Massachusetts are public officers, in the performance of whose duties the whole community has an interest. Towns have no authority to direct or control them, but all their powers and duties are prescribed and regulated by statute; and, in case they do not perform their duties, the town has no remedy against them. They are not, in any sense, the agents or servants of the town, and the town, by their election, enters into no contract with them for the payment of their services. *Cook v. City of Springfield*, 68 N. E. 201, 202, 184 Mass. 245.

LICENSE FEE.

As a tax, see, also, "Tax—Taxation."

A "license fee" is a price paid for a franchise or a public right vested in an individual. It is not a tax. *Chilvers v. People*, 11 Mich. 43, 50.

License fee is a fee exacted in order to secure the authority to engage in a business, which, without paying for and obtaining such authority, would be illegal. *Home Ins. Co. v. City Council of Augusta*, 50 Ga. 530, 537.

A "license tax" is one imposed on the privilege of exercising certain callings, professions, or avocations, that, when collected, goes into the state treasury, and when applied to municipal taxation is termed a "license fee." *Levi v. City of Louisville*, 30 S. W. 973, 974, 97 Ky. 394, 28 L. R. A. 480.

A license fee does not lose its character as such, and cease to be sustainable as a police regulation, because called a tax in the legislation which permits it. *Levy v. State*, 68 N. E. 172, 176, 161 Ind. 251.

A license fee is a tax when imposed mainly for the purposes of revenue. *Ward v. Maryland*, 79 U. S. (12 Wall.) 418, 20 L. Ed. 449; *Glasgow v. Rowse*, 43 Mo. 479. In *City of St. Louis v. Spiegel*, 75 Mo. 145, the litigated ordinance showed that it was imposed for purpose of revenue, and upon this this court said: "In this case it is apparent at first blush that the license fee is imposed for the purpose of revenue. That such fee is also imposed for the purpose of regulation does not deprive it of the salient characteristics of a tax." A license is issued under the police power, but the exaction of a license fee with a view to revenue would be the exercise of the power of taxation. *State v. Bengsch*, 70 S. W. 710, 717, 170 Mo. 81.

A license fee, so called, is such a sum as will compensate for the expense of issuing

and recording a license, and, when the license is issued for the purpose of securing public control over the matter licensed, such further sum as will probably be incurred in inspecting and regulating such business. When such a license may lawfully be issued, such a fee may lawfully be charged. *People v. Jarvis*, 46 N. Y. Supp. 596, 597, 19 App. Div. 466.

A license fee is a price paid for a franchise. The power to license, strictly and properly speaking, is simply a power to sell a privilege, and hence is given to the granting of a privilege to do a thing in a case where the privilege might be withheld, or the doing of the thing might lawfully be prohibited entirely. *Per Dickey, J., dissenting. Wiggins Ferry Co. v. City of East St. Louis*, 102 Ill. 560, 576, 577.

A "license fee" or "franchise tax," computed upon the entire capital stock of a company less the assessed value of its property in the state, is a tax upon the general business of the company and upon its extraterritorial property. *Hancock v. Singer Mfg. Co.*, 41 Atl. 846, 852, 62 N. J. Law, 289, 42 L. R. A. 852.

A license fee is a tax sometimes and for some purposes, and sometimes not. The license taxes provided by Pol. Code, §§ 4079, 4080, providing that every person carrying on a steam laundry business shall pay a license of \$15 per quarter, and that every male person engaged in the laundry business, other than the steam laundry business, shall pay a license of \$10 per quarter if engaged in business by himself, but \$25 if employing other persons, are not taxes within Const. art. 12, § 11, requiring assessment and levy of taxes to be uniform. *State v. French*, 41 Pac. 1078, 1079, 17 Mont. 54, 30 L. R. A. 415.

The license fee imposed by a state upon every commercial traveler, agent, drummer, or other person selling or offering to sell any goods, wares, or merchandise of any kind to be delivered at some future time, or carrying samples and offering to sell goods similar to such samples, to be delivered at some future time before carrying on such business, is not a tax upon the business or the importation, the traveling man representing a foreign company, but is the purchase of the privilege of engaging in the occupation of selling goods, wares, and merchandise, such as may be exacted in case of an auctioneer, peddler, saloon keeper, or other trade or profession. *Territory v. Farnsworth*, 5 Pac. 869, 875, 5 Mont. 303.

LICENSE, REGULATE, AND PROHIBIT.

A power given to villages to license, regulate, and prohibit the sale of intoxicating liquors has been held to authorize the licensing of the sale of liquor in one part of such a

village and the prohibition of such sales in other parts. *People v. Cregier*, 28 N. E. 812, 815, 138 Ill. 407.

A power to license, regulate, and prohibit the selling or giving away of spirituous liquors, conferred upon cities by Rev. St. Ill. c. 24, includes the power to prohibit the sale of such liquors in quantities of one gallon or more without first obtaining a license. *Miller v. Ammon*, 12 Sup. Ct. 884, 885, 145 U. S. 421, 36 L. Ed. 759.

LICENSE, REGULATE, AND RESTRAIN.

A municipal power to license, regulate, and restrain the sale of intoxicating liquors authorizes a prohibition of the bartering or giving away of liquors without license. *Vinson v. Town of Monticello*, 19 N. E. 734, 118 Ind. 103.

"License, regulate, and restrain," as used in a municipal charter, granting to the city power to license, regulate, and restrain the sale, etc., of intoxicating liquors, does not include the power to prohibit the manufacture and sale of liquors within the city limits. *Logan City v. Buck*, 2 Pac. 706, 708, 3 Utah, 301.

"License, regulate, and restrain," as used in a grant of property to a municipality to license, regulate, and restrain theatrical amusements, should be construed to include the taxing power to effect this object. *Hodges v. Town of Nashville*, 21 Tenn. (2 Humph.) 61, 67.

LICENSE, REGULATE, AND TAX.

"License, tax, and regulate," as used in city charter authorizing the council to license, tax, and regulate telephone companies and all other branches of business, includes the power to grant such companies the right to erect poles in the streets. *Herschfield v. Rocky Mt. Bell Tel. Co.*, 29 Pac. 883, 884, 12 Mont. 102.

"License, tax, and regulate," as used in a city charter, granting the right to license, tax, and regulate hackney carriages and omnibuses, etc., should not be construed to authorize the city authorities to grant to one person the sole and exclusive right to run omnibuses in the city. *Logan v. Pyne*, 43 Iowa, 524, 526, 22 Am. Rep. 261.

LICENSE TAX.

An ordinance providing that every attorney at law shall pay a license of a specified sum per quarter is a provision for a license tax upon the business of the practice of law. *City of Sonora v. Curtin*, 70 Pac. 674, 675, 137 Cal. 583.

A license tax is one imposed on the privilege of exercising certain callings, profes-

sions, or avocations, that, when collected, goes into the state treasury, and when applied to municipal taxation is termed a "license fee." *Levi v. City of Louisville*, 80 S. W. 973, 974, 97 Ky. 894, 28 L. R. A. 480.

A license tax on foreign corporations is evidently intended as a compensation to the state for the protection which it affords foreign corporations who have an office within its borders for the convenience of its officers, but upon whose property it could impose no tax because not within its jurisdiction. *Commonwealth v. Standard Oil Co.*, 101 Pa. 119, 145, 146.

Act 1894, c. 113, requiring traders in the city of Baltimore to take out separate licenses to carry on business in disconnected buildings, does not violate the Bill of Rights (article 15), providing that every person ought to contribute his proportion of taxes according to his actual worth in property, as a license tax is not a property tax, but a tax "for the good government and benefit of the community." *Rohr v. Gray*, 80 Atl. 632, 633, 80 Md. 274.

"License tax," as used in Laws 1879, c. 3099, § 11, subd. 2, providing that all keepers of keno or pool tables or wheels of fortune shall pay in each county a license tax of \$100 for each table or wheel, means the amount paid for the purpose of procuring a license which is to be issued by the clerk of the circuit court under the seal of the county on filing the receipt of the collector for the necessary amount therefor. *Overby v. State*, 18 Fla. 178, 180.

Const. art. 11, § 11, gives counties and municipalities power to enact police and sanitary regulations. St. 1901, p. 635, is entitled "An act relating to the powers of the boards of supervisors, city councils, and town trustees in their respective counties, cities and towns, and to impose a license tax." The body of the act forbade all license tax for revenue. Held, that the title of the act was not insufficient on the ground that the words "license tax" therein meant a license tax for revenue, which was forbidden by the body of the act, but that those words should be construed as synonymous with license "fee" or "charge." *Ex parte Pfirrmann*, 66 Pac. 205, 207, 134 Cal. 143.

A charge imposed by a city on a telegraph company for the privilege of using the streets, alleys, and public places of the city, which is graduated by the amount of such use, is not a license tax, the amount not being graduated by the amount of the business, and not being a sum fixed for the privilege of doing business, but is more in the nature of a charge for the use of property belonging to the city, which may properly be called rental. *City of St. Louis v. Western Union Tel. Co.*, 13 Sup. Ct. 485, 487, 148 U. S. 92, 37 L. Ed. 380.

As tonnage duty.

See "Tonnage Duty."

LICENSED.

Where a party who applies for a license to sell liquors removes from the state, without intending to return, between the granting or awarding of the license by the court and a payment of the license fee, he is a "party licensed," within Act April 20, 1858, § 7, providing that if a party licensed shall die or remove his license may be transferred by the authorities granting the same, or a license be granted to the successor for the remainder of the year. *In re Umboltz*, 43 Atl. 75, 76, 191 Pa. 177.

LICENSED PILOT.

"Licensed pilot," as used in Laws 1853, c. 469, as amended by Laws 1857, c. 243, declaring that masters of vessels sailing under register from the port of New York should take a licensed pilot, means only those pilots appointed by the board of commissioners established by the act, and does not include a New Jersey pilot. *Brown v. Elwell*, 60 N. Y. 249, 251.

LICENSEE.

As assign, see "Assigna."

"A licensee is one who has transferred to him, in writing or orally, a less or different interest than either the interest in the whole patent, or an undivided part of such whole interest, or an exclusive sectional interest." *Potter v. Holland* (U. S.) 19 Fed. Cas. 1154, 1156.

"Licensee," as used in Pub. St. c. 100, in reference to certain licensees, and providing that no such licensee shall place or maintain any screen, curtain, or other obstruction on the licensed premises, refers to every licensee, and not merely such as have been required by the licensing board to remove a screen, curtain, or other obstruction. *Commonwealth v. Rourke*, 6 N. E. 383, 384, 141 Mass. 321.

A licensee is one who is not the owner of an interest in the patent, but who has by contract acquired a right to make or use or sell machines embodying the invention. *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* (U. S.) 77 Fed. 288, 290, 25 C. C. A. 267, 35 L. R. A. 728.

The term "licensee," as applied to a common carrier, relates more properly to persons entering by express or implied permission on depot grounds or standing trains for purposes other than that of transportation, such as news venders to sell papers, persons receiving or parting with guests, or any one having business with the company. It would seem that no one can become such licensee

on premises of a railroad company or on its train while standing at the station without the consent of the company either express or implied. *Berry v. Missouri Pac. Ry. Co.*, 25 S. W. 229, 246, 124 Mo. 223.

LICENTIATE IN PHARMACY.

"Licentiates in pharmacy," within the meaning of the pharmacy act, shall be such persons not less than eighteen years of age, who shall have had not less than three years' practical experience in pharmacy, and who shall have passed a satisfactory examination touching their competency before the board of examiners. *Cobbey's Ann. St. Neb.* 1903, § 9478.

LICENTIOUSNESS.

"Licentiousness" is defined by Bouvier to be the doing what one pleases without regard to the rights of others, and such is its meaning in the definition of wantonness as the licentious act of one toward the person of another. *State v. Brigman*, 94 N. C. 888, 889; *Welch v. Durand*, 36 Conn. 182, 184, 4 Am. Rep. 55.

"Licentiousness" is defined in 2 Abb. Law Dict. as being equivalent to "lewdness." The word "licentiousness" is so used in an act entitled to protect females from licentiousness. *Holton v. State*, 9 South. 716, 717, 28 Fla. 303.

LIE.

A right of way may be said to "lie" in the county where it exists and is exercisable within the meaning of an act requiring deeds to be acknowledged in the county court where the lands, tenements, or hereditaments lie. *Hays v. Richardson* (Md.) 1 Gill & J. 366, 380.

LIE.

See "Bare Naked Lie"; "Sworn to a Lie."

A charge that another "will swear, lie, cheat, or steal" may import that he lies, swears, cheats, and steals, and, if used in the latter sense, it is to be determined by the jury whether the language is actionable. *Dottarer v. Bushey*, 16 Pa. (4 Harris) 204, 209.

The term "lie" in a statement that one swore to a lie on the oath which he took as a viewer of a proposed alteration of a road cannot be construed as meaning perjury, which in common as well as legal understanding applies to the statement of a fact in the course of some judicial or quasi judicial proceedings, and not to a statement of a promise, or to an oath of office. *Beswick v. Chap-pel*, 47 Ky. (8 B. Mon.) 486.

Telling a bare naked lie, without intention to injure, cheat, or deceive another person, is not ground for an action. Though every deceit comprehends a lie, yet it is more than a lie on account of the view with which it is practiced and the injury which it is calculated to occasion and does occasion to another person. If a man will willfully assert that which he knows to be false, and thereby draws his neighbor into a heavy loss, the law will compel him to pay for it. *Benton v. Pratt* (N. Y.) 2 Wend. 385, 389, 20 Am. Dec. 623.

LIEGE SUBJECT.

Perhaps a person who owes but a temporary allegiance might without impropriety be called a "liege subject." And it is certain that in an indictment of such a person for treason it would be said that he had committed the treason *contra ligeantiae suae debitum*. Among lawyers, however, by the term "liege subject" is generally understood a natural-born subject, and this is the sense in which it is used in a charter reciting that "divers members of the German Lutheran Congregation, his Britannic Majesty's liege and naturalized subjects," etc. *Commonwealth v. Woelper* (Pa.) 3 Serg. & R. 29, 34, 8 Am. Dec. 628.

LIEN.

See "Absolute Lien"; "Admiralty Lien"; "Agricultural Lien"; "Attorney's Lien"; "Building Lien"; "Charging Lien"; "Concurrent Liens"; "Contractor's Lien"; "Equitable Lien"; "Existing Lien"; "Factor's Lien"; "General Lien"; "Judgment Lien"; "Manufacturer's Lien"; "Maritime Lien"; "Mechanic's Lien"; "Municipal Lien"; "Particular Lien"; "Perpetual Lien"; "Possessory Lien"; "Prior Liens"; "Retaining Lien"; "Special Lien"; "Specific Lien"; "Statutory Lien"; "Superior Lien"; "Vendor's Lien."

All other liens, see "All Other."

Any lien, see "Any."

Other lien, see "Other."

At common law a lien implies a power to hold; nothing more. *Marsh v. The Minnie* (U. S.) 16 Fed. Cas. 810, 811.

A lien is a claim which one person has upon the property of another as a security for some debt or charge; a tie that binds property to a debt or claim for its satisfaction. *Mendenhall v. Burnette*, 49 Pac. 93, 96, 58 Kan. 355; *Whiting v. Beebe*, 12 Ark. (7 Eng.) 421, 570; *Atwater v. Manchester Sav. Bank*, 48 N. W. 187, 188, 45 Minn. 341, 12 L. R. A. 741; *In re Byrne* (U. S.) 97 Fed. 762, 764; *In re Laird*, 109 Fed. 550, 555, 48

O. C. A. 538 (quoting *Bouv. Law Dict.*); *Arnold v. Porter*, 29 S. E. 414, 416, 122 N. C. 242; *Central City Brick Co. v. Norfolk & W. R. Co.*, 44 W. Va. 286, 294, 28 S. E. 926, 929; *Stillings v. Gibson*, 63 N. H. 1, 2; *Hamlett v. Tallman*, 30 Ark. 505, 509; *Buchner v. Metz*, 77 Va. 107, 115.

A lien may be defined to be a charge on property for the payment of a debt or duty, and for which it may be sold in discharge of the lien. *Bliss v. Clark*, 39 Ill. 590, 594, 89 Am. Dec. 330; *Thigpen v. Leigh*, 93 N. C. 47, 49; *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 56, 20 Am. Rep. 451; *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307, 313, 23 Am. Dec. 607; *Frowenfeld v. Hastings*, 66 Pac. 178, 179, 134 Cal. 128.

A lien in general may be defined to be a right to retain property until a debt due to the party retaining it has been satisfied. *Houston & T. C. Ry. Co. v. Bremond*, 18 S. W. 448, 449, 66 Tex. 159; *Nell v. Staten*, 54 Tenn. (7 Heisk.) 290; *In re Byrne* (U. S.) 97 Fed. 762, 764; *Ex parte Foster* (U. S.) 9 Fed. Cas. 508, 513; *The Nestor* (U. S.) 18 Fed. Cas. 9, 14; *Crommellin v. New York & H. R. Co.*, 23 N. Y. Super. Ct. (10 Bosw.) 77, 80; *Appeal of Riddle* (Pa.) 7 Atl. 232, 235; *Andrews v. Wilkes*, 7 Miss. (6 How.) 554, 562, 38 Am. Dec. 450; *Alexander v. Pardue*, 30 Ark. 359, 361; *Boorman v. Wisconsin Rotary Engine Co.*, 36 Wis. 207, 211, 212; *Trust v. Pirsson* (N. Y.) 1 Hilt. 292, 296.

"Lien" is a technical term that means a charge upon lands, running with them and incumbering them, in any change of ownership, as mortgages, judgments, ground rents, etc." *Ingles v. Bringhurst* (Pa.) 1 Dall. 341, 345, 1 L. Ed. 167.

A lien is a security given by law to secure the payment of money. It is as much a security as a mortgage, which is given by contract. *Gilchrist v. Helena, H. S. & S. R. Co.* (U. S.) 58 Fed. 708, 711.

The word "lien" includes every case in which personal or real property is charged with the payment of a debt. *Bell v. Hiner*, 44 N. E. 576, 577, 16 Ind. App. 184; *Lafferty v. People's Sav. Bank*, 43 N. W. 34, 39, 76 Mich. 35 (citing *Bidwell v. Whitaker*, 1 Mich. 469, 472).

The word "lien" is of the same origin as the word "liable," and the right of lien expresses the liability of certain property for a certain legal duty, or a right to resort to it in order to enforce the duty. *Appeal of Wood*, 30 Pa. (6 Casey) 274, 277.

"Lien," as used in *Rev. St. Me. c. 125, § 35*, giving to those who perform labor or furnish materials for or on account of any vessel building or undergoing repairs a lien on such vessel for his wages and materials, "was intended to be employed in the same

sense in which it had been previously known and used, and the right or interest which it designates is the same right or interest which laborers and materialmen had previously possessed in foreign vessels." The effect of the act was to give mechanics and materialmen the same lien on domestic vessels as the general admiralty law had previously given foreign vessels. *The Young Mechanic* (U. S.) 30 Fed. Cas. 873, 876.

A lien is defined to be a hold or claim which one has upon the property of another as security for some debt or charge. At common law there could be no lien without possession. It is therein defined as a right in one man to retain that which is in possession and belonging to another. In maritime law liens exist independently of possession, either actual or constructive, and in the courts of equity the term "lien" is used as synonymous with a charge or incumbrance upon the thing where there is neither *jus in re* nor *ad rem*, nor possession of the thing. *In re Byrne* (U. S.) 97 Fed. 762, 764.

A lien is a special right which one has in that of which another has the general property, and to the extent of the lien it is an abridgment of the dominion which the latter has in the thing. From its nature, therefore, a lien can only be created by the consent of the party who has the general property, or by operation of some positive rule; or, in other words, it can only exist where the person having the absolute dominion of the thing has so far voluntarily parted with his right, or it has been taken from him without his consent. *Hayden v. Delay*, 16 Ky. (Litt. Sel. Cas.) 278, 279.

"Lien," as used in *Act 1867, p. 44*, relating to mortgages, embraces any charge or right upon the land by means of which a sale thereof could be compelled. *Wright v. Vickers*, 81 Pa. (31 P. F. Smith) 122, 132.

A lien is a charge imposed upon specific property, by which it is made security for the performance of an act. *Rev. St. Okl. 1903, § 3438*; *Rev. Codes N. D. 1899, § 4673*; *Civ. Code S. D. 1903, § 2017*; *Comp. Laws N. M. 1897, § 2216*; *Code Civ. Proc. Cal. 1903, § 1180*; *Civ. Code Mont. 1895, § 3730*; *Civ. Code Cal. 1903, § 2872*; *Civ. Code Idaho 1901, § 2785*.

A lien is a charge imposed upon specific property, and may be created by the contract of the parties or by operation of law. *Kreling v. Kreling*, 50 Pac. 546, 548, 118 Cal. 413.

Kent's Comm. 642, says a lien is in many cases like an asset at common law, and gives the party detaining the chattel the right to hold it as a pledge or security for a debt. *McCaffry v. Knapp, Stout & Co. Company*, 74 Ill. App. 80, 85.

A lien is a qualified ownership, enforced by detention of the property till the claim resting on it shall be paid and satisfied. *Hamilton v. Buck*, 36 Me. 538, 539.

The word "lien" has a well-known signification. In law it signifies an obligation, tie, or claim annexed to or attaching upon any property, without satisfying which such property cannot be demanded by its owner. In the everyday use of the term, "liens" include mortgages as well as the more restricted interests which one may hold in the property of another, and its usual and accepted meaning is quite as extensive as the definition of it. In the clause of the bankruptcy act providing that nothing in the act shall be construed to annul and destroy or impair any liens, mortgages, or other securities on property there was no intent to limit the provision to common-law liens, which exist only where the party entitled to it has possession of the goods, and which are lost whenever he parts with the possession. This is one of the smallest classes of liens known to our jurisprudence. There are numerous statutory liens and liens by the maritime laws, some of which require possession to accompany them, while others exist independent of possession. Nor is there any distinction between absolute and conditional liens. Although the latter may be defeated by the condition, they are nevertheless liens until the contingency happens. *Storm v. Waddell* (N. Y.) 2 Sandf. Ch. 494, 507, 508.

The word "lien" is a French word, and originally signified a string, tie, or bond, and in the metaphorical sense in which the law uses it it signifies such hold or claim on a thing for the satisfaction of a debt, duty, or demand as that it cannot be taken away until the same be satisfied and paid. It is in this sense properly applicable and originally was only applied to chattels, things movable and easily passed from hand to hand, and with respect to these the claim which one has on them is called a lien, a string which binds them fast, and holds them in his possession. In most instances in which one has such lien, if the debt or duty be not paid on reasonable request and within reasonable time the party himself may sell the chattel so held without the intervention of any judiciary, as in the case of pledges, etc. *Stansbury v. Patent Cloth Mfg. Co.*, 5 N. J. Law (2 South.) 433, 441.

Liens are, so far as the source of their creation is concerned, divisible into common-law, equitable, maritime, and statutory. Originally, by the common law, a lien consisted merely in the right to retain possession, under certain circumstances, of the property of another, until some debt or charge was paid. Equitable liens did not depend upon possession, nor, strictly speaking, did they constitute a *jus in re* or a *jus ad rem*, but more properly constituted a

charge upon the thing. 2 Story, Eq. Jur. § 1215; *Peck v. Jenness*, 48 U. S. (7 How.) 612, 12 L. Ed. 841. At common law, though ordinarily the delivery of possession by the one entitled to a lien destroyed or terminated the lien, yet by contract the parties might agree to continue the lien after delivery, or, in other words, might agree that the property, after delivery, should be subject to be taken and sold if the purchase price or other charge thereon was not paid. *Gregory v. Morris*, 96 U. S. 619, 24 L. Ed. 740. In equity, the lien consisted in the right to subject the property, even though not in possession of the lienor, to the payment of the debt or claim, as a charge upon the property; and a maritime lien is of like nature in this respect. Thus, in the case of *Galena, Dubuque, Dunleith & Minn. Packet Co. v. Rock Island Bridge*, 73 U. S. (6 Wall.) 213, 18 L. Ed. 753, it is said: "A maritime lien, unlike a lien at common law, may in many instances exist without possession of the thing upon which it is asserted, either actually or constructively. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim for damages." *Bouvier* defines a lien to be "a hold or claim which one has upon the property of another as security for some debt or charge." When, therefore, a statute declares that under certain circumstances a person shall have a lien upon a certain class of property for a debt due or charge due, what is meant is that the person shall have the right to hold the property for, or subject it to, the payment of the claim or charge. On the other hand, if the statute declares that the person shall have the right, under the given circumstances, to hold certain property for, or subject it to, the payment of a certain claim or charge, this in like manner creates and confers a lien, although the word "lien" may not be used in the statute. It is the right to hold or subject the property to the payment of the claim or debt that constitutes the lien, and the mere words used in the statute are immaterial so long as the substantial right itself is created. *The Menominee* (U. S.) 38 Fed. 197, 199.

A lien is defined to be a right, by which one person in certain cases possesses or retains property placed in his possession belonging to another until some demand which the former has is satisfied. They are of two kinds: particular or special and general. A particular or special lien is the right to retain the property of another on account of labor bestowed or money expended on the same property, and is established by common law and by express agreement. A general lien is the right to detain property for a general balance due from the owner, and arises by usage of trade, usage of the parties, or by express contract. The lien of a common carrier is a special, and not a gen-

eral, *lien. Crommelin v. New York & H. R. Co.*, 23 N. Y. Super. Ct. (10 Bosw.) 77, 80.

"Lien" is a term of very large and comprehensive signification, but which never imports more than security. At common law it imported a right to retain possession of property until a demand was satisfied. Now it is of more extended signification, and designates all the various charges on land or personalty created by contract or by law. Thus we have in common law the lien of a judgment, the lien on land of a vendor, the lien of a mortgage; and whenever the word is employed it carries with it a right to remove it by satisfying the charge or demand it is intended to secure. *Mobile Building & Loan Ass'n v. Robertson*, 65 Ala. 382, 383.

A lien is the ligament which binds certain property to a certain debt or claim for its payment or satisfaction. It may be created by contract expressly or impliedly, or it may be created by statute. The mechanic's lien on buildings and the land on which they are erected, as we know it, is the creature of statute, and was unknown in common law or in equity. *United States Blowpipe Co. v. Spencer*, 21 S. E. 769, 771, 40 W. Va. 698.

A lien is a right of property, and not a mere matter of procedure. *The J. E. Rumbell*, 13 Sup. Ct. 498, 500, 148 U. S. 1, 37 L. Ed. 345.

The term "lien," in a narrow and more technical sense, signifies the right by which a person in possession of personal property holds and detains it against the owner in satisfaction of a demand; but it has a more extensive meaning, and in common acceptance is understood and used to denote a legal claim or charge on property, either real or personal, for the payment of any debt or duty. Every such claim or charge is still a lien on the property, although the property be not in the possession of him to whom the debt or duty is due. The right of a vendor of land as a security for the purchase money, the right of a judgment creditor against the lands or goods of the judgment debtor given by the law in England and in many of the states of this country, and the right acquired by a creditor under an attachment of property, where the law of attachment exists, are all spoken of and treated as liens in elementary treatises and judicial proceedings, and the term "lien" is so used in the bankruptcy act providing that nothing contained therein shall be taken or construed to invalidate any lien given by the laws of the state, and not inconsistent with other provisions of the act. *Downer v. Brackett*, 21 Vt. 599, 602.

A lien is not a quitclaim, nor is it the subject of a quitclaim. A lien is a certain right or control which one man has in or over the property of another. The lien is

something entirely distinct from the claim. It is in the nature of security for the claim. It may or may not be asserted, and the claim may be enforced with or without its aid. *Rochester Distilling Co. v. O'Brien*, 25 N. Y. Supp. 281, 282, 72 Hun, 462.

The word "lien" is ordinarily used as a noun, and its use as an adjective is unusual; and therefore, though no comma follows the word "lien" in a bond accompanying a mortgage, and providing that any judgment entered by virtue of the bond shall be restricted "in its lien operation and effect" to the premises described in the mortgage, the word "lien" will not be considered an adjective, but the restriction will be held to apply both to the lien of the judgment and to its operation and effect. *In re Abbott's Estate*, 48 Atl. 435, 198 Pa. 493; *Appeal of Huber*, Id.

Assessment.

In courts of equity the term "lien" is used as synonymous with a charge or incumbrance upon a thing where there is neither *jus in re* nor *ad rem*, nor possession of the thing. *Peck v. Jenness*, 48 U. S. (7 How.) 611, 612, 12 L. Ed. 841. In *Bouvier's Law Dictionary*, a lien is defined to be a hold or claim which one has on the property of another as a security for some debt or charge. Thus a paving assessment under the provisions of a charter making such assessment a charge on the property with authority to sell the same for collection of the tax was said to be in substance a lien. *American Nat. Bank v. Northwestern Mut. Life Ins. Co.* (U. S.) 89 Fed. 610, 616, 32 C. C. A. 275.

A "lien," under Code Civ. Proc. § 1180, is a charge imposed on specific property by which it is made security for the performance of an act. A swamp-land assessment on property, imposed thereon by authority of the Legislature, is a lien on the property assessed. *People v. Hulbert*, 12 Pac. 43, 71 Cal. 72.

Attorney's lien.

"Lien," as used in Rev. Code, § 1980, protecting "any lien or claim under contract with" the client, includes attorney's liens arising by operation of law. *Jones v. Groover*, 46 Ga. 568, 575.

As claim or demand.

Where goods sold were returned by the purchaser on the claim that they did not comply with a warranty, while the seller, claiming an unconditional and absolute sale, notified the purchaser that the goods returned would be treated as on a consignment from him, and sold, and the proceeds applied upon the seller's lien for the price, the word "lien" was not used in the technical sense, but was equivalent to "claim" or "de-

mand" for the price. *Stone v. Browning* (N. Y.) 49 Barb. 244, 249.

A lien is a right or control which one man has in or over the property of another. A lien is something distinct from a claim. It is in the nature of security. *Rochester Distilling Co. v. O'Brien* (N. Y.) 72 Hun, 462, 25 N. Y. Supp. 281.

Consent of owner implied.

One making repairs on a hack at the request of a person in possession under a contract of purchase the terms of which were unperformed can acquire no lien on the hack for the cost of such repairs, as against the owner. A lien is a proprietary interest and qualified ownership, and in general can only be created by the owner, or by some person by him authorized. A bailee can give no lien upon the property bailed as against the owner, nor a mortgagor as against the mortgagee. The exceptional case of the innkeeper rests upon the ground that, as he is by law bound to receive a guest and his goods, and might be liable for indictment for not so receiving them, he shall have a lien on such goods as he is bound to receive, whether owned by his guest or not. *Small v. Robinson*, 69 Me. 425, 427, 428, 31 Am. Rep. 299.

Contingent remainder.

"Lien," as used in Gen. St. 1894, § 1603, providing that minors, insane persons, idiots, or persons in captivity, having an estate in or lands sold for taxes, may redeem the same within two years after such disability shall cease, cannot be construed to include contingent remainders. *Minnesota Debiture Co. v. Dean*, 89 N. W. 848, 849, 85 Minn. 473 (citing *Bouv. Law Dict.*).

As contractual lien.

The word "lien," as used in the registry act of 1889, providing when transfers and liens shall take effect as against third parties, has reference exclusively to liens acquired by contract. "Lien" is a generic term, and includes both liens acquired by contract and by operation of law, but the context clearly indicates it is used here in its restricted sense as applicable only to contractual liens. *Donovan v. Simmons*, 22 S. E. 966, 968, 96 Ga. 340.

The word "lien" in the phrase "who may have acquired a transfer or lien binding the defendant's property," applies only to liens acquired by contract, and consequently this act has no application to contests between ordinary common-law judgments. *Griffith v. Posey*, 25 S. E. 515, 98 Ga. 475.

Equitable lien.

An equitable lien is not a *jus in re* or a *jus ad rem*. It is not a property in the thing itself, but a charge upon the thing. It is simply a right to have a demand satis-

fied out of the property of another. *Arnold v. Porter*, 29 S. E. 414, 416, 122 N. C. 242.

A lien is neither a *jus ad rem* nor a *jus in re*, and the lien of a vendor on the land sold is so mere a creature of the court of equity that its existence cannot be safely predicated in any case until established by the decree of the court. *Gilman v. Brown* (U. S.) 10 Fed. Cas. 392.

"Lien," in its enlarged signification, denotes the various charges or debts upon land or personality, whether created by contract or by statute or suit in equity. In courts of equity the term "lien" is used to suit a charge or incumbrance on the thing when there is no possession. *Hines v. Duncan*, 79 Ala. 112, 117, 58 Am. Rep. 580.

The term "lien," as used in courts of equity, is synonymous with a charge or incumbrance upon a thing where there is neither *jus in re* nor *ad rem* nor possession of the thing. The term is applied as well to charges arising by express engagement of the owner of the property as to a duty or intention implied on his part to make the property answerable for the specific debt or engagement. An instrument in the form of a promissory note executed by the trustee of an incorporated society, the members of which held its property in common, and on behalf of such society, in the form in which the trustees were accustomed to do business, and in return for money which went to increase the funds of the society, created an equitable lien on the society's property. *Society of Shakers v. Watson* (U. S.) 68 Fed. 730, 739, 15 C. C. A. 632.

At common law it is almost universally held that a lien can only exist in cases where the party entitled to the lien has either actual or constructive possession of the goods, but this does not hold true in maritime law and in equity, where a lien may exist independently of possession. A lien in equity is not a property in the thing, nor does it constitute a right of action for the thing, but is a charge upon it. *Ex parte Foster* (U. S.) 9 Fed. Cas. 508, 518.

"At common law a lien is the right to retain the possession of personal property until moneys due on or secured by it shall be paid. If the possession is lost, the lien is gone; and, although in equity possession is not necessary to the existence of a lien, yet it is necessary that the property or fund be distinctly traced." *Grinnell v. Suydam*, 5 N. Y. Super. Ct. (3 Sandf.) 132, 135.

So shadowy a right as the claim of the vendor of land to have the unpaid purchase money after default charged upon the land by a court of equity is not a lien within the provisions of the practice act, which precludes the right to attach. It is not a lien acquired by express contract, but is one of a very imperfect character, at least inchoate,

not recognized at all in a court of law where attachments are enforced, but fastened upon the land by a court of equity upon application duly made, even against the apparent intention of the parties. The vendor has no present indefeasible right to have his debt charged upon the land. It is not a present specific lien. He is simply in a condition which may or may not at some future time, depending upon contingencies over which he has no control, enable him to acquire a lien or obtain an appropriation of the proceeds of the land to the payment of the debt through the intervention of a court of equity. It seems to be a misnomer to call this imperfect, contingent, unassignable, personal privilege, before suit brought, a present, subsisting lien in any sense. It is but a possible capacity to acquire a lien at some future day. It is not a lien by which a debtor can be said to be secured within the meaning of those terms as used in the practice act with reference to attachments. *Porter v. Brooks*, 35 Cal. 199, 204, 205.

Execution.

See "Execution (Writ of)."

Inchoate dower interest.

A married woman's "inchoate interest" in the lands of her husband is not a lien suffered or created upon lands, within Rev. St. 1867, § 650, providing that the mechanics' liens therein mentioned "shall relate to the time when the work on certain buildings or repairs began, and to the time when the person furnishing material began to furnish the same, and shall have priority over all liens suffered or created thereafter, except other mechanics' and materialmen's liens, over which there shall be no such priority." *Mark v. Murphy*, 76 Ind. 534, 543.

Interest of plaintiff in garnishment.

The interest which the plaintiff in a garnishee action obtains in the property or credits of the defendant by the due service of a garnishee process upon the person liable to such defendant as a debtor or custodian of his property is a lien created by law within the meaning of the bankrupt act, and an action pending to recover an indebtedness which has been discharged in bankruptcy, having a garnishee action incidental thereto, will survive the discharge and defense on that ground so far as to permit enforcement as to the equitable lien secured in the garnishee action. *Bank of Commerce v. Elliott*, 85 N. W. 417, 421, 109 Wis. 648.

As interest in land.

See "Interest (In Property)."

Judgment or attachment.

A judgment is a lien on land only because the land can be taken in execution and

sold. *Morton v. Grafflin*, 13 Atl. 341, 346, 68 Md. 545.

A judgment is not necessarily a lien. *In re Sedgely Ave.*, 88 Pa. 509, 513.

A judgment cannot be a lien on land without statutory authority therefor. At the present day such a lien is a creature of statute, and, when there is no express statute authorizing a judgment to be a lien on land, such a judgment does not take effect as a lien in the modern sense of the term. *Noe v. Montray*, 48 N. E. 709, 711, 170 Ill. 169.

A judgment, in general, is for the defendant's debt, and involves a personal obligation. The proceedings to obtain it are in personam. Unless restricted in its terms, it is a lien upon all the defendant's property within the jurisdiction, and is without limitation as to the defendant, his heirs or devisees; but judgments recovered upon mechanics' and municipal liens are not themselves liens as of the date of their entry, but simply give effect to the lien of the original debt or lien which they represent, as a means of enforcement and collection. Consequently judgments on municipal liens are not governed by Act March 27, 1827, providing that all judgments shall constitute a lien on the real estate of the defendant for the term of five years, and no judgment shall constitute a lien on such real estate for a longer period than five years unless revived, etc., which statute has been construed to in no manner interfere with the lien of the judgment as to the defendant, his heirs and devisees, but is rather governed by Acts April 16, 1845, and June 16, 1836, providing that municipal and mechanics' liens shall expire at the end of five years unless revived in a certain manner, in which case the lien shall continue for another five years, "and so from one such period to another." *Haddington M. E. Church v. City of Philadelphia*, 108 Pa. 466, 471.

The lien of a judgment or attachment does not extend beyond the interest of the debtor in the land. In strictness, neither a judgment nor an attachment is a lien upon the land. Both are simply charges against land existing by virtue of statute. An attachment does not come up to the exact definition or meaning of a lien, either in the general sense of the common law, or in maritime law, or in that of equity jurisprudence. Usage has perhaps justified the employment of the term "lien" as denoting a charge upon property created by statute. *Shirk v. Thomas*, 22 N. E. 976, 977, 121 Ind. 147, 16 Am. St. Rep. 381.

An attachment in proceedings on mesne process under the laws of Massachusetts made before the commencement of bankruptcy proceedings is a lien or security on property, within the meaning of the United

States bankrupt act of 1841, § 2, which provides that such lien or security shall not be impaired or destroyed by anything contained in that act. *Davenport v. Tilton*, 51 Mass. (10 Metc.) 320, 328.

An attachment of property upon mesne process, if perfected by judgment and levy, is a lien protected by the bankruptcy act. *In re Reed*, 21 Vt. 635, 638, 20 Fed. Cas. 417, 419.

The provision in the insolvent debtor's act that all legal mortgages and bona fide liens shall remain good and valid, as though no surrender by the insolvent had been made, includes the lien of an attaching creditor. *Berryman v. Stern*, 14 Nev. 415, 418.

Mortgage.

Under a statute providing for a laborer's lien on crops, and that it shall be prior to all other liens, it is held that a chattel mortgage executed before the crop is grown is a lien, within the meaning of the statute. *Sitton v. Dubois*, 45 Pac. 303, 304, 14 Wash. 624.

"Lien" is a legal term used generally to signify any incumbrance on property, and is usually employed in connection with privileges, and not with mortgages. *Succession of Benjamin*, 2 South. 187, 188, 39 La. Ann. 612.

In everyday use the term "lien" includes mortgages. *Storm v. Waddell* (N. Y.) 2 Sandf. Ch. 494, 507.

Mortgage distinguished.

A lien is a claim which one person has on the property of another as security for some debt or charge. It is not property in the thing itself, nor does it constitute itself a right of action for the thing, nor can it be construed as a mortgage. A mortgage is made by the person having the property giving the title to another for security. *Russell v. Harkness*, 7 Pac. 865, 866, 4 Utah, 197.

Pledge.

A lien includes every case in which the personal or real property is charged with the payment of the debt. A pledge is a lien. *Jackson v. Kincaid*, 46 Pac. 587, 590, 4 Okl. 554.

By the principles of the common law, a man who has the lawful possession of a thing, and has expended his money or labor upon it at the request of the owner, has a lien upon the property, and a right to retain possession of it until his demand is satisfied. This lien is in the nature of a pledge by the owner of the property to the party with whom he contracts for labor to be bestowed upon it. But it is a personal right, and can only be created by the owner or by his authority. So a subcontractor or any

servant of the person entitled to the lien acquires no interest in the property by reason of the qualified rights or interests of his employer. *Jacobs v. Knapp*, 50 N. H. 71, 77.

Possession required.

A lien on goods existed at common law only where the party had possession. *Newhall v. Vargas*, 15 Me. (3 Shep.) 314, 319, 33 Am. Dec. 617.

The right of lien is a right in one person to retain that which is in his possession, belonging to another, until certain demands of the party in possession are satisfied, and it presupposes that the person making the claim has possession of property belonging to the person against whom the claim is made. *Barry v. Boninger*, 46 Md. 59, 65.

Possession is essential not only to the creation, but also to the continuance, of a lien created by a pledge; and, when a party voluntarily parts with the possession of the property upon which the lien has attached, he is divested of his lien. 2 Kent (4th Ed.) 639. A lien is always forfeited by delivery, but a delivery procured by fraud is not within the rule. *Walcott v. Keith*, 22 N. H. (2 Fost.) 196, 209.

The word "lien" imports that the party is in possession of the thing he claims to detain. It is a right to hold the property on which payment is required to be made, either for the purchase price, or for some care, labor, or attention bestowed upon it. At common law a large class of persons were authorized to claim such right. It included all persons who by their labor or skill imparted an additional value to the goods or chattels in their custody, though it was confined mainly to tradesmen. *Sess. Laws 1878*, p. 102, providing that any person who shall make, alter, repair, or bestow labor on any article of personal property at the request of the owner shall have a lien upon such property so made, altered, or repaired, or upon which labor has been bestowed, for his just and reasonable charges for the labor he has performed and the material he has furnished, does not give a lien to an employé of a farmer on a crop which the employé has harvested, for the lien, under the statute, is of the same nature it formerly was, and the same circumstances must combine to create it. There must be a possession of the thing; otherwise there cannot, without a special agreement to that effect, be any lien. And the term "lien," as used in the statute, means the same thing it did at common law. *McDearmid v. Foster*, 12 Pac. 813, 816, 14 Or. 417.

A lien is generally defined to be a tie, hold, or security upon goods or other things which a man has in his custody, till he is paid what is due him. From this definition it is apparent that there can be no lien where

the property is annihilated, or the possession parted with voluntarily and without fraud. The claim otherwise well founded cannot be supported if there is a particular agreement made and relied on, or where the particular transaction shows that there was no intention that there should be a lien, but some other security is looked to and relied on. *United States v. Barney* (U. S.) 24 Fed. Cas. 1014, 1015.

"Lien" has been well defined to be the right of one man to retain property in his possession, belonging to another, until the demands of the party in possession are satisfied. This right depends on the possession, and, if the possession is parted with, the lien is lost. So, where the owners of a sawmill permitted boards sawed by them at a stipulated price to be removed from their millyard to the bank of a canal, at the distance of half a mile from the mill, they lost their lien, in respect to third persons, although it was expressly stipulated between the parties that the liens should continue notwithstanding the removal. *McFarland v. Wheeler* (N. Y.) 26 Wend. 467, 472; *Oakes v. Moore*, 24 Me. (11 Shep.) 214, 219, 220, 41 Am. Dec. 379.

In 2 Story, Eq. Jur. 1216, a lien is defined to be "a right to retain and possess a thing until some charge upon it is paid and removed." A vendor's lien is lost by an unconditional delivery to the purchaser of the goods which are the subject of the sale. *A. F. Engelhardt Co. v. Benjamin*, 39 N. Y. Supp. 31, 32, 5 App. Div. 475.

A lien is the right which a creditor has of detaining in his possession the goods of his debtor until the debt is paid. To the common-law idea of a lien it is necessary that the creditor should have the actual possession of the goods over which the lien is claimed, and that the debt should have been incurred in respect to the very goods detained. As possession is the foundation of the common-law lien, any parting with the possession operates as a waiver or forfeiture of it. *Fishell v. Morris*, 57 Conn. 547, 551, 18 Atl. 717, 6 L. R. A. 82; *Cincinnati Cooperage Co. v. Woodyard* (Ky.) 54 S. W. 831, 832. See, also, *United States Blowpipe Co. v. Spencer*, 21 S. E. 769, 771, 40 W. Va. 698; *Ex parte Foster* (U. S.) 9 Fed. Cas. 509, 513; *The Nestor* (U. S.) 18 Fed. Cas. 9, 13; *Grinnell v. Suydam*, 5 N. Y. Super. Ct. (3 Sandf.) 132, 135.

The term "lien," as used in *Mills' Ann. St. p. 1607, c. 77*, giving any person who shall bestow labor on any personal property a lien thereon, means the same thing it ever did—the right to hold the thing until the payment of the reasonable charges for making, altering, repairing, or bestowing labor upon it. Possession of the article is essential. *Wenz v. McBride*, 36 Pac. 1105, 1106, 20 Colo. 195.

5 Wds. & P.—15

As right of priority.

In 2 Story, Eq. Jur. § 1252, the word "lien," used in reference to the lien of creditors of a corporation upon its assets, meant simply a right of priority of payment in preference to any of the stockholders in the corporation. *Merchants' Nat. Bank v. Newton Cotton Mills*, 20 S. E. 765, 766, 115 N. C. 507.

An execution bearing the first teste will be satisfied before one of a younger teste, first delivered and levied upon property, but not sold before that of the first teste comes to the hands of the sheriff. The lien of an execution attaches from the date of the teste. When the term "lien" is applied to other subjects in the law, its import is familiarly understood to be a binding or attachment of the thing spoken of, for the benefit of him who is entitled thereto. The lien of the vendor on goods not yet delivered, of a carrier, a factor, or pawnbroker, entitles them, respectively, to a priority over others whose claims are posterior, upon the simple rule of justice that the first lien gives a right to the first satisfaction. The same rule applies to executions. *Green v. Johnson*, 9 N. C. 309, 310, 11 Am. Dec. 763.

Whenever the law gives a creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt. *In re Trim* (U. S.) 24 Fed. Cas. 197, 198.

As property.

See "Property."

Right to sell not implied.

A simple lien is a right to detain chattel property until a debt be paid, but without any right to sell it and apply the proceeds in payment. *First Nat. Bank v. Illinois Trust & Savings Bank* (U. S.) 84 Fed. 34, 38.

As specific lien.

Code Civ. Proc. § 181, provides that no writ of attachment shall be issued until the plaintiff, his agent or attorney, shall file with the clerk an affidavit showing that the defendant is indebted to the plaintiff upon a contract, express or implied, for the payment of money, which is not secured by a mortgage, lien, or pledge upon real or personal property. The word "lien," while having a different legal signification from the words "mortgage" and "pledge," in connection with which it is used, is somewhat analogous to them; and, being used in the connection with them, they serve to explain each other's meaning, and the sense in which they were intended in the act. *Bouvier* defines the word "lien" as follows: "In its most exten-

sive signification, this term includes every case in which real or personal property is charged with the payment of any debt or duty; every such charge being denominated a lien on the property. In a more limited sense, it is defined to be a right of detaining the property of another until some claim is satisfied." Doubtless the word is more comprehensive than either a mortgage or a pledge. It includes these, as it does all similar obligations by which specific property may be subjected to the payment of a particular debt. That this is what was intended by the Legislature in passing the act is manifest from the last sentence of the section referred to, in which it, in substance, says that, if the security has become insufficient by act of defendant or other cause, attachment may issue. It is obvious that the lien here contemplated was a lien on specific property, which subjected it to the payment of a debt. A creditor of a partnership has no such lien on partnership funds as is contemplated in the statute. In one sense, every creditor has a lien on the entire property of his debtor not exempt from execution. He may sue his debtor, and, when he obtains judgment, may subject his property to the payment of the judgment; and this, or something like it, was evidently what the court had in view when holding that a creditor of a partnership had a lien on partnership property as security for his debt. A lien, from its very nature, takes hold of the property, and retains it for the satisfaction of the debt. Not so with the lien of a creditor of a partnership on the property of a firm. While the partnership continues, the partners, or any of them, acting for the partnership or the firm, may sell or dispose of the property. They may assign, mortgage, or alienate it, and, if the property passes out of the possession or ownership of the partnership, the lien which the partners had is lost, with the ownership of the property; and with it is lost the quasi lien or derivative right or equity of a creditor to subject the property to the payment of the partnership debts. *Krueger v. Spelth*, 20 Pac. 664, 667, 8 Mont. 482, 3 L. R. A. 291.

Tangible property implied.

The word "lien," as used in the act of 1872, giving a lien to mechanics, miners, laborers, and others, gives a lien upon such personal property of the employer as is subject to seizure and sale on execution, and hence a chose in action is not subject to a lien in favor of wage claimants. In *re Thompson Glass Co.'s Estate*, 40 Atl. 526, 528, 186 Pa. 383.

When we speak of a lien on personal property, we mean something which can be enforced by keeping in possession or which can be reduced into possession. It must be property visible and tangible. *Fidelity Ins.*,

Trust & Safe Deposit Co. v. Roanoke Iron Co., 81 Fed. 439, 443.

Tax deed.

The statute "for a more equitable appraisal of real property under judicial sales" provides that, for the purpose of appraisal, the officer and the freeholders therein named shall deduct from the real value of the lands and tenements levied on the amount of all liens and incumbrances for taxes or otherwise prior to the lien of the judgment under which the execution is levied, and the sum thereafter remaining shall be the real value of the interest therein of the persons against whom the execution is levied. An incumbrance is defined to be any right to or interest in the land which may subsist in third persons, to the diminution in value of the estate of the tenant, but consistent with the passing of the fee. A lien is defined to be "a hold or claim which one person has upon the property of another as a security for some debt or charge." Tax deeds are not liens or incumbrances, within the meaning of the statute. A party claiming title under a tax deed holds adversely, and for the time being, at least, must rely upon his title. The statute provides that, in cases where there has been a valid assessment, if the tax title fails, the holder may have a lien upon the real estate; but this is a mere possibility, and cannot be considered by the appraisers, as the validity of a tax deed must be determined by the court, and not by appraisers. *Sessions v. Irwin*, 8 Neb. 5, 8, 9.

LIEN AS SECURITY.

A lease on plaintiff's land for one year at a specified rent provided that plaintiff should have a "lien upon the crops as security" for the rent, and that the lessee should market the same. Held, that the words "lien on the crops as security" should not be construed to import a sale or mortgage. *Milliman v. Neber*, 20 Barb. 37, 40.

LIEN IN THE NATURE OF A MORTGAGE.

A lien in the nature of a mortgage is a mortgage itself. It is hard to conceive of a lien, simply, without a means to enforce it. And an agreement that certain notes shall be a lien in the nature of a mortgage on certain land, with a deed of conveyance in fee, constitutes a mortgage, so as to give a preference in regard to a lien over subsequent judgment creditors. *McLanahan v. Reeside* (Pa.) 9 Watts, 508, 512, 36 Am. Dec. 136.

LIEN ON TITLE DEEDS.

A "solicitor's lien on title deeds" was a right to hold the deeds so as to enforce

payment of the amount intended to be secured by their deposit, by embarrassing the debtor, but unaccompanied by any charge upon the estate. *Gardner v. McClure*, 6 Minn. 250, 260 (Gil. 167, 171); (citing *Adams*, Eq. 323).

LIENS AND CLAIMS OF LIENS.

A covenant in a bond to secure plaintiff "from all liens and claim of liens" is not violated by simply permitting the liens to be filed. *Carson Opera House Ass'n v. Miller*, 16 Nev. 327, 329.

LIEU.

See "In Lieu of."

"Lieu lands" is the name applied to lands in a grant of public lands in aid of a railroad, which are to be selected by the company to take the place of lands within the limits of the grant and designated therein, which have been previously appropriated by settlers or for other purposes. The right to such lieu lands attaches to no specific tract until the selection is actually made by the company in the manner prescribed. *Elling v. Thexton*, 16 Pac. 931, 934, 7 Mont. 330.

LIFE.

See "Natural Life."

"Life" is the immediate gift of God, and a right inherited by nature in every individual. *Evans v. People* (N. Y.) 1 Cow. Cr. R. 494, 501.

The Court of Appeals, in *Bertholf v. O'Reilly*, 74 N. Y. 509, 523, 30 Am. Rep. 323, in commenting on the clause in the Bill of Rights, providing that no person shall be deprived of life, liberty, or property without due process of law, says that the "right to life includes the right of the individual to his body in its completeness and without dismemberment." *Wilson v. Commercial Tel. Co.*, 3 N. Y. Supp. 633, 638.

"Life," as used in Const. U. S. Amend. 14, providing that no state shall deprive any person of life, liberty, or property without due process of law, means something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to every one with life for its growth and enjoyment, is prohibited by the provision in

question. Per Justice Field's dissenting opinion. *Munn v. Illinois*, 94 U. S. 113, 142, 24 L. Ed. 77.

LIFE EMPLOYMENT.

Under a contract for life employment, the employer would not be bound to retain in his service one who was unfaithful in the performance of his duties, or who was incapable of performing them, or if the employer had no work which the employé could perform. *Jackson v. Illinois Cent. R. Co.*, 24 South. 874, 875, 76 Miss. 607.

LIFE ESTATE.

An estate for life is defined to be a freehold interest in lands, the duration of which is confined to the life or lives of some particular person or persons, or to the happening or not happening of some uncertain event. 1 Hil. Abr. 38, § 1; 1 Lomax, Dig. 32, § 1. And where a testator provided "that the children who are now living with me hold the home on the home plantation until otherwise provided for," as such children may not be otherwise provided for during their lives, they take an estate for life in such plantation, determinable upon their being otherwise provided for. *Williams v. Ratcliff*, 42 Miss. 145, 154.

An estate for life, even if it be per autre vie, is a freehold. *Jeffers v. Easton, Eldridge & Co.*, 45 Pac. 680, 681, 113 Cal. 345.

"Life estate," as used in 2 Rev. St. p. 541, § 1, providing that all controversies existing between persons which might be the subject of an action at law may be submitted to arbitrators, except those respecting the claim of any person to "any estate in fee or for life" to real estate, means legal titles, and does not include those interests which are called equitable estates and titles. The terms in question originally were only employed to designate legal titles, and when equitable rights afterwards grew up and gained recognition, and were molded into forms analogous to legal estates, these came to be designated as equitable estates in fee or for life. But the original sense has been preserved as the proper and legal force of the words. *Olcott v. Wood*, 14 N. Y. (4 Kern.) 32, 37.

In construing a will devising a life estate in real property to testator's widow if she remain unmarried, and giving her an estate in fee in one-half the property in case she married, it was said that, "while a fee in one-half would properly have been called by the early lawyers an estate of higher dignity than a life estate, in the whole I am not aware of any rule which would enable us to say, as a matter of law, that it was a larger or more favorable provision for the

widow. That is a question of fact which depends upon circumstances, and must always be largely a matter of individual choice." *Long v. Paul*, 17 Atl. 988, 991, 127 Pa. 456, 14 Am. St. Rep. 862.

A life estate in personal property gives the donee a right to consume such articles as cannot be enjoyed without consuming them, and to wear out by use such as cannot be used without wearing out. *Walker v. Pritchard*, 12 N. E. 336, 337, 121 Ill. 221.

A gift of the income of personal property is a gift of a life estate. *Bradbury v. Jackson*, 54 Atl. 1008, 1072, 97 Me. 449 (citing *Sampson v. Randall*, 72 Me. 109).

Estates which may extend during life, but must terminate at death, so long as they exist, are deemed life estates; such are estates during widowhood. *Civ. Code Ga.* 1895, § 3089.

An estate for life may be either for the life of the tenant, or of some other person or persons. *Civ. Code Ga.* 1895, § 3087.

A devise to a wife, to have and hold "forever and during her life," constitutes, in the absence of anything to show a contrary intention on the part of the testator, a life estate. *Sheafe v. Cushing*, 17 N. H. 508, 513.

A devise to testatrix's husband of "the use and occupancy of her real estate during his natural life" was a devise of the land for life, and not of any rents springing out of it, and not of the income of the land, as distinguished from the land. *McClure v. Melendy*, 44 N. H. 469, 471.

A devise to D., to descend to the younger son of his body, and from him to the oldest male heir of said younger son, and, in failure of such issue, to the heirs of B. forever, gives to the younger son an estate for life only, and not an estate in fee. *Dennett v. Dennett*, 43 N. H. 499, 501.

A deed conveying all the right, title, and interest of the grantor for the life of the grantee would convey the land for his life, and would have the same effect as, and no higher than, if the deed had conveyed the land for life; and a reservation in a deed of all the right, title, and interest in and unto the land is the same in legal effect as a reservation of the land itself for life. *Webster v. Webster*, 33 N. H. 18, 22, 66 Am. Dec. 705.

A life estate is a net use and income, not including a diminution of the capital by the diversion of it to the payment of any part of the ordinary expenses of its preservation. *Peirce v. Burroughs*, 58 N. H. 302, 305.

LIFE INSURANCE.

See "Mutual Insurance Company."

An insurance on life is a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another dies within the time limited by the policy. *Cason v. Owens*, 28 S. E. 75, 76, 100 Ga. 142.

"Life insurance is protection given to one person against the damage he may suffer through the death of another." *Fuller v. Metropolitan Life Insurance Co.*, 41 Atl. 4, 10, 70 Conn. 647.

"Life and accident insurance" is a contract whereby one party, for a stipulated consideration, agrees to indemnify another against injuries by accident or death from any cause not excepted in the contract. *State v. Pittsburgh, O., C. & St. L. Ry. Co.*, 67 N. E. 93, 96, 68 Ohio St. 9, 64 L. E. A. 405, 96 Am. St. Rep. 635.

A contract for life insurance is really a contract for insurance for one year in consideration of an advanced premium, with the right of assured to continue it from year to year upon payment of a premium as stipulated. *Mutual Life Ins. Co. v. Girard Life Ins. Co.*, 100 Pa. 172, 180.

Life insurance is a mere business transaction, and cannot be considered as charitable. *State v. Taylor*, 27 Atl. 797, 798, 56 N. J. Law (27 Vroom) 49.

"The insurance of life is a contract whereby the insurer, in consideration of a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made a stipulated sum, or an annuity equivalent, on the death of the person whose life is insured, whenever this shall happen within a certain period, if the insurance be for a limited time." *State ex rel. Beach v. Citizens' Ben. Ass'n*, 6 Mo. App. 163, 169 (quoting 2 Marsh. Ins. 766).

The term "life insurance" is not alone applicable to an insurance for the full term of one's life. It includes an insurance for a term of years, or until the assured shall arrive at a certain age. It is simply an undertaking on the part of the insurer that, either at the death of the insured, whenever that event may occur, or on his death if it shall happen within a specified term or before attaining a certain age, as the case may be, there shall be paid a stipulated sum. In either form it is, strictly speaking, an insurance on the life of the party. *Endowment & Benev. Ass'n v. State*, 10 Pac. 872, 873, 35 Kan. 253.

"Bunyan—an English writer on the subject—defines life insurance to be that in which one party agrees to pay a given sum

on the happening of a particular event consequent on the duration of human life, in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another. The Supreme Court of Massachusetts defines it to be 'a contract by which one party promises to make a certain payment on the destruction or injury of something in which the other party has an interest, whatever may be the terms of payment of the consideration, or the mode of estimating or securing the payment of the sum to be assured in case of loss.' But the origin of life insurance, as we are told by all writers on the subject, is traceable to benevolent motives. The object was to secure to the family of a person who was dependent on a salary or other income, which ceased with his life, a support on the death of the insured, by a small contribution of the annual income; and this, it is apparent, was a laudable and benevolent object. In France, we are told, life insurance was in early times prohibited, on the ground that it might operate as an incentive to those who would benefit by the termination of a life to hasten such termination; but in England it was adopted by the judiciary long before its sanction by Parliament, on an assumption, not unusual with those islanders, of a superiority in popular morals over their continental neighbors." *State ex rel. Atty. Gen. v. Merchants' Mut. Ben. Soc.*, 72 Mo. 146, 159.

A contract commonly called "life assurance," when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for life; the amount of the annuity being calculated in the first instance according to the probable duration of the life, and, when once fixed, it is constant and invariable. A stipulated amount and annuity is to be paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given) the same on the other. This species of insurance in no way resembles a contract of indemnity. *Dalby v. Life Assur. Co.*, 15 C. B. 365, 386.

Life insurance imports a mutual agreement whereby the insurer, in consideration of the payment by the assured of a named sum annually or at certain times, stipulates to pay a larger sum at the death of the assured. The insurer takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with the applicant's own age, course of life, habits, and present physical condition; and the premium exacted from the insured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance. *Ritter v. Mutual Life Ins. Co.*, 18 Sup. Ct. 300, 304, 169 U. S. 139, 42 L. Ed. 693.

Life insurance is not a means of creating wealth, nor yet a contract of mere indemnity, as is that of fire and marine insurance. It is, in its most usual form, simply a mode of putting by money for savings. A sum of money is paid half-yearly or yearly, as the case may be, to a corporation, which receives and invests it carefully, and adds to it its yearly earnings, and, in consideration of such payments, agrees to pay the party insured, or such other person as may be named, a sum certain upon his death. The amount so agreed to be paid is arrived at by taking the age and state of health of the party at whose death the money is to be paid, and estimating how many years he will probably live. *Merchants' & Miners' Transp. Co. v. Borland*, 31 Atl. 272, 273, 53 N. J. Eq. (8 Dick.) 282.

Generally stated, a policy of life insurance may be said to be an agreement by the obligor to pay to a certain person named a sum of money on the death of the insured, subject to the condition that the premiums reserved be paid upon the day that they fall due, and subject, also, to other conditions as to residence and occupation of the assured. On the death of the assured, the other conditions of the policy having been performed, there then exists a demand for a payment of the money; but, until that contingency happens, the obligation of the insurer is not that of a debtor, and, unless the policy has a surrender value, no demand exists against the insurer which is subject to attachment. *Columbia Bank v. Equitable Life Assur. Soc.*, 80 N. Y. Supp. 428, 431, 79 App. Div. 601.

As contract to pay certain sum.

A contract of life insurance is "not a contract of indemnity, as in the case of fire or marine insurance, but a contract to pay a certain sum of money in the event of death." *Scott v. Dickson*, 108 Pa. 6, 14, 56 Am. Rep. 192; *Embler v. Hartford Steam Roller Inspection & Ins. Co.*, 40 N. Y. Supp. 450, 452, 8 App. Div. 186.

In *Olmsted v. Keyes*, 85 N. Y. 593, 598, it was said: "A life insurance is not, like fire insurance, a contract of indemnity, but a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life. * * * Like every other contract to pay money, such a policy is a chose in action, with all the ordinary incidents of every other chose in action." *Algate v. Horse Owners' Mut. Indemnity Ass'n*, 29 N. Y. Supp. 101, 102, 77 Hun, 472.

A life policy is a contract to pay a certain sum at an indefinite time, while a fire policy is a contract to indemnify any cases of loss. *Commonwealth v. American Life Ins. Co.*, 29 Atl. 660, 663, 162 Pa. 586, 42 Am. St. Rep. 844.

Life insurance is an arbitrary agreement to pay a fixed sum upon the happening of an inevitable event, to wit, the death of the insured, without regard to the value of his life, or the loss sustained by the insured. A contract of life insurance is not a contract of indemnity, like the ordinary insurance contract. *Campbell v. Supreme Conclave I. O. Heptasophs*, 49 Atl. 550, 552, 66 N. J. Law, 274, 54 L. R. A. 576.

"Life insurance," so far as the insurance company is concerned, is simply a contract to pay a certain sum of money on the death of the insured in consideration of the payment of the premiums as stipulated. It is not a contract of indemnity. *Central Nat. Bank v. Hume*, 9 Sup. Ct. 41, 44, 128 U. S. 195, 32 L. Ed. 370.

Insurable interest.

Life insurance is a contract by which the insurer, in consideration of an annual payment to be made by the assured, promises to pay to him a certain sum upon the death of the person whose life is insured. To prevent this from being void as a mere wager on the continuance of a life in which the parties have no interest except that created by the wager itself, it is necessary that the assured should have some pecuniary interest in the continuance of the life insured. It is not a contract for an indemnity for actual loss, but a promise to pay a certain sum on the happening of a future event from which loss or detriment may ensue, and if made in good faith for the purpose of providing against possible loss, and not as a cloak for a wager, is sustained by any interest existing at the time the contract was made. *Mutual Life Ins. Co. of New York v. Allen*, 138 Mass. 24, 27, 52 Am. Rep. 245.

Benefit societies.

All benefit societies, whether corporations or mere voluntary associations, are, strictly speaking, insurance organizations, whenever, in consideration of a periodical contribution, they engage to pay the member or his designated beneficiary a benefit upon the happening of a specified contingency. It may be also asserted as a general principle that, wherever or whenever a benefit society paying a benefit to the beneficiaries of its deceased members claims to be exempt from the operation of certain laws applicable to persons or companies doing a life insurance business, it can only safely base such claim on express provisions of its charter or of the statutes exempting similar organizations from such liability. The association may be benevolent and charitable, and only incidentally provide benefits for its members or their beneficiaries; but, nevertheless, when it contracts to pay a certain sum to the appointees of its members upon their decease while in good standing, in consideration of

certain contributions made by such members while living, it is doing a life insurance business. *Citizens' Life Ins. Co. v. Commissioner of Ins.*, 87 N. W. 126, 128, 128 Mich. 85.

The term "life insurance" does not include membership in a beneficial association, the constitution of which merely provides for a beneficiary fund, and for the payment out of the fund of a specified sum to the surviving or designated person or persons qualified to receive it upon the death of a member. In such case there is no contract of insurance between the members. *Swift v. San Francisco Stock & Exchange Board*, 8 Pac. 94, 98, 67 Cal. 567.

The term "life insurance" may be used to characterize a contract entered into by an association agreeing to pay death benefits, according to its rules and by-laws, after the death of a member of the association, to certain designated relatives of the member, or his legal representatives. *Golden Star Fraternity v. Martin*, 35 Atl. 908, 909, 59 N. J. Law, 207.

The ordinary contract of membership of a mutual benefit association is a policy of life insurance, within Gen. Laws, c. 175, so that the insolvency of the estate of a deceased member does not subject the sum insured to the payment of his debts. *Mellows v. Mellows*, 61 N. H. 137, 139.

The contract of the members of a mutual relief association, by which, on the death of one, the sum of \$1 assessed on each survivor is due to an appointee of the deceased, being one of his heirs or a member of his family, is a contract of life insurance. *Smith v. Bullard*, 61 N. H. 381.

LIFE INSURANCE COMPANY.

A life insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or other thing of value to families or representatives of policy holders, continued or conditioned upon continuance or cessation of human life, or involving an insurance, guaranty, contract or pledge for the payment of endowments or annuities. *Rev. St. Tex.* 1895, art. 3096a.

A mutual benefit society is not a life insurance company, within the meaning of that term in the statutes relative to life insurance companies. *Martin v. Stubbings*, 18 N. E. 657, 660, 126 Ill. 387, 9 Am. St. Rep. 620.

LIFE, LIBERTY, AND PROPERTY.

See "Right to Life."

The term "life, liberty, and property" is a representative term, and intended to cover every right to which a member of the

body politic is entitled under the law. This term includes the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrest, and the right freely to buy and sell as others may. Indeed, it embraces all our liberties, personal, civil, and political, including the rights to labor, to contract, to terminate contracts, and to acquire property. *Gillespie v. People*, 58 N. E. 1007, 1009, 188 Ill. 176, 52 L. R. A. 233, 80 Am. St. Rep. 176.

"Life, liberty, and property," as used in Const. art. 2, § 30, declaring that no person shall be deprived of life, liberty, and property without due process of law, are representative terms, and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, and the right to buy and sell as others may; all our liberties, personal, civil, and political; in short, all that makes life worth living. The rights thus guaranteed are something more than the mere privilege of locomotion. The guaranty is the negation of arbitrary power, in every form, which results in a deprivation of a right. *In re Flukes*, 57 S. W. 545, 546, 157 Mo. 125, 51 L. R. A. 176 (quoting 2 Story, Const. [5th Ed.] § 1950); *State v. Julow*, 31 S. W. 781, 782, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443.

LIFE, LIBERTY, AND PURSUIT OF HAPPINESS.

The expression "life, liberty, and the pursuit of happiness," in the Constitution of the United States, is general in its character, and includes many rights which are inherent and inalienable. Many of the rights referred to in this expression are included in the general guaranty of liberty. The happiness here referred to may consist in many things, or depend on many circumstances, but it unquestionably includes the right of the citizen to follow his individual preferences in the choice of an occupation. The right of every man to choose his own occupation, profession, or employment, though not expressly guaranteed by the Constitution, is included in the right to the pursuit of happiness. In *Allgeyer v. State of Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832, it was said: "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such in the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental phrase 'that all men are created free and equal; that they are endowed by their Creator with certain inalienable rights; and that among these are life, liberty, and the pursuit of

happiness.'" It was also said that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of the American citizen. *Ruhrstrat v. People*, 57 N. E. 41, 43, 185 Ill. 133, 49 L. R. A. 181, 76 Am. St. Rep. 30.

LIFE OR LIVES IN BEING.

The common-law rule against perpetuities, that any estate granted or devised must, in order to be valid, vest within a "life or lives in being, and 21 years afterwards," means that the estate will be invalid if by any possibility it will not vest within the time specified; but this rule relates entirely to time, and not to persons, since the testator is allowed to select as a measure of time the lives of any persons in existence, and the 21 years afterwards are not regulated by the birth or the coming of age of any person, for they begin, not with a birth, but with a death, and are 21 years in gross, without regard to the life or to the coming of age of any person whosoever. *McArthur v. Scott*, 5 Sup. Ct. 652, 663, 113 U. S. 340, 28 L. Ed. 1015.

LIFE POLICY.

As chose in action, see "Chose in Action."

A life policy for the benefit of the family of a person procuring it, though not a testament, is in the nature of a testament; and, in construing it, the courts should consider it, as far as possible, as a will, as in doing so they will more clearly approximate the intention of the parties, the destination of whose bounty is involved in such cases. It is not to be supposed that the father, in procuring insurance on his own life for the benefit of his family, intends to benefit himself or his estate. *Supreme Council Catholic Knights of America v. Densford (Ky.)* 56 S. W. 172, 173.

A certificate of membership in a mutual benefit society is not a "life policy," within the meaning of that phrase in the statutes relative to life insurance. *Martin v. Stubblings*, 18 N. E. 657, 660, 126 Ill. 387, 9 Am. St. Rep. 620.

LIFE TABLES.

Life tables are never taken as fixing the expectancy of the life of the particular person, or as forming a legal basis for a calculation, but are accepted as furnishing some evidence to be considered by the jury in connection with all the other pertinent evidence in ascertaining the probable duration of the life in question. Expressions are frequently found that such tables, to be useful as evidence, should not appear to have

been made up with regard to selected lives only, exclusive of the life in question. *Galveston, H. & S. A. Ry. Co. v. Johnson*, 58 S. W. 622, 625, 24 Tex. Civ. App. 180.

LIFTING.

An accident policy exempting the insurer from liability for injury or death caused by lifting should be construed to mean "a voluntary and unnecessary act of the insured—one from which injury might reasonably be anticipated, and which might, in the exercise of reasonable care, have been avoided—and an effort to lift, put forth in an emergency of danger, as, for instance, in the effort to save one's self from being crushed by a descending weight, is not within the exception of the policy." *Reynolds v. Equitable Acc. Ass'n*, 1 N. Y. Supp. 738, 739, 59 Hun, 13.

LIFTS.

"Lifts" is a mining phrase, and means rests or stopping points along the shaft of the mine, at which there were switches on the track, by which the descending cars could be turned off or placed back on the track. *Woodward Iron Co. v. Jones*, 80 Ala. 123, 124.

LIGAN.

"Ligan" is where the goods cast into the sea to lighten the vessel to save her from some danger are so heavy that they sink, and the mariners tie a buoy or something to them so that they may find them again. *Lacaze v. Pennsylvania (Pa.)* 1 Add. 58, 64.

LIGHT.

See "Ancient Lights"; "Servitude of Light."

The word "light," as used in Laws 1897, c. 378, § 1320, providing that in dark hallways and tenements a light shall be maintained, evidently means an artificial light, such as is furnished by a lamp, gas, or electricity. *Bretsch v. Plate*, 81 N. Y. Supp. 868, 869, 82 App. Div. 399.

Lights are those openings which are made rather for the admission of light than to look out of. Civ. Code La. 1900, art. 715.

LIGHT-LADEN.

The expression "light-laden," as used in a charter of a steamship for the fruit trade, guarantying that she should make a certain average speed "light-laden," when construed in reference to the context, means that the vessel will make a certain speed

laden with a fruit cargo or with its equivalent, i. e., when as light-laden as with a fruit cargo, or one not more cumbersome, nor more unfavorable for speed. The vessel was to be deemed light-laden in respect of draft, if her draft did not exceed that of a full fruit cargo, and, in reckoning weight of cargo, the weight of so much ballast as would be needed for a fruit cargo should not be counted. *The Ceres (U. S.)* 61 Fed. 701, 702, 72 Fed. 936, 938, 19 C. C. A. 243.

LIGHTER.

As vessel, see "Vessel."

Barge synonymous, see "Barge."

"Lighter," as used in Rev. St. U. S. 1878, § 4289, providing that the limited liability act shall not apply to the owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation, means a vessel used in assisting to load and unload other vessels. *The Mamie (U. S.)* 5 Fed. 813, 818.

"Lighter," as used in St. 7 & 8, Geo. IV, c. 75, § 37, imposing a penalty on any person other than a freeman of a waterman company, or an apprentice to a freeman or the widow of a freeman, who shall navigate or work "any wherry, lighter, or other craft" within certain prescribed limits, means a boat plying for hire, and carrying passengers or goods, and does not include a steam tug used for towing boats. *Reed v. Ing-ham*, 26 Eng. Law & Eq. 164, 167. A lighter is a craft plying for hire for the carrying of goods. *Regina v. Reed*, 28 Eng. Law & Eq. 133, 135.

LIGHTERAGE.

The ordinary signification of "lighterage" is the price paid for unloading ships by lighters or boats, and is not properly applicable to the unloading of a canal boat at one wharf or pier instead of another. As used in a notice that, if property were taken out of the canal boat elsewhere than at a certain pier, lighterage would be charged, the term means additional compensation beyond the freight and ordinary charges. *Western Transportation Co. v. Hawley (N. Y.)* 1 Daly, 327, 332.

"Lighterage at shipper's risk," as used in a bill of lading, includes all damage or loss while on the lighters without the shipper's fault. *The Seguranca (U. S.)* 68 Fed. 1014, 1016.

LIGHTNING.

A policy of fire insurance providing that it was liable for any loss or damage caused

by lightning to the property insured covers all known effects of electricity coming under the general head of "lightning," and not merely those arising from combustion. The word "lightning," in its ordinary and popular sense, applies to any sudden and violent discharge of electricity occurring in the course of nature between positively and negatively electrified bodies, usually developing in its course the phenomena of light, heat, and disruptive force. *Spensley v. Lancashire Ins. Co.*, 11 N. W. 894, 897, 54 Wis. 433.

In construing a policy against fire by lightning, it was held that the term did not cover the loss of a building which was prostrated and destroyed by lightning, without fire resulting therefrom. The court, however, refused to determine whether lightning is fire, scientifically considered, but based its decision on the fact that the insurance was against fire in the ordinary and popular meaning of the term; that is, actual ignition or burning. *Babcock v. Montgomery County Mut. Ins. Co.*, 4 N. Y. (4 Comst.) 328, 331.

LIGHTNING ROD.

As building, see "Building (In Lien Laws)."

LIGIMATE PORTION.

"Ligimate portion" is a term used in the Spanish law to designate the share of an estate to which an heir is entitled. *Crain v. Crain*, 17 Tex. 80, 90.

LIGIOSO.

"Ligioso" is the Spanish word for "litigious," and "is defined to be that which is in dispute in a suit. The subject of the suit cannot, during its continuance, with certain exceptions pointed out in the law, be sold or transferred." *White v. Gay's Ex'rs*, 1 Tex. 384, 387.

LIKE.

See "Under Like Circumstances"; "Words of Like Import."

As defined by Webster, "like" means equal in quantity, quality, or degree; exactly corresponding; so that "in like manner" means with same force and effect. *Badger v. Daniel*, 79 N. C. 372, 387.

The term "like" means "precisely the same," and differs from the word "similar" in one of its senses, in that it means "identical," and not "resembling." *Commonwealth v. Fountain*, 127 Mass. 452, 455.

As analogous.

Act Cong. Aug. 1, 1888, c. 728, 25 Stat. 357 [U. S. Comp. St. 1901, p. 2517], providing that the practice, pleading, forms, and motives of proceedings in cases arising under the act shall conform as near as may be to the practice, pleadings, forms, and proceedings existing at the time in like cases in courts of record of the state, means "in analogous cases." *In re Rugheimer* (U. S.) 36 Fed. 369, 373.

As in same manner.

The expression "like punishment," in a statute providing that an accessory shall receive like punishment with the principal, imports that he shall be liable to indictment in the same manner as the principal. *Commonwealth v. Andrews*, 2 Mass. 409, 410.

As others.

A city ordinance provided that the outside walls of buildings having trussed roofs, such as churches, public halls, theaters, restaurants, and the like, if more than 16 and less than 25 feet high, shall average at least 17 inches in thickness. Held, that the words "and the like," occurring after the particular buildings or structures mentioned, cannot be interpreted as limiting the buildings having trussed roofs to uses similar to the uses to which churches, public halls, theaters, and restaurants are particularly appropriated, but are meant to give extension to the uses to which buildings having trussed roofs may be particularly applied; and protection to persons properly and lawfully in any such building having trussed roofs, whatever their lawful uses may be, was as much intended by this provision as it was to persons who might be in churches, public halls, theaters, and restaurants. *Diamond State Iron Co. v. Giles* (Del.) 11 Atl. 189, 195, 7 Houst. 557.

As resembling.

Webster defines "like" to mean "having the same, or nearly the same, appearance, qualities, or characteristics; resembling; similar to." Thus the word in a municipal ordinance making it unlawful for any person or persons to sell any malt, hop tea, hop tea tonic, ginger ale, American hop ale, cider, or any other drink of a like nature, no matter by what name it might be called, etc., applies to liquors which are like the specified liquors, in this: that they are liquids; that they are kept in bottles; that they are nonintoxicants; that they contain a mere trace of spirits; that they are put up for the Kansas trade; and, finally, that they are all used as a beverage. *City of Lincoln Center v. Linker*, 53 Pac. 787, 788, 7 Kan. App. 282.

As same.

A shipper's receipt stipulating that goods shall be "delivered in like good condition"

means the same condition as that in which they were received. If in good order when received, they must be delivered in that condition, in order to comply with the contract, while, if broken or damaged when received, the contract is complied with by delivering in the same condition. *Kliff v. Atchison, T. & S. F. R. Co.*, 4 Pac. 401, 403, 32 Kan. 263.

As of same class or kind.

Under a statute declaring it unlawful for any person to keep or exhibit a gaming table commonly called A B C or E O table, or faro bank, or a table of the like kind under any denomination, an indictment, though it does not charge the keeping of one of the enumerated games, must charge a game of the like kind—that is, one of unequal gains—included in the class prohibited. *Huff v. Commonwealth (Va.)* 14 Grat. 648, 650.

The word "like" is defined to mean resembling; having resemblance; similar; or, equal; same in quantity, amount, or extent. Where a statute required that, when a pleading had been adjudged insufficient, a like pleading must be filed, it was clear that the requirement was not that a pleading precisely similar in character should be filed, since such proceeding would have led to an absurdity, but the true meaning of the words "like pleading" is that they refer to a petition, answer, or reply, as the case may be, which has been adjudged insufficient, or, in other words, if a petition, answer or reply has been adjudged insufficient, another petition, answer, or reply must be filed, but it must not be like the petition, answer or reply which has been adjudged insufficient, at least in the sense of resembling it as to its insufficiency. *Mumford v. Keet*, 55 S. W. 271, 274, 154 Mo. 36.

As substantially alike

Saying that one article is like another does not necessarily mean that they are the same in all particulars, but rather the contrary, that is, that they are the same in some particulars, and not in others. *Houghton v. Field*, 56 Mass. (2 Cush.) 141, 145.

"Like," as used in Rev. St. U. S. § 847, providing that for issuing any warrant or writ, and for any other service, the United States commissioners shall receive the same compensation as is allowed to clerks for like services, does not necessarily mean "identical with," but includes those services of the clerks which bear a substantial resemblance to the duty performed by the commissioners. The phrase should receive a reasonable construction. *United States v. Wallace*, 6 Sup. Ct. 408, 409, 116 U. S. 398, 29 L. Ed. 675.

The term "like courts," in the Constitution, providing that writs of error lie to the

Supreme Court from the superior courts of the state, and from the city courts of Atlanta and Savannah, and such other like courts as may be established in other cities, does not mean courts identical in all respects. It is sufficient if the courts established be substantially like the courts of Savannah or Atlanta, or either of them. *Ivey v. State*, 37 S. E. 398, 399, 112 Ga. 175.

LIKE ANIMAL.

Paragraph 377, Act. Oct. 1, 1890, imposing a certain duty per pound upon the hair of goats and other "like animals," cannot be construed to include a sheep, for the sheep, in respect to its fleece, is not a like animal to the goat, but is almost *sui generis*. In that respect it differs wholly from the goat and from almost every other known animal. *Lyon v. Marine (U. S.)* 55 Fed. 964, 967, 5 O. C. A. 359.

LIKE AUTHORITY.

Const. U. S. art. 1, § 8, provides that Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district as may become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the state in which the same shall be used for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. Held to mean the power of exclusive legislation in all cases whatsoever when the lands acquired by the United States within the limits of a state have upon them forts, arsenals, or other public buildings erected for the use of the general government. Such buildings, with their appurtenances, as instrumentalities for the execution of its powers, are free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed, but, when not used as such instrumentalities, the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits. *Ft. Leavenworth R. Co. v. Lowe*, 5 Sup. Ct. 995, 997, 114 U. S. 525, 29 L. Ed. 264.

LIKE CHARACTER.

"Like character," within the meaning of Code, § 4465, providing that any person who shall preside and deal at any faro table, or use any E O or A B C table or roulette table, or any other table of like character, for the purpose of playing and betting at the same, shall be guilty, etc., means that character common to all the instruments or tables described, to wit, a device decided by chance, the result upon which bystanders might play and bet. *Brown v. State*, 40 Ga. 689, 693.

LIKE CRIMES.

Gen. St. c. 33, art. 12, § 15, providing that any person convicted of robbery, counterfeiting, or perjury, or other like crimes, should forfeit his right of suffrage and right to hold office, embraces all crimes, besides those specifically mentioned, which are inconsistent with the common principles of honesty or humanity, and convict the perpetrator of moral turpitude, such as grand larceny. *Anderson v. Winfree*, 4 S. W. 351-352, 85 Ky. 597.

LIKE EFFECT.

A statute requiring that a certain notice be given in a specified form, or to the like effect, was complied with by a notice which gave all the information which the Legislature intended to be given by the form recommended. *Regina v. Harwich*, 1 El. & Bl. 617, 618.

LIKE INSTRUMENT.

A note is not a conveyance, mortgage, or like formal instrument in writing, within the Acts of 1887, which provide that such instruments executed by a married woman shall be effectual to convey or charge her separate estate when the intention to do so is declared in them. *Singluff v. Tindal*, 10 S. E. 137, 138, 40 S. C. 504.

LIKE MANNER.

Code, p. 1347, rule 13, provides that in all cases of claims, where the burden of proof rests with the plaintiff in execution, he is entitled to the conclusion, but if the claimant introduces no evidence he shall have the conclusion, and in cases of illegality the plaintiff in execution shall "in like manner" conclude. Held, that the words "in like manner" do not mean that in illegality cases the defendant shall have the conclusion where he assumes the burden of proof. The words should be construed to mean that the defendant on the trial of an affidavit of illegality is not entitled to assume the burden of proof by admitting the apparent regularity of the fl. fa. and levy, and alleging that the judgment is void for want of service. *Bertody v. Ison*, 69 Ga. 317, 318.

"In like manner," as used in Laws 1888, providing that comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person claimed on a trial to have made or executed the disputed instrument or writing shall be permitted and submitted to the court and jury "in like manner," refers to the manner provided in the prior execution to which it was an addition, requiring that the submission of a writing to a jury must be in connection with

the testimony of witnesses in regard to the validity or authorship of the various handwritings, and that, independent of the examination of witnesses, such handwriting cannot be submitted to the jury for the purpose of arbitrary comparison by them. *People v. Pinckney*, 22 N. Y. Supp. 118, 121, 67 Hun, 428.

By the words "in like manner" in a will giving certain leasehold houses in trust for A. absolutely for her separate use, and leasehold houses for B. for her separate use for her life, and after her decease for her children; if none, to fall into the residue; and giving the residue in trust for A. and B., to be divided between them share and share alike, and to be paid and applied in like manner for their use and benefit as the rents and profits of the leasehold premises therebefore settled upon them, was meant for their separate use. *Shanley v. Baker*, 4 Ves. 732, 734.

Act 1844, Bat. Rev. c. 43, § 10, provides that in actions brought upon official bonds of administrators, "when it may be necessary for the plaintiff to prove any default of the principal obligors, any receipt or acknowledgment of such obligors, or any other matter or thing which by law would be admissible and competent for or toward proving the same as against him, shall 'in like manner' be admissible and competent against all or any of his sureties who may be defendants with or without him in said action." The only natural and reasonable construction of this act is that, when the evidence was conclusive against the principal prior to the act, it became in like manner conclusive against the sureties after the act. A judgment against the administrator was therefore conclusive against the surety, both of the debt and assets sufficient to pay it. *Brown v. Pike*, 74 N. C. 531, 534.

In a statute providing that a written petition in summary proceedings shall be verified in like manner as a verified complaint, "in like manner" means in like form as pleadings are verified. "Manner" means method of procedure, habit, or custom. *Stuyvesant Real Estate Co. v. Sherman*, 81 N. Y. Supp. 642, 643, 40 Misc. Rep. 205.

Where a testator, after giving an estate to one son, and to his issue male after his death, directed that in default of such issue the estate should go "in like manner" to another son, it was held that the words "in like manner" imported a gift of the same estate with respect to the second son as was previously given to the first. *Lewis v. Puxley*, 16 Mees. & W. 733, 743.

LIKE NATURE.

In St. 5 & 6 Wm. IV, c. 107, § 171, providing that the provision of the statute shall

not extend to articles, matters, or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only to "single parcels unconnected with parcels of a 'like nature' which may be sent upon the railway at the same time," the expression "like nature" refers only to the quality or kind of parcels. *Parker v. Great Western R. R. Co.*, 6 El. & Bl. 77, 105.

LIKE OCCUPATIONS.

"Like occupations," as used in a statute authorizing the incorporation of cities and villages, and providing that the city council in cities shall have authority to license hackmen, draymen, omnibus drivers, cabmen, expressmen, and all others pursuing "like occupations," includes street railroads. *Allerton v. City of Chicago* (U. S.) 6 Fed. 555.

LIKE PROCEEDINGS.

"Like proceedings," as used in *Detroit City Charter*, § 24, providing, that "all the proceedings of the recorders' court may be removed to the Supreme Court by writ of error, or other process, in the same manner that like proceedings may be removed from the circuit courts of the state," refers as well to character as to details, and does not authorize the removing of convictions for offenses against city ordinances. *People v. Jackson*, 8 Mich. 110, 112.

Where a statute in one section provides that a certain proceeding shall not be carried further than the examination on oath of the party sought to be charged, and in another section, that "like" proceedings may be had against another, the word "like" necessarily limits the latter proceedings to the examination under oath of the party against whom the proceedings are instituted. *In re Stuart's Estate*, 67 Mo. App. 61, 65.

LIKE PROPORTION.

"In like proportion," as used in *Elliott's Supp.* § 1193, providing that the cost of repairs shall be apportioned on the land adjudged benefited by the construction of the drain "in like proportion" as benefits were assessed against the land for the construction of the work, does not mean that the apportionment to any tract of land for the repairs and improvement should be based upon the exact portion of the original cost of construction with which that tract was originally assessed, without reference to the benefits accruing to the land from the present improvement; but that the assessments for repairs should be assessed in proportion to the benefits received therefrom. *Parke County Coal Co. v. Campbell*, 89 N.

E. 149, 150, 140 Ind. 28; *Morrow v. Greeting*, 41 N. E. 848, 15 Ind. App. 358.

LIKE PURPOSE.

A by-law of the Associated Press of New York, providing that "no member of this association shall receive or publish the regular news dispatches of any other news association covering a like territory, and organized for a 'like purpose' with this association," should be construed to include an association which obtains news directly through its own agents from various parts of the world, though the Associated Press of New York obtains news from its own agents only in New York, and from other parts of the world through contracts with other agents. *Matthews v. Associated Press*, 32 N. E. 981, 136 N. Y. 333, 32 Am. St. Rep. 741.

LIKE SERVICE AND PROOF.

"Like service and proof," as used in *Gen. St.* 1878, c. 68, § 210, allowing judgment on default to be entered in certain actions on like service and proof as in an action arising on contract for the payment of money only, means the personal service of the summons and proof of such service and of defendant's default. *Exley v. Berryhill*, 33 N. W. 567, 568, 37 Minn. 182.

LIKE SUM.

"Like sum," as used in *Rev. St.* 1874, p. 510, §§ 52, 53, prohibiting all railroads from obstructing public roads or highways by stopping trains or leaving cars standing on crossings, except for the purpose of receiving passengers, and providing that every conductor or engineer who shall violate such act shall forfeit a sum not less than \$10 nor more than \$100, and the corporation on whose road the offense is committed shall be liable for a "like sum," means a sum not less than \$10 nor more than \$100. It cannot be construed to only mean the same sum which had formerly been adjudged against the engineer or conductor for the same offense, and hence the corporation may be required to pay the penalty before the prior conviction of the engineer or conductor. *Toledo, W. & W. Ry. Co. v. People*, 81 Ill. 141, 142.

LIKE TENOR.

In the statute providing that bonds issued in renewal of former bonds shall be of like tenor with the old ones, the words "of like tenor" are not to be taken in the sense in which they are used in reference to crimes of counterfeiting and libel, but merely mean of the same nature or char-

acter. Town of Lexington v. Union Nat. Bank, 22 South. 291, 293, 75 Miss. 1.

LIKE TERRITORY.

A by-law of the Associated Press of New York provided that no member of the association should receive or publish the regular news dispatches of any other news association covering a "like territory" and organized for a like purpose with the Associated Press. The Associated Press of New York obtained news from its own agents only in New York, and from other parts of the world through contracts with other agents. Another association obtained news directly through its own agents from various parts of the world. Held, that the latter association should be deemed to cover a "like territory" within the meaning of those words as used in the by-law. *Matthews v. Associated Press*, 32 N. E. 981, 136 N. Y. 333, 32 Am. St. Rep. 741.

LIKELIHOOD.

"Likelihood," as used in instructions relative to preponderance of evidence, is not a proper synonym of "probability." *Howard v. State*, 18 South. 813, 816, 108 Ala. 571.

LIKELY.

"Likely," as used in instructions relative to preponderance of evidence, is not a proper synonym of "probable." *Howard v. State*, 18 South. 813, 816, 108 Ala. 571.

The word "likely" means "probable," and is equivalent to that word as used in a question to a physician, in an action for personal injuries, as to what, in his opinion, would be the "probable" effects of the wounds on the future health of the injured party. *O'Brien v. New York, N. H. & H. R. Co.*, 13 N. Y. Supp. 305, 59 Hun, 623.

The word "likely" is not synonymous with the word "probable," but has practically the same meaning in a question to a witness as to whether personal injuries are "likely" to be reduced or increased as the injured person grows older. *Knoll v. Third Ave. R. Co.*, 62 N. Y. Supp. 16, 19, 46 App. Div. 527.

A pistol, snapped so many times without being discharged as to strongly warrant, if not actually demand, the inference that it was either incapable of being fired or was not really loaded, is not "a weapon likely to produce death." *Meriwether v. State*, 30 S. E. 806, 104 Ga. 500.

A statute authorizing the sale of property attached when "likely" to waste or to be destroyed by keeping is subject to two constructions, the strict construction meaning those articles only which are in themselves perishable, and which contain within themselves the elements of their own destruc-

tion and decay, as, for instance, ripe fruits, fresh meats, and articles of a similar nature. With this definition applied to the term, it would necessarily comprehend but very few articles of the vast variety of personal estate liable to attachment. The other construction of which the term is susceptible, is that it comprehends all those articles which not only contain in themselves necessarily the elements of decay, but which by being kept by the officer levying upon them would become fruitless to the creditor and by consequence an entire loss of the debtor. This construction agrees with the object and intent of the statute, and would comprehend slaves. *Millard's Adm'r's v. Hall*, 24 Ala. 209, 210, 230.

In an instruction, in an action for personal injuries, that the jury should consider the nature of the injuries suffered, as to whether they are likely to prove permanent or temporary only, the use of the word "likely" is not objectionable as permitting and encouraging the jury to indulge in conjecture and speculation in determining the extent of the injuries, the definition of "likely" being "in all probability," there being always more or less conjecture as to whether injuries are permanent or temporary; and, while the words "likely" or "in all probability" are not exactly interchangeable or synonymous with the words "reasonably certain," the difference is but slight, and will not warrant a reversal. *Union Gold Min. Co. v. Crawford*, 69 Pac. 600, 603, 29 Colo. 511.

The phrase "likely to become chargeable," in St. 1821, c. 122, § 15, authorizing the removal of paupers likely to become chargeable on the town, does not apply to persons who may be likely to become chargeable at some future and yet an uncertain time, but authorizes their removal only when the fact that they are likely to become chargeable would not depend upon a contingency, but upon an ascertained necessity. *Inhabitants of Cornish v. Inhabitants of Parsonsfield*, 22 Me. (9 Shep.) 433, 436.

LIKEWISE.

A will provided that the testator's funeral expenses should be paid, and "likewise" all his just debts, and that certain land was to be set apart as dower for his wife, and "likewise" to have one-half of certain personalty, and that certain persons "in likewise manner" were to have certain tracts of land. The will then reserved certain property from general distribution, part of which was bequeathed to a son, "likewise" certain land, and "likewise" a farm, etc. Construing the various provisions of the will in which the word "likewise" occurs, the word was more probably used to mean "also." This construction is manifest when we look to other parts of the will, in which the words "in likewise manner" are used

to convey a different meaning from what the word "also" would convey. *State Bank v. Ewing*, 17 Ind. 68, 74.

Where by will testator gave to his wife his horses and cattle, with the household furniture, to be wholly and solely at her disposal, "and likewise Sam, Nan and Cuff to be at her disposal for the use and purpose of working and raising the children," by the word "likewise" the testator does not mean that a like disposition is made of the negroes to that which has been made of the horses and cattle, but, having devised the stock and furniture to his wife, he now likewise devises to her the negroes, but to be used for the purpose indicated. *King v. Smith*, 25 Tenn. (6 Humph.) 55, 57.

LIMEKILN.

As building, see "Building (In Lien Laws)."

A limekiln is a structure fit only for burning lime. *Slight v. Gutzlaff*, 35 Wis. 675, 678, 17 Am. Rep. 476.

LIMESTONE ROCK.

In a contract for the construction of bridge piers, reciting that the foundation of the same should rest on "limestone rock," that term is synonymous with "solid rock" or "bed rock." *Sullivan County v. Ruth*, 59 S. W. 138, 140, 106 Tenn. 85.

LIMIT.

See "City Limits"; "Within the Limits."

The words "limit and appoint," in a deed may operate as words of grant so as to pass a reversion. *Shove v. Pincke*, 5 Term R. 124.

"Limit" means boundary, border, the outer line of a thing, and nothing else, except when used to convey the idea of restraint. *Casler v. Connecticut Mut. Life Ins. Co.*, 22 N. Y. 427, 431.

"Change or limit," as used in *Laws* 1867, p. 165, § 1, providing that a railroad company shall not "change or limit" its common-law liability as a common carrier except by written contract, etc., is used as synonymous with "lessen" or "abridge." *Felge v. Michigan Cent. R. Co.*, 28 N. W. 685, 687, 62 Mich. 1.

LIMITATION.

See "Collateral Limitation"; "Conditional Limitation"; "Special Limitation"; "Title by Limitation"; "Words of Limitation."

"A 'limitation' marks the period which determines the estate, without any act on

the part of him who has the next expectant interest. On the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises." *Church in Brattle Square v. Grant*, 69 Mass. (8 Gray) 142, 147, 63 Am. Dec. 725.

The word "limitation" has two well-known and distinct meanings. In the one, the primary meaning, it signifies the marking out the bounds or limits of the estate created; in the other it signifies simply the creating of an estate. *Starnes v. Hill*, 16 S. E. 1011, 1016, 112 N. C. 1, 22 L. R. A. 598.

The word "limitation," in its most technical sense, when used in the habendum clause of a deed, is an appropriate term under which to declare the nature and extent of the estate granted, and the uses for which the grant is made. *Mills v. Davison*, 35 Atl. 1072, 1075, 54 N. J. Eq. 659, 35 L. R. A. 113, 55 Am. St. Rep. 594.

A limitation is conclusive of the time of continuance and of the extent of the estate granted, and beyond which it is declared that its creation is not to be extended and continued. Limitations render an estate void without entry. *Smith v. Smith*, 23 Wis. 176, 181, 99 Am. Dec. 153.

The word "limitation," as used in Const. art. 8, § 3, providing that the appellate jurisdiction of the Supreme Court, which extends to all cases at law and in equity, subject to such limitations and regulations as may be prescribed by law, does not give to the Legislature authority to limit absolutely the appellate jurisdiction of the Supreme Court to the extent of cutting off the right of appeal, but merely enables the Legislature to enact reasonable regulations as to the time at which and the mode by which an appeal is to be taken. *Finlen v. Heinze*, 70 Pac. 517, 27 Mont. 107.

Estate on condition distinguished.

A limitation determines an estate upon the happening of the event itself, without the necessity of doing any act to regain the estate. The distinction between an estate upon condition and the limitation by which an estate is determined upon the happening of some event is that in the latter case the estate reverts to the grantor, or passes to the person by whom it is granted, by limitation over, upon the mere happening of the event upon which it is limited, without any entry or other act. *Hoselton v. Hoselton*, 65 S. W. 1005, 1006, 166 Mo. 182.

"A condition is to be carefully distinguished from a limitation. It is the character and quality of the estate granted, and not the terms used in their creation, that distinguishes them. The latter requires no entry to determine the estate, but ter-

minates it ipso facto by the happening of the event referred to, while the former is determined only by the re-entry of the grantor or his heirs for the condition broken." *Bryan v. Spires* (Pa.) 3 Brewst. 580, 583.

The principal difference between a condition and a limitation is that a condition does not defeat the estate, when broken, until it is avoided by the act of the grantor, but a limitation marks the period which is to determine the estate, without entry or claim. *Smith v. White*, 5 Neb. 405, 407 (citing *Stearns v. Godfrey*, 16 Me. [4 Shep.] 153, 160).

LIMITATION OF ACTIONS.

The statute of limitations alters the common law by introducing limitations to the right of actions in mentioned cases. The object of the act is to secure and quiet men in their estates and possessions, and one means of doing so is by obliging creditors to demand their debts within a reasonable time, under the penalty of losing the right of action in case of their neglect to sue within a prescribed time. The debt is not abolished—it is the remedy in the judicial form that is denied—by reason of the creditor's default. *Smith v. Mitchell* (S. C.) Rice, 313, 319, 33 Am. Dec. 119.

The reasons upon which these statutes are founded, Sir William Blackstone tells us, are: First, because the law will not disturb an actual possession in favor of a claim which has been suffered to lie dormant for a long and unreasonable time; secondly, because it presumes that he who has for a long time had the undisturbed possession of either goods or lands, however wrongfully obtained at first, has either procured a lawful title or made satisfaction to the injured, otherwise he would have been sooner sued; and, thirdly, because it judges that such limitations tend to the prevention of innumerable perjuries, the preservation of the public tranquillity, and, what it values perhaps more than all, the suppression of contention and strife among men. Taking these principles as the basis of their conduct, the courts of justice built up upon them a system extending beyond the letter of the statutes themselves. And the judges extended the principle of the presumption of payment to cases which, though not within the letter, were yet within the reason and spirit, of the law. *Buchanan v. Rowland*, 5 N. J. Law (2 Southard) 721, 830, 839.

The word "limitation," according to Mr. Angell in his work on Limitations of Actions, is used in reference to the time, which is prescribed by the authority of the law, during which a title may be acquired to property by virtue of a simple adverse possession and enjoyment, or the time at the end of which

no action at law or suit in equity can be maintained. *Busby v. Florida Cent. & P. R. Co.*, 23 S. E. 50, 51, 45 S. C. 312; *Arraington v. Liscom*, 34 Cal. 365, 381, 94 Am. Dec. 722; *Reynolds v. Baker*, 46 Tenn. (6 Cold.) 221, 228.

The essential attribute of a statute of limitations is that it accords and limits a reasonable time within which a suit may be brought on causes of action which it affects. *Keyser v. Lowell* (U. S.) 117 Fed. 400, 404, 54 O. C. A. 574.

Statutes of limitations are statutes of repose, intended to put at rest controverted facts, to insure to a degree certainty in testimony by compelling its production. *Bettman v. Cowley*, 53 Pac. 53, 56, 19 Wash. 207, 40 L. R. A. 815.

Statutes of limitations are acts limiting the time within which actions shall be brought. They are based upon presumptions arising from lapse of time, which may be rebutted by showing an acknowledgment by defendant or proving plaintiff under a disability to sue. Acts regulating proceedings at law, as the time limited for entering an appeal, staying an execution, serving a notice, and the like, and acts regulating the rights of two persons against a third as to preferences between them, though they limit the time within which certain acts may be done, do not come within this definition of "statutes of limitations." They are not acts limiting the time within which actions or proceedings shall be commenced in a court of justice, nor are they based on the presumption arising from the lapse of time. They are for public convenience, and for the purpose of giving to third persons reasonable notice of acts affecting their conduct. *Battle v. Shivers*, 39 Ga. 405, 409.

"Statutes of limitations are statutes which prescribe a period within which a right may be enforced, afterward withholding a remedy for reasons of private justice and public policy. It would encourage fraud, oppression, and interminable litigation to permit a party to delay a contest until it is probable that papers may be lost, facts forgotten, or witnesses dead." *Baker v. Kelley*, 11 Minn. 480, 493 (Gil. 358, 371).

The word "limitations," in its ordinary legal and popular sense, refers to the time within which an action may be brought for some act done to preserve a right. In this sense it implies power in the Legislature to enact reasonable provisions fixing a limit to the time within which an appeal to a final judgment may be prosecuted. It refers also to the power of the Legislature to provide for appeals from interlocutory or intermediate orders and decisions, and, in its discretion, to direct that such appeals shall be taken and entertained prior to final judgment, but

It does not extend to the right of appeal from final judgments, or to the power of the court on such appeals. *Finlen v. Heinze*, 69 Pac. 829, 832, 27 Mont. 107.

"Statutes of limitations relate to the remedies which are furnished in the courts. They establish that certain circumstances shall amount to evidence that a contract has been performed, rather than dispense with its performance." *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122, 207, 4 L. Ed. 529.

Statutes of limitations are statutes of repose. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he has the power to sue. Such reasonable time is therefore defined and allowed. They rather establish that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance. Such statutes must be reasonable, and therefore *Laws 1874, c. 623*, which provides that no action for personal injuries shall be maintained against a certain village unless the claim has been presented in writing within 30 days after the injuries have been received, is unconstitutional as to one sustaining injuries through the negligence of the village, which injuries prevent the presentation of such claim within the prescribed time, as such requirement deprived him of his right to a remedy without due process of law, as guaranteed by Const. art. 1, §§ 1, 6. "All limitation laws, however," says Judge Cooley (Const. Lim. [6th Ed.] p. 449), "must proceed on the theory that the party, by a lapse of time and omission on his part, has forfeited his right to assert his title in law, and these laws must also proceed on the idea that the party has full opportunity afforded him to try his right in the courts." *Williams v. Village of Port Chester*, 70 N. Y. Supp. 631, 638, 72 App. Div. 505.

Statutes of limitation are statutes limiting the time in which actions may be brought. "They do not confer any right of action. They are enacted to restrict the period in which the right, otherwise unlimited, may be asserted. They are founded upon the general experiences of mankind that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates a presumption against its original validity, or that it has ceased to exist. This presumption is made by these statutes a positive bar, and they thus become statutes of repose, protecting parties from the prosecution of stale claims when, by loss of evidence from death of some witnesses and the imperfect recollection of others, or the destruction of documents, it may be impossible to establish the truth." *Riddlesbarger v. Hartford Fire*

Ins. Co., 74 U. S. (7 Wall.) 888, 890, 19 L. Ed. 257.

A statute granting a right of action for damages, for death caused by wrongful act, which did not exist at common law, and which did not obtain in the absence of the statute which prescribed that such action must commence within a specified time, is a condition imposed upon the exercise of the right of action granted, and is not, properly speaking, a "limitation," as that term is generally used. *Rodman v. Missouri Pac. Ry. Co.*, 70 Pac. 642, 644, 65 Kan. 645, 59 L. R. A. 704.

The statute of limitations does not, after the prescribed period, destroy, discharge, or pay the debt, but it simply bars a remedy thereon. The debt and the obligation to pay the same remain, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment. *Maxwell v. Cottle*, 25 N. Y. Supp. 635, 638, 72 Hun, 529.

The word "limitation," in Comp. St. 534, § 24, providing "whenever any payment of principal or interest has been or shall be made upon an existing contract, etc., if such payment be made after the same became due, the limitation shall commence from the time the last payment was made," means the limitation within which an action can be brought on the contract as made originally between the parties. *Whitaker v. Rice*, 9 Minn. 13, 20 (Gil. 1, 9), 86 Am. Dec. 78.

Equitable actions.

"Formerly, when statutes of limitations applied only to actions at law, courts of equity, proceeding on the analogy of such statutes, would ordinarily refuse relief when the party had slept on his rights for a length of time which would constitute a bar to an action at law on the same cause of action; but with us statutes of limitations apply as well to equitable as to legal actions." *Mueller v. Fruen*, 86 Minn. 273, 274, 30 N. W. 886.

"It is true that a mere formal plea of the statute of limitations has been said in courts of common law not to be a plea to the merits, but a reliance on the presumption arising from a great lapse of time has never been considered in chancery as a defense of the same rigid character. Limitations must be pleaded or relied on in equity specially, but a presumption founded on a long lapse of time is a defense which has always been allowed to be made out as a matter of substance, and which was not necessary specially to advance." *In re Hepburn (Md.)* 3 Bland, 95, 106, 110

Extraterritorial operation.

Statutes of limitations are municipal regulations founded on local policy, which

have no coercive authority abroad, and with which foreign or independent governments have no concern. *Ruggles v. Keeler* (N. Y.) 8 Johns. 263, 265, 8 Am. Dec. 482.

As prescription.

According to some writers, the term "prescription" covers both senses in which the word "limitations" has been used; that is to say, as conferring a right and taking away a remedy. In *Billings v. Hall*, 7 Cal. 1, 4, Chief Justice Murray says: "Statutes of limitations are designed to effect the remedy and not the right of contract. 'Prescription' is defined by civilians to be a right by which a mere possessor acquires the property of a thing which he possesses by the continuance of his possession during the time fixed by law, so that the difference between 'statutes of limitations,' as they are known to the course of common law, and the 'law of prescriptions,' consists in this, that one confers a right and the other takes away a remedy." *Alhambra Addition Water Co. v. Richardson*, 14 Pac. 379, 381, 72 Cal. 598.

"Prescription" and "limitation" are convertible terms, and a plea of the proper statute of limitations is a good plea of a prescriptive right. *Churchill v. Louie*, 67 Pac. 1052, 1053, 135 Cal. 608. See, also, *Chenot v. Lefevre*, 8 Ill. (3 Gilman) 637, 642.

Speaking of the defense of limitation, the court says it is quite immaterial whether this defense is called "limitation," "prescription," or "adverse user." These terms may be used interchangeably, and they mean substantially the same thing. Prescription properly applies to incorporeal easements, and is of the same length of time as limitation by statute, and adverse user is the same. It is not worth while to spend time in distinctions which do not exist. *Murray v. Scribner*, 43 N. W. 549, 74 Wis. 602.

LIMITATION OVER.

A limitation over includes any estate in the same property, created or contemplated by the conveyance, to be enjoyed after the first estate granted expires or is exhausted. Thus, in a gift to A. for life, remainder to the heirs of his body, the remainder is a limitation over to the heirs of the body. *Ewing v. Shropshire*, 7 S. E. 554, 556, 80 Ga. 374.

LIMITED.

The word "limited" means narrow, restricted. It is synonymous with the word "circumscribe;" and that word means to inclose within a certain limit, to hem in, to confine, to bound, to limit, to restrict, etc. *Cheyney v. Smith* (Ariz.) 23 Pac. 690, 685.

The phrase "limited to the following effect," in Comp. Laws 1884, § 2750, providing

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that the words "bargained and sold," etc., in all conveyances of hereditary real estate, etc., shall be limited to the following effect, etc., means "construed to the following effect." *Douglass v. Lewis*, 9 Pac. 377, 379, 8 N. M. (Johns.) 345.

Property is limited or qualified when the control which one has over external objects or things falls short of the absolute property, which is appropriation of the thing by one to his own use in exclusion of all others. *Griffith v. Charlotte, C. & A. R. Co.*, 23 S. O. 25, 38, 55 Am. Rep. 1.

LIMITED BY LAW.

The term "limited by law," when used in a statute, is to be construed as meaning limited by the statute law, and not to mean limited by the general law. *Brinckerhoff v. Bostwick*, 1 N. E. 663, 665, 99 N. Y. 185.

Rev. St. U. S. 1878, § 1866, which declares that the jurisdiction of justices of the peace, as well as the jurisdiction of other courts referred to, shall be "limited by law," should be construed to mean that justices of the peace shall have jurisdiction to try all causes of action that might arise within the limits fixed by law. It extends their authority to such limits. *People v. Douglass*, 14 Pac. 801, 802, 5 Utah, 283.

The term "as limited by law," as used in the ninth section of the organic act, conferring upon district courts common-law and chancery jurisdiction, etc., provided that such jurisdiction shall be as limited by law, means that the "mode and manner of proceedings may be controlled and governed by law" (*Gallagher v. Basey*, 1 Mont. 457, 462); not that the Legislature may enlarge or contract such jurisdiction or that the common-law or chancery jurisdiction can be taken away, or that the right of a territorial district to exercise such jurisdiction can be transferred or disturbed, but that the mode of exercising such jurisdiction may be by law. *United States v. Ensign*, 2 Mont. 396, 401.

LIMITED FEE.

The term "limited fee," rather than "fee simple," is properly to be used in describing the estate of one who owns a reversion or remainder in realty. *Brackett v. Ridlon*, 54 Me. 428, 434.

"A limited or qualified fee simple is such as has some collateral matter annexed to it whereby it is made by some means determinable, viz., by limitation or condition." *Lott v. Wyckoff* (N. Y.) 1 Barb. 565, 575 (quoting Hale, Com. Law, p. 58).

"Limited fees" are (1) qualified or base fees; (2) fees conditional at the common law. A "base fee" was confined to a person as tenant of a particular place; a "conditional fee"

was restrained to particular heirs, as to the heirs of a man's body. *Paterson v. Ellis' Ex'rs* (N. Y.) 11 Wend. 259, 277.

LIMITED INTEREST.

A "limited interest" is a duration less than that of the property. Civ. Code Cal. 1903, § 692; Rev. Codes N. D. 1899, § 3291; Civ. Code S. D. 1903, § 207; Civ. Code Mont. 1895, § 1113.

LIMITED JURISDICTION.

"Limited jurisdiction," as applied to courts, has been often used instead of the term "special," to distinguish such courts from courts which have general jurisdiction. A court of limited or special jurisdiction is one which has jurisdiction only for a particular purpose, or is clothed with special powers for the performance of specific duties, beyond which they have no manner of authority; and these special powers are to be exercised in a summary way, either by a tribunal already existing for general purposes, or by persons appointed or to be appointed in some definite form. Such tribunals with special powers for adjudicating particular cases are very numerous, such as commissioners, surveyors, appraisers, committees, overseers, and the like, but they relate only in a small degree to the general administration of justice. *Obert v. Hammel*, 18 N. J. Law (3 Har.) 73, 78.

The jurisdiction of a court of limited jurisdiction must be proved when the acts and judgments of such court are relied upon as giving a right or furnishing a defense. *People v. Liscomb*, 60 N. Y. 559, 568, 569, 19 Am. Rep. 211.

LIMITED PARTNERSHIP.

Limited partnerships were unknown to the common law, but in some countries of Europe have existed for hundreds of years. In Italy they were known and recognized in the laws of Pisa and Florence as early as 1166, in Geneva in 1562, in France in 1253, also under Louis the Tenth in 1315, and still continue under the republic. In England, it is said that limited partnerships only exist as joint-stock companies. They seem to have been devised to enable persons to engage in mercantile business without being known or named, and became the most frequent combinations of trade, and in a large degree contributed to the commercial prosperity which the above countries afterwards enjoyed. In our own state there was enacted a statute authorizing limited partnerships in the year 1822, being substantially a copy from the French act, and since that time similar laws have been adopted in most of the other states and territories which have patterned their

statutes after that of New York. *Moorhead v. Seymour*, 77 N. Y. Supp. 1050, 1054.

The term "limited partnerships" is commonly used to designate partnerships which extend to a single transaction or adventure only, such as the purchase or sale of a particular parcel of goods. *Bigelow v. Elliot* (U. S.) 8 Fed. Cas. 349, 351.

A partnership, general and unlimited so far as the liability of the partners to third persons are concerned, and limited only, as nearly all partnerships are, in respect to the nature and scope of the business to be carried on, is not a "limited partnership." Such a partnership is one in which one or more of the partners are so in the usual way in respect to power, property, and obligation, and one or more of them have placed a certain sum in the business and may lose that, but are not liable further. *Taylor v. Webster*, 39 N. J. Law (10 Vroom) 102, 104.

LIMITED PUBLICATION.

"A limited publication" of a literary composition is the act of communicating the knowledge of the contents to a select few, upon conditions expressly or impliedly limiting its rightful ulterior communication except in restricted private intercourse. *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 199.

LIMITED TICKET.

The term "limited ticket," as applied to railroad tickets, may be one the use of which is limited, as by requiring a continuous journey to be made by the holder of the ticket. *United States v. Egan* (U. S.) 47 Fed. 112, 116.

LINE.

See "Telephone Line."

A testator who, intending to devise part of his farm, begins at one of the corners of it and says, "thence as the line runs," is to be understood to mean the line of the farm, whether it be straight or crooked. A crooked line is a line just as much as a straight one. We say the line of a state, a county, a coast, or of the seashore, though it have a great many bendings; and, with equal propriety, a line of a fence, a road, or a farm. *Cubberly v. Cubberly*, 12 N. J. Law (7 Halst.) 308, 315.

"Line," as used in 18 and 19 Vict. c. 120, § 143, providing that no building shall be erected beyond "the regular line of buildings in the street in which the same is situate," does not mean a strict mathematical line, but means substantially such a line as shall preserve uniformity of appearance. *Tear v. Freebody*, 4 C. B. (N. S.) 228, 263.

As boundary.

We say the line of a state, a county or coast, or a seashore, though it may have a great many bendings and inflections, and with equal propriety the line of a fence, a road, or a farm; so when a testator, intending to devise part of his farm, begins at one of its corners and says, "thence as the line runs," we understand by it the line of the farm, whether it be straight or crooked. *Cubberly v. Cubberly*, 12 N. J. Law (7 Halst.) 308, 814.

A "line," within the meaning of a will directing that the testator's property shall be divided between his sons, and that the division line shall be run between the house and the barn, must be construed to mean a straight line, if it is practicable to make the partition in such a manner. *Brown v. Brown* (Pa.) 6 Watts, 54, 55.

As heirs.

In a will giving a plantation, after a life estate in another, to the next male heir nearest in kindred and relation to testator according to law, and so on in succession "on that line," the expression "on that line" does not necessarily mean that the estate shall go to the heirs of the body of the devisee in remainder, nor the male issue of the devisee, but simply to his heirs, as contradistinguished from the heirs of the tenant of the life estate previously given; for to create an estate tail by construction, it would have to be done, not only without words of procreation, but without any words which could supply their place. *McIntyre v. Ramsey*, 23 Pa. (11 Harris) 317, 320.

In printing.

The word "line" is not a technical term, but one in common use, and having in common usage, when applied to printed matter, a well-known signification. It then means a row of words, letters, or figures printed across a page or column, without regard to the size of the type. Such is its meaning as used in Act April 14, 1891 (2 Gen. St. p. 2325), fixing the rate of legal advertising at a certain sum per line. *Sheehy v. City of Hoboken*, 40 Atl. 626, 627, 62 N. J. Law, 184.

In surveying.

"A 'line,' in surveying and dividing grounds, means, prima facie, a mathematical line, without breadth; yet this theoretic idea of a line may be explained by the facts referred to, and connected with the division, to mean a wall, a ditch, a crooked fence, or a hedge—a line having breadth." As used in a deed of partition of two lots, reciting that the parties had made a "line" through the lot, running with a certain entry across the lot, the term was construed, not to mean an alley, but to mean a mathematical line,

as the parties could have expressly stated that they intended an alley, if such was their intention. *Baker v. Talbott*, 22 Ky. (8 T. B. Mon.) 179, 182.

LINE OF CREDIT.

In a contract guarantying the account of a merchant for a line of credit to a certain amount, the term "line of credit" has a fixed and definite meaning in the mercantile world, and means a margin of credit, enabling one to continue buying so long as he keeps his account within the limit by payments. *Shneider-Davis Co. v. Hart*, 57 S. W. 903, 904, 23 Tex. Civ. App. 529.

In a contract by which a wholesale dealer agreed to extend a line of credit of \$5,000 to a retailer, and another party became surety for the payment of all goods purchased by the retailer, the expression "line of credit" did not have the effect of limiting the surety's liability to the sum of \$5,000. *Isadore Bush Wine & Liquor Co. v. Wolff*, 19 South. 765, 766, 48 La. Ann. 918.

Defendant contracted with plaintiff to sell its machines and make monthly settlements "with cash or by note at 4 months," and that "on such basis" of settlement he should have "any reasonable line of credit." Held, that the phrase "line of credit" meant the amount of goods to be furnished on credit, and did not modify the provision that the notes should be made payable at 4 months. *American Button-Hole, Overseaming & Sewing Mach. Co. v. Gurnee*, 44 Wis. 49, 62.

LINE OF DUTY.

Attorney General Cushing in 1855, in discussing Rev. St. 4693, 4694, providing that a soldier who is disabled while in the service of the United States, and in the line of his duty, shall be entitled to a pension, characterized the phrase "line of duty" as an apt one to denote that an act of duty performed must have relation of causation, mediate or immediate, to the wound, the casualty, the injury, or the disease producing disability or death. *Rhodes v. United States* (U. S.) 79 Fed. 740, 743, 25 C. C. A. 186 (citing 7 Op. Atty. Gen. 149, 161; 17 Op. Atty. Gen. 172).

"Line of duty," as used in a statement that an act of a brakeman was in the line of duty, is synonymous with the words "in the discharge of duty" *Allen v. Burlington, C. R. & N. R. Co.*, 11 N. W. 614, 616, 57 Iowa, 623.

LINE OF NAVIGATION.

The state of Kentucky improved the Green and Barren rivers by means of locks and dams, but by Act March 9, 1868, the

legislature incorporated the G. & B. R. N. Co., and leased to it the G. and B. "river line of navigation," together with the grounds, tools, and machinery, etc., appurtenant thereto, requiring it to keep "said line of navigation in good repair," and to permit boats to navigate the rivers on payment of a certain toll. Held, that the locks, dams, and other improvements were what constituted the line of navigation, and that the grant of a license to a railroad company to build bridges so as not unreasonably to obstruct navigation does not impair the rights of the navigation company under the lease. *Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co.*, 10 S. W. 2d, 88 Ky. 1, 2 L. R. A. 540.

LINE OF RAILROAD.

"Line of the railroad," as used in a city ordinance granting a railroad company the right to build its road in a street, and providing that the company should grade the street, and that the "line of the railroad" should be located so as not to approach the sidewalk curbstone nearer than 15 feet, does not mean the extreme limit, including ties and grade, or the center or thread of the track, but refers to the rails on which the cars run. *Chicago, St. L. & P. R. v. Elsert*, 26 N. E. 759, 761, 127 Ind. 156.

In a proceeding by mandamus to compel a railroad company to deliver at the elevator or grain warehouse of the relator, in the city of Chicago, whatever grain in bulk might be consigned to it upon the "line" of their road, it appeared that the company entered the city from different points upon separate tracks, these separate tracks or lines of road being called "divisions." The elevator was situated upon a track used by the company in connection with the business of one of those divisions exclusively, but could be reached from the other division, though by a very indirect route, and subjecting the company to great loss of time and pecuniary damages in the delay that would be caused to their regular trains and business on the latter division. It was held that the roads constituting these different divisions, though belonging to the same corporation and having a common name, were, for the purposes of transportation, substantially different roads, constructed under different charters; and, the track upon which the elevator in question was situated having been laid for the convenience especially of one of those divisions, and only approachable from the other under the difficulties mentioned, it could not be regarded that the elevator was upon the line of the latter division in any such sense as to make it obligatory upon the company to deliver thereat freight coming over that division. *Chicago & N. W. Ry. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690.

Where a fire policy issued to a railroad corporation was "on their road furniture, con-

sisting of locomotive engines, cars of all descriptions, and snow plows on the line of their road and in actual use but not in machine or repair shops," the phrase "line of road" did not confine the policy to cars while on the particular road, in distinction from any spurs used in connection therewith, and included cars in the ordinary course of business on a track connected with the road, though not owned or controlled by the corporation. *Fitchburg R. Co. v. Charlestown Mut. Fire Ins. Co.*, 73 Mass. (7 Gray) 64, 66.

As right of way.

"Line," as used in Act March 17, 1869, authorizing any railroad to widen, enlarge, and improve its line of railroad, means what is commonly called the "right of way," and not the track. *Western New York & P. Ry. Co. v. Buffalo, R. & P. Ry. Co.*, 44 Atl. 242, 244, 193 Pa. 127.

The term "line of road," standing alone, used in relation to a railroad, may be sufficiently comprehensive to include spurs, yards, and side tracks; but when it is followed by the specification of "spurs, yards, and side tracks," the words will be held as referring to a line of road, as contradistinguished from spurs, yards, and side tracks. *Liverpool & L. & G. Ins. Co. v. McNeill* (U. S.) 89 Fed. 131, 137, 82 C. O. A. 173.

"On the line of a railroad," as used in a deed describing the land as lying "on the line of a certain railroad," means next to or bounded by the railroad. The line of a road must mean, as used in the contract, the boundary of the land appropriated for its use. *Burnam v. Banks*, 45 Mo. 349, 350.

In a statute (Rev. St. §§ 4358, 4359) providing that railroads shall be liable for damages caused by disease being communicated from diseased cattle, in course of transportation, to other cattle in the neighborhood or along the line of such transportation, the word "line" means the right of way of the railway company, and "along the line of the road" means in a line with it, by the side of it, near to it. *Coyle v. Chicago & A. R. Co.*, 27 Mo. App. 584, 593.

LINE OF THE ROAD.

"Line," as used in a description of land, conveyed by deed, as commencing at a certain point south of a road, thence running westerly along the line of said road, means center line of the road, for there is no other line of the road. The sides of the road are quite different from the line of the road. *Helmer v. Castle*, 109 Ill. 664, 672.

A grant of land described as bounded "by the line of," or "by the margin of," or "by the side of" a highway, excludes the soil of the highway. *Baltimore & O. R. Co. v. Gould*, 8 Atl. 754, 756, 67 Md. 60.

"Line," as used in a deed describing the tract of land as beginning at a certain corner, then running in the east line of a certain street, and further on in the same course a certain number of feet to the line of a certain street, thence in line with such street, means the exterior limits, and not the middle of the street. *Hamlin v. Pairpoint Mfg. Co.*, 6 N. E. 531, 532, 141 Mass. 51.

Where the words "line of the road" are used in a deed to describe a boundary of the land, commencing at the corner formed by the intersecting of the road with another road, the land conveyed only extends to the edge of the road, and not to the center. In *Smith v. Slocomb*, 75 Mass. (9 Gray) 36-38, 69 Am. Dec. 274, the court held the conclusion to be inevitable that the road is excluded when the boundary starts at the side of the road and comes back to the road. In *Sibley v. Holden*, 27 Mass. (10 Pick.) 249, 20 Am. Dec. 521, the court arrives at a similar conclusion. *Mead v. Riley*, 50 N. Y. Super. Ct. (13 Jones & S.) 20, 25.

The use of the words "line of the street," to describe a boundary line commencing at the junction of two streets, operates to fix the boundary of the lot at the side line of the street, and not the center line. *Hughes v. Providence & W. R. Co.*, 2 R. I. 508, 512.

Where the words "south line of the road" is used to designate a boundary of land which is described as lying north of the road, the land will be construed to include the entire road. *Williams v. Sparks*, 24 Ohio St. 141, 142.

LINE OF STEAMERS.

"Line," as used in an agreement by a party that during a certain year all steamers belonging to his line at New York or Brooklyn should be sent to a certain pier, should be construed to include a vessel belonging to such party which was under contract of affreightment to a London firm, the captain, crew, and ship being, however, under the control and direction of the owner. *Elwell v. Fabre*, 13 N. Y. Supp. 829, 830.

LINE OF TUNNEL.

"Line," as a term of surveying, is that which has length without breadth, but as used in Act Cong. May 10, 1872, providing that, when any tunnel is run for the development of a vein or lode or for the discovery of mines, the owners shall have the right of possession of all veins or lodes, not previously known to exist within 3,000 feet from the face of such tunnel on the line thereof, the word has reference to the subject it intends to describe, and designates the width marked by the exterior lines or sides of the tunnel. The "line" of the tunnel does

not mean the entire width and length of the surveyed site, nor does the act provide for or authorize a tunnel site survey and location 1,500 feet in width. *Corning Tunnel Co. v. Pell*, 4 Colo. 507, 511.

"Line of the tunnel," as used in Rev. St. U. S. § 2323 [U. S. Comp. St. 1901, p. 1426], allowing persons who are engaged in exploring for precious metals by means of tunnels, the right of possession of all veins or lodes along the line of the tunnel for 3,000 feet from its face, and not previously known to exist, designates the width marked by the exterior lines or sides of the tunnel. The line of the tunnel is the width of the tunnel excavation, and no more or less. *Hope Mining Co. v. Brown*, 19 Pac. 218, 220, 6 Mont. 550.

Under Rev. St. U. S. § 2323 [U. S. Comp. St. 1901, p. 1426], providing that one running a tunnel for the development or discovery of mines shall have "the right of possession of all veins or lodes within 3,000 feet from the face of the tunnel on the line thereof; secondly, that locations on the line of such tunnel, of veins or lodes not appearing on the surface, made by other parties at the commencement of the tunnel etc., shall be invalid"—after the location of a tunnel claim a person discovering, within the surface boundaries thereof, a lode which crosses the line of the tunnel, will be restrained from prosecuting proceedings for a patent while the tunnel is duly worked, and until it is demonstrated that the lode will not be discovered in the tunnel. *Disapproving Corning Tunnel Co. v. Pell*, 4 Colo. 507, 508, holding that the "line of the tunnel," as used in the statute, "designates a width marked by the exterior lines or sides of the tunnel." *Hope Min. Co. v. Brown*, 11 Mont. 370, 379, 380, 28 Pac. 732, 734.

LINE TREES.

By "line trees" is to be understood not trees marked and set apart by the parties as evidence or monuments of the division line, but trees deriving their nourishment from roots extending on both sides of the line, and with bodies so directly over the line, and necessarily on both sides of that line, that it could not be determined upon which side of the line the tree was planted. *Dubois v. Beaver*, 25 N. Y. 123, 126, 82 Am. Dec. 326.

LINEAGE.

The word "lineage," as used in a will giving certain property to testator's daughter and her "lineage," should be construed to mean heirs, and as simply a word of limitation. "Lineage" is not a legal term, but means, according to Webster's Dictionary,

race, progeny, descendants in a line from a common progenitor. *Lockett v. Lockett*, 22 S. W. 224, 94 Ky. 289.

LINEAL

The term "lineal descents" is used to designate descents from father to son, or grandfather to grandson, etc., as distinguished from "collateral descents," as from brother to brother, cousin to cousin, etc. *Levy v. McCartee*, 31 U. S. (6 Pet.) 102, 112, 8 L. Ed. 334.

LINEAL CONSANGUINITY.

A series of degrees between persons who descend from one another is called direct or lineal consanguinity. Civ. Code Cal. 1903, § 1890; Civ. Code Mont. 1895, § 1858.

Lineal consanguinity is that relation which exists among persons where one is descended from the other, as between the son and the father, or the grandfather, and so upward in the ascending line, and between the father and the son, or the grandson, and so downward in a direct descending line. *Willis Coal & Min. Co. v. Grizzell*, 65 N. E. 74, 76, 198 Ill. 313 (quoting Bouv. Law Dict.).

Lineal consanguinity is the relation which subsists between persons of whom one is descended in a direct line from the other. *McDowell v. Addams*, 45 Pa. (9 Wright) 430, 432.

LINEAL DESCENDANTS.

"Lineal descendants," in Laws 1885, c. 483, imposing a tax on inheritances to persons through father, mother, husband, wife, children, brother, and sister, and lineal descendants born in lawful wedlock, extends only to those who occupy that relation toward the testator, intestate, or person making the transfer described in the statute. In re *Smith* (N. Y.) 5 Dem. Sur. 90, 91.

The term "lineal descendants," as used in a statute which imposes a tax upon all property which passes by will or by the intestate laws of the state to any person other than to the lineal descendants born in lawful wedlock, and certain others specified in the statute, includes only the direct descendants of the testator or intestate, and does not include children of brothers and sisters of the deceased. In re *Miller*, 45 Hun, 244, 246.

Laws 1855, c. 483, provides in the first section that all property, or the income thereof, given by will to corporations or persons other than "to or for the use of father, mother, husband, wife * * * and lineal descendants," and the wife or widow of a son and the husband of a daughter, shall be subject to a tax of 5 per cent. on the market value. Held, that the phrase "lineal

descendants" included only those who were lineal descendants of the testator or intestate. In re *Jones* (N. Y.) 19 Abb. N. C. 221, 224.

Testator by will bequeathed to a sister, and at her death to her child, children, or other "lineal descendants," any money and other property, real or personal, which he possessed, etc. Held, that the words "child" and "children" were used in the sense of heirs of his sister's body, and, this being so, the term "other lineal descendants" could mean none other than the issue of her body, indicating indefinite issue, and the estate would, under the expression "lineal descendants," have gone to grandchildren and great-grandchildren, thus clearly defining the nature of the estate intended to be given to the successors of his sister as one which the testator meant they should take by descent from her. The words "other lineal descendants" so qualified the previous words "child" and "children," which would otherwise be words of purchase, as to make them words of limitation. *Mason v. Ammon*, 11 Atl. 449, 450, 117 Pa. 127.

As issue.

In Rev. St. c. 74, § 10, providing that a devise shall not lapse when the devisee is a relative of the testator and died before him, leaving "lineal descendants," who take by substitution, the term "lineal descendants" cannot be construed to include the devisee's mother, "lineal descendants" being synonymous with "issue." *Morse v. Hayden*, 19 Atl. 443, 444, 82 Me. 227.

Adopted child.

"Lineal descendant," as used in Rev. St. c. 74, § 10, providing that lineal descendants shall take from their ancestor, etc., includes a legally adopted child. *Warren v. Prescott*, 24 Atl. 948, 949, 84 Me. 483, 17 L. R. A. 435, 30 Am. St. Rep. 370.

LINEAL HEIRS OF THE BODY.

The phrase "lineal heirs of her body," in a will in which testator devises land to his daughter, her heirs and assigns, forever, providing that she dies leaving "lineal heirs of her body," means all lineal descendants, and therefore the will operates to create an estate tail, and not an executory devise. *Holden v. Wells*, 31 Atl. 265, 266, 18 R. I. 802.

LINEN.

As merchandise, see "Merchandise."

A bequest of "all my clothes and linen whatsoever" passes body linen only. The connecting of the word "linen" with "clothes" showed that such was the intention. *Hunt v. Hort*, 3 Brown, Ch. 312.

"Linen," in the dictionary, is described as a thread or cloth made of flax or hemp. From linen cloth are made hemstitched pocket handkerchiefs. Testimony merely to the fact that these handkerchiefs are never bought and sold in the trade by any other name than "hemstitched pocket handkerchiefs," and that they are never known in the trade as "linen," would not take these goods out of the class of linens, unless it is also shown that the word "linen" has been distorted from its actual meaning, and is by the trade used solely in a restricted sense as covering only goods other than handkerchiefs. *Clafin v. Robertson* (U. S.) 38 Fed. 92, 93.

"Linens or a manufacture of flax," as used in Tariff Act Aug. 30, 1842, 5 Stat. 549, imposing a duty of 25 per cent. on linens or a manufacture of flax, would include linen pocket handkerchiefs hemstitched or hemmed. *Richardson v. Lawrence* (U. S.) 20 Fed. Cas. 717, 718.

LINK.

An instruction, in a criminal prosecution, that the rule requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt in order to warrant a conviction does not require that the jury should be satisfied beyond a reasonable doubt of each "link" in the chain of circumstances relied upon to establish defendant's guilt, may refer only to evidentiary facts which might add force or weight to other facts from which the inference of guilt could be drawn, in which case the instruction might be said to be correct; or it may mean such criminatory facts as of themselves form the chain of evidence from which the inference of guilt is to be drawn, in which case it would not state the law correctly. No chain can be stronger than its weakest link; if the link is gone, it is no longer a chain. *Marion v. State*, 20 N. W. 289, 294, 16 Neb. 349.

LINOLEUM.

Linoleum is a preparation of linseed oil and ground cork, intimately mixed and spread in a uniform layer over a sheet of rough jute canvas, and is often used for floor cloth. A sole of a bathing shoe made of linoleum is not an infringement of a cork sole treated with rubber cement. *S. Rauh & Co. v. Guinzburg* (U. S.) 95 Fed. 151, 152.

The term "linoleum" signifies solidified oil, and appropriately describes an article made of such a composition and used as a floor covering, as oilcloth. *Linoleum Mfg. Co. v. Nairn*, 7 Ch. Div. 834, 836.

LINOTYPE.

As machinery, see "Machinery."

LIQUEUR.

The cordial known as "Chartreuse," imported from France, is a liqueur, and included in the provision for a reduced rate of duty on brandy and other spirits in the commercial agreement with France, May 30, 1898. *Nicholas v. United States* (U. S.) 122 Fed. 892, 893.

The term "liqueur," in French, corresponds with the English word "cordial," and is defined to be a liquor composed of alcohol, water, sugar, and different aromatic substances. *United States v. Three Hundred Casks of Juniper Cordial* (U. S.) 28 Fed. Cas. 141.

LIQUIDATE.

"To 'liquidate' is to settle, to adjust, to ascertain, reduce to precision in amount." *Midgett v. Watson*, 29 N. C. 143, 145.

To liquidate an account "is to ascertain the balance due, to whom due, and to whom payable." *Midgett v. Watson*, 29 N. C. 143, 145.

"'Liquidate' is said to be a term of jurisprudence, finance, and of commerce; the action by which one determines or fixes that which has been indeterminate in every species of accounts; liquidation of expenses, of interest, of accounts; liquidation of profits; liquidation and partition of a succession. He labors for a liquidation of his debts, of his effects, of his accounts." Dictionary of the French Academy. It is defined by Webster as "to pay; settle; adjust and satisfy." When applied to a bill or note or bill of exchange it means a payment in satisfaction thereof, and when applied to open accounts it means settlement and adjustment of the accounts by which the amount due is to be ascertained by mutual examination by the parties interested. *Martin v. Kirk*, 21 Tenn. (2 Humph.) 529, 531.

"Liquidate" means not merely the ascertainment of the amount of a debt, but in common parlance signifies its payment or satisfaction. *Fleckner v. Bank of United States*, 21 U. S. (8 Wheat.) 338, 362, 5 L. Ed. 631.

"Liquidate" means to clear away—to lessen—debts; and in common parlance, especially among merchants, to "liquidate" a balance means to pay it. *Austin v. Tecumseh Nat. Bank*, 68 N. W. 628, 629, 49 Neb. 412, 35 L. R. A. 444, 59 Am. St. Rep. 543.

The term "settle up and liquidate," as used in a bond conditioned that, if the said J. shall settle up and liquidate all the just claims against the firm of J. & Co., then the obligation shall be void, is equivalent to the word "pay," and imposes the obligation to "pay" all the debts of the firm. *Wilson*

v. Stilwell, 9 Ohio St. 467, 469, 75 Am. Dec. 477.

LIQUIDATED.

Arranged synonymous, see "Arrange."

"Bouvier says 'liquidated' is that which is made clear, manifest, as 'liquidated damages,' ascertained damages; 'liquidated debts,' ascertained debts, as to amount." Roberts v. Prior, 20 Ga. 561, 562.

A claim is "liquidated" when the amount due is fixed by law, or has been ascertained and agreed upon by the parties. Chicago, R. I. & P. Ry. Co. v. Mills (Colo.) 69 Pac. 317, 318; Commercial Union Assur. Co. v. Meyer, 29 S. W. 93, 97, 9 Tex. Civ. App. 7; Jones v. Hunt, 12 S. W. 832, 833, 74 Tex. 657; Mitchell v. Addison, 20 Ga. 50, 53; Hargroves v. Cooke, 15 Ga. 321, 332; Kennedy v. Queens County, 62 N. Y. Supp. 276, 283, 47 App. Div. 250; Kercheval v. Doty, 31 Wis. 476, 485; Treat v. Price, 66 N. W. 834, 836, 47 Neb. 875. Such is the meaning of the word in Rev. St. art. 2971, providing that a fire insurance policy covering real property shall in case of total loss be considered a liquidated demand against the company for the full amount thereof. Continental Ins. Co. v. Chase, 33 S. W. 602, 603; Kennedy v. Queens County, 62 N. Y. Supp. 276, 283, 47 App. Div. 250.

"Liquidated account" means that the amount due has been ascertained and fixed either by the acts and agreements of the parties or by operation of law, or a sum which cannot be varied by proof, and the term does not necessarily refer to a writing. Nisbet v. Lawson, 1 Ga. (1 Kelly) 275, 287; Anderson v. State, 2 Ga. (2 Kelly) 370, 374.

A debt is "liquidated" when it appears that something, and how much, is due. Ditman v. Hotz (La.) 9 Mart. (O. S.) 200, 203; Kennedy v. Queens County, 62 N. Y. Supp. 276, 283, 47 App. Div. 250.

A claim is "liquidated" only when the amount of it has been determined, or the data settled upon by which the amount can be calculated. Charnley v. Sibley, 73 Fed. 980, 982, 20 C. C. A. 157; Chicago, M. & St. P. Ry. Co. v. Clark, 92 Fed. 968, 985, 35 C. C. A. 120.

A claim for damages founded on a tort or breach of covenant is not a "liquidated claim." Worley v. Smith, 63 S. W. 903, 904, 26 Tex. Civ. App. 270.

The commonest example of a liquidated demand is an action of debt where there is an express contract to pay the sum certain at a fixed time. Thus, where a contract provides a minimum amount for which one party may be liable, such minimum amount is certain, and constitutes a liquidated de-

mand. Kennedy v. Queens County, 62 N. Y. Supp. 276, 283, 47 App. Div. 250.

The word "liquidated," in the sense of the rule that payment of a lesser sum is a discharge as to the remainder where the amount in dispute is unliquidated, but that it is not a discharge when it is liquidated, means that the amount due has been ascertained and agreed on by the parties or fixed by operation of law. The rule does not apply where there is a bona fide dispute as to the amount actually due. Treat v. Price, 66 N. W. 834, 836, 47 Neb. 875.

A demand is not liquidated, even if it appears that something is due, unless it appears how much is due; and when it is admitted that one of two specific sums is due, but there is a general dispute as to which is the proper amount, the demand is regarded as "unliquidated" within the meaning of that term as applied to the subject of accord and satisfaction. Lestienne v. Ernst, 39 N. Y. Supp. 199, 200, 5 App. Div. 373 (citing Nassoly v. Tomlinson, 148 N. Y. 326, 331, 42 N. E. 715); Ives v. Jefferson County Sup'rs, 18 Wis. 166, 168; Clark v. Dutton, 69 Ill. 521, 523; Greenlee v. Mosnat, 90 N. W. 338, 339, 116 Iowa, 535 (citing Nassoly v. Tomlinson, 148 N. Y. 326, 42 N. E. 715).

A claim is not liquidated when the balance due is fairly disputed. Plaintiff's claim is therefore an unliquidated one, so as to be the subject of a compromise, though the dispute is only as to whether damages to the fire and sprinkling plugs was caused by it, where it did street sprinkling for defendant city under a contract that it should receive a certain amount therefor, but that from such sum there should be deducted any damages to the fire and sprinkling plugs caused by it. H. C. Pollman & Bros. Coal & Sprinkling Co. v. City of St. Louis, 47 S. W. 563, 564, 145 Mo. 651.

Where there is a controversy over a set-off, and the balance due the plaintiff is fairly in dispute, the claim cannot be treated as liquidated, although the items of the plaintiff's claim are not disputed. Ostrander v. Scott, 43 N. E. 1089, 1091, 161 Ill. 339.

"An account is to be considered as liquidated after a demand of payment, with knowledge of what is claimed upon the part of the debtor, and without objection by him; or after it has been rendered to him without objection to it on his part within a reasonable time." Henderson Cotton Mfg. Co. v. Lowell Mach. Shops, 7 S. W. 142, 145, 86 Ky. 668.

"Liquidated," as used in Code, § 447, providing that debts which in the aggregate amount to more than justices' courts have jurisdiction of may be divided into liquidated demands so as to bring each within such jurisdiction, "is equivalent to 'settlement,'

'arrangement,' 'acknowledgment,' 'agreement to clear from obscurity,' etc., with each of which it is synonymous." *Parris v. Hightower*, 76 Ga. 631, 634.

"Liquidated" is used in different senses, but as used in a referee's finding of fact stating that, of two sums representing the aggregates of various business transactions between the parties, one was as much liquidated as the other, means certain as to what and how much is due; made certain by an agreement of the parties or by operation of law. *Chicago, M. & St. P. R. Co. v. Clark*, 20 Sup. Ct. 924, 931, 178 U. S. 353, 44 L. Ed. 1099.

Where counsel were employed by parol contract at a gross sum to defend accused, and he died before all the contemplated services were rendered, and there was no abandonment of the case on the part of the attorneys, one-half of the stipulated fee was a "liquidated demand" against the client's estate, under Code, § 406, providing that one-half of the fee of an attorney, unless otherwise stipulated, is a retainer and due at once. *McNulty v. Pruden*, 62 Ga. 135, 136.

"Liquidated," when stamped by a collector of customs on the entry of goods at a custom house, meant that the entry had been passed regularly through the various divisions of the collector's office, and the duties thereon had been finally ascertained and fixed by the custom officials. *Merritt v. Cameron*, 11 Sup. Ct. 174, 175, 137 U. S. 542, 34 L. Ed. 772.

LIQUIDATED BY LITIGATION.

The claim of a surety for a bankrupt is not "liquidated by litigation," within the meaning of Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 [U. S. Comp. St. 1901, p. 344], so as to entitle it to be proved after the expiration of the year fixed for proving claims, because of litigation between the principal creditor and the surety to determine the latter's liability, where the amount was not in controversy. In *re E. O. Thompson's Sons* (U. S.) 123 Fed. 174, 176.

LIQUIDATED DAMAGES.

Liquidated damages in a contract mean the payment of a certain and reasonable sum of money which should operate to extinguish any claim of plaintiff's for damages by reason of the breach of the contract by defendants. *Rosenquist v. Canary*, 45 N. Y. Supp. 342, 343, 20 Misc. Rep. 46.

When it is provided in a contract that on a breach thereof a certain sum shall be payable to the other party as "liquidated damages," the phrase means a positive debt, excluding evidence of actual damage. *Beale*

v. Hayes, 7 N. Y. Super. Ct. (5 Sandf.) 640, 644.

Liquidated damages is a sum agreed to be paid by the party in default where the damages which may result from the non-performance of a contract are uncertain, and cannot be admeasured with any degree of accuracy, or where a party stipulates to perform work by a definite time, and upon default to pay so much, weekly or monthly, if the sum is not so unreasonably large as to induce the belief that the parties never contemplated its payment. *Watts' Ex'rs v. Sheppard*, 2 Ala. 425, 445.

Where it is agreed that if a party shall do a particular thing a stipulated sum shall be paid by him, the sum stated may be treated as liquidated damages. As, for example, where a bond was conditioned that the obligor should not practice medicine within a certain distance from the location of the physician to whom he had sold his business, and in case he did so that he should pay \$500 for every month he so practiced, the sum stated is properly treated as liquidated damages. *Smith v. Smith*, 4 Wend. 468, 470. See, also, *Heatwole v. Gorrell*, 12 Pac. 135, 137, 35 Kan. 692; *Tobler v. Austin*, 53 S. W. 706, 707, 22 Tex. Civ. App. 99.

Attorney's fees.

"Liquidated damages," as used in a mortgage containing a stipulation that the mortgagor should not only pay the debts secured by the mortgage and the interest thereon, but also \$50 as "liquidated damages" in case of foreclosure, will not be construed to mean attorney's fees, and hence a judgment for \$50 attorney's fees is invalid. *Foote v. Sprague*, 13 Kan. 155, 160.

Construction of contracts.

In determining whether a sum stipulated to be paid upon default of a contract is a penalty or liquidated damages, the court will always seek to ascertain the true and real intention of the contracting parties, giving due weight to the language or words used in the contract, but not always being absolutely controlled by them when the enforcement of such contract operates with unconscionable hardship, or otherwise works an injustice. The mere denomination of the sum to be paid as "liquidated damages" or as "a penalty" is not conclusive on the court as to its real character. Although designated as "liquidated damages," it may be construed as a penalty, and often when called a "penalty" it may be held to be liquidated damages, where the intention to the contrary is plain. The courts are disposed to lean against any interpretation of a contract which will make it liquidated damages, and in all cases of doubtful intention will pronounce the stipulated sum a penalty. Where

the payment of a smaller sum is secured by an obligation to pay a larger sum, it will be held a penalty, and not liquidated damages. Where the agreement is for the performance or nonperformance of a single act, or of several acts, or of several things which are but minor parts of a single complex act, and the precise damage resulting from the violation of each covenant is wholly uncertain or incapable of being ascertained save by conjecture, the parties may agree on a fixed sum as liquidated damages, and the courts will so construe it, unless it is clear on other grounds that a penalty was really intended. When the contract provides for the performance of several acts of different degrees of importance, and the damages resulting from the violation of some, although not all, of the provisions are of easy ascertainment, and one large gross sum is stipulated to be paid for the breach of any, it will be construed a penalty, and not as liquidated damages. When the agreement provides for the performance of one or more acts, and the stipulation is to pay the same gross sum for a partial as for a total or complete breach of performance, the sum will be construed to be a penalty. Whether the sum agreed to be paid is out of proportion to the actual damages, which will probably be sustained by a breach, is a fact into which the court will not enter on inquiry, if the intent is otherwise made clear that liquidated damages, and not a penalty, is in contemplation. Where the agreement is in the alternative to do one of two acts, but is to pay a larger sum of money in the one event than in the other, the obligor having his election to do either, the amount thus agreed to be paid will be held liquidated damages, and not a penalty. In applying these rules, the controlling purpose of which is to ascertain the real intention of the parties, the court will consider the nature of the contract, the terms of the whole instrument, the consequences naturally resulting from a breach of its stipulations, and the peculiar circumstances surrounding the transaction; thus permitting each case to stand, as far as possible, on its own merits and peculiarities. These rules are believed to be sustained by the preponderance of judicial decision. Plaintiff was employed by defendant's testator as a business manager, having been his partner. He had sold to him his entire interest, but remained ostensibly a partner. A written agreement imposed on plaintiff the obligation "to wholly abstain from the use of intoxicating liquors," and "to continue and remain sober," giving his attention to the business, and promising, in the event he should become intoxicated, that he would pay, "as liquidated damages," the sum of \$1,000, which the testator was authorized to retain out of a debt he owed plaintiff. Plaintiff became intoxicated, and remained so for a long time, injuring thereby the

business. Held, that the sum agreed to be paid was liquidated damages, and not a penalty. *Keeble v. Keeble*, 5 South. 149, 85 Ala. 552.

Stipulations for liquidated damages are generally for amounts in excess of the actual damage, and in such cases work a hardship upon the party in default. In consequence courts are strongly inclined to treat all agreements to pay a lump sum in case of failure to perform the contract as a mere penalty, and in all doubtful cases to allow a recovery only for actual damages. This is even so where the contract expressly names the sum as liquidated damages, if the damages are such as can be ascertained with reasonable certainty according to the terms of law, and if, from inspection of the entire instrument, it appears that the sum may have been named as a penalty. Still it may be admitted that a contract for liquidated damages is lawful; that in the construction of these contracts, as in all others, the intention of the parties must govern. Where a stipulation in a contract to purchase cattle provided that a certain note given for a part of the purchase money should act as a forfeiture in case the vendee abandoned the trade, it was held an agreement for liquidated damages, although the actual damages were capable of being ascertained; the word "forfeiture" not being synonymous with "penalty." *Eakin v. Scott*, 7 S. W. 777, 778, 70 Tex. 442.

Though parties to a contract have named a specified sum as liquidated damages for its breach, the courts may in certain cases treat the provision as a penalty, and restrict the recovery to the actual damages which have accrued. If the damages be in their very nature uncertain, or the amount indeterminate, the sum specified will be treated as fixing by stipulation the amount of the recovery. The principle would seem to be that, though a sum be named as liquidated damages, the court will not so treat it unless it bear such proportion to the actual damages that it may reasonably be presumed to have been arrived at upon a fair estimation by the parties of the compensation to be paid for the prospective loss. *Collier v. Betterton*, 29 S. W. 467, 468, 87 Tex. 440; *Wilcox v. Walker* (Tex.) 43 S. W. 579, 580. See *Taylor v. Sandiford*, 20 U. S. (7 Wheat.) 14, 5 L. Ed. 384; *Sun Printing & Publishing Ass'n v. Moore*, 22 Sup. Ct. 240, 248, 183 U. S. 642, 46 L. Ed. 366.

Whether a sum agreed upon by the parties as the measure of damages for the violation of covenants shall be considered as liquidated damages or only as a penalty depends upon the meaning and intent of the parties, as gathered from a full view of the provisions of the contract and the terms used to express such intent. Where it is doubtful

whether the sum inserted was intended as a penalty or as liquidated damages, it will be considered in the nature of a penalty, especially if the payment of a certain damage less than the whole sum is provided for by the instrument; but where the sum applies as well to stipulations where the damages, in case of breach, necessarily must be uncertain, as to stipulations where the damages would be certain, it will be regarded as liquidated damages, and not as a penalty. Where the plaintiffs gave \$3,000 for the patronage and good will of a newspaper establishment, and \$500 for the type and printing apparatus, and the defendants (the vendors) covenanted that they would not publish or aid or assist in the publishing of a rival paper, and fixed the measure of damages at \$3,000, the case, from its peculiar nature and the total uncertainty of arriving at a correct conclusion as to the amount of damages, was held to be a fit and proper one for the application of the rule that the sum agreed upon should be regarded as stipulated damages, and not as a penalty. *Dakin v. Williams* (N. Y.) 17 Wend. 447. See, also, *Williams v. Dakin* (N. Y.) 22 Wend. 201, and *Hahn v. Horstman*, 75 Ky. (12 Bush) 249, 254.

Where a contract provides a forfeiture for the purpose of securing the payment of a sum of money or the performance of an act which may be compensated in damages, the sum forfeited may be deemed a penalty, and not liquidated damages. *Flagg v. Monger*, 9 N. Y. (5 Seld.) 483, 500.

The distinction between penalty and liquidated damages is clearly stated in *People v. Love*, 19 Cal. 676, 677, and cases there cited. As there said, it matters not what particular terms are used in contract. Even if the thing to be done be called a "penalty" or "liquidated damages" or given no name at all, it will be treated according to the evident intent of the parties, and the subject-matter of the contract. *Pogue v. Kaweah Power & Water Co.*, 72 Pac. 144, 145, 138 Cal. 684.

Where an agreement secures the performance or omission of various acts which are not measureable by any exact pecuniary standard, together with one or more acts in respect to which the damages for a breach of contract are readily ascertainable by a jury, and there is a sum stipulated as damages for a breach of any one of the covenants, such sum is held to be a penalty merely, and not liquidated damages. So, where defendant agreed with plaintiffs not to pay for ore taken from plaintiffs' land or elsewhere more than plaintiffs were paying, and to sell ore purchased by him to plaintiffs for which he was to receive \$4 per thousand pounds more than plaintiffs were then paying to the miners on their own land, and bound himself in a certain sum as liquidated damages to be

paid in case of a violation or failure to perform any such stipulation, it was held that such sum was a penalty. *Long v. Towl*, 42 Mo. 545, 550, 97 Am. Dec. 355; *Emery v. Boyle*, 49 Atl. 779, 780, 200 Pa. 249.

A sum which a contract of sale of business and good will provides that the seller shall pay as liquidated damages in case they re-engage in business is not a penalty. While the definition of the parties in contracts of such a character is not an invariable and controlling guide for construction, the subject-matter of such a contract was such in its very nature as to render proof of the damages exceedingly difficult, if not impossible, and manifestly to make it a case of liquidated damages. *Potter v. Ahrens*, 43 Pac. 888, 389, 110 Cal. 674.

The phrase "liquidated damages" in a contract providing for the payment of a certain sum as liquidated damages was said in *Scofield v. Tompkins*, 95 Ill. 190, 193, 35 Am. Rep. 160, as having often "been made to read 'penalty' if the strict construction of the phraseology would work oppression upon the obligor, or, if the enforcement of the contract would be unconscionable, the courts will then construe the amount named in the contract as a penalty. And it seems from all the cases that, whatever may be the working of the contract, the courts will admit evidence as to whether or not the strict enforcement of its provisions would work a hardship upon the obligor." *Radloff v. Haase*, 63 N. E. 729, 730, 196 Ill. 865.

The intention of the party as to whether a sum is liquidated damages or a penalty under the artificial rules that have been adopted is determined by a very latitudinary construction. To be potential and controlling that a sum is liquidated damages, that sum must be fixed as the basis of compensation, and substantially limited to it; for just compensation is recognized as the universal measure of damages not punitive. Parties may liquidate the amount by previous agreement. But when a liquidated sum is evidently not based on that principle, the intention to liquidate damages will either be found not to exist, or will be disregarded, and the sum treated as a penalty. *Muldoon v. Lynch*, 6 Pac. 417, 419, 66 Cal. 536.

Where, from the nature of the transaction, the actual damages consequent on a breach of the contract are incapable of accurate measurement, or where the sum specified is not out of all proportion to any damages which could arise, the provision will be treated as liquidated damages. But where these facts do not exist the tendency of the court is to treat the stipulation in the nature of a penalty. *Cesar v. Robinson*, 67 N. E. 58, 59, 174 N. Y. 492.

It would seem that the expressed intention of the parties to a contract should gov-

ern. In every case where they say that a certain sum shall be paid in case of a breach it shall be construed as fixing the amount of recovery, and yet, notwithstanding such provision, in certain cases the damages may be limited to a just compensation for the loss which has been suffered. Therefore the principle would appear to be that, though a sum be named as liquidated damages, the court will not so treat it unless it bears such a proportion to the actual damages that it would reasonably be presumed to have been arrived at upon a fair estimation by the parties of the compensation to be paid, or the prospective loss. After all that is said, it is the intention of the parties that must govern in the construction of such contracts, as in all others. *Dobbs v. Turner* (Tex.) 70 S. W. 458, 460 (citing *Collier v. Betterton*, 87 Tex. 442, 29 S. W. 468).

A stipulation for liquidated damages, however positively assented to, will be construed as one for a penalty if it be necessary to do so in order to avoid extortion and oppression; but if it is not oppressive, in view of the circumstances, it will be enforced as the compensation an aggrieved party is entitled to receive, even if it is probably greater than the loss he sustains by the other party's breach, if his actual damage cannot be measured with approximate certainty. *Menges v. Milton Piano Co.*, 70 S. W. 250, 251, 96 Mo. App. 283.

A clause in a charter party in which the parties mutually bind themselves "in the penal sum of estimated amount of freight" to the performance of all and every of their agreements, is not a stipulation for liquidated damages, but a penalty to secure the payment of the amount of damage that either party may actually suffer from any breach of the contract. *Watts v. Camors*, 6 Sup. Ct. 91, 94, 115 U. S. 353, 29 L. Ed. 406.

A penalty in general is a sum of money in gross to be paid for nonperformance of an agreement. The question whether a sum stipulated in a written contract to be paid on the breach of its condition is a penalty or liquidated damages is a question for the court, to be determined by the intention of the parties as drawn from the words of the whole contract, examined in the light of its subject-matter and its surroundings. A seller of his stock of merchandise and good will stipulated in the contract of sale that he would not engage in or open a store doing the same kind of business within certain defined limits "under penalty of \$1,000," and in case the party should fail to comply with the conditions of the agreement he should "forfeit and pay to the other a sum of \$1,000." The sum specified in the agreement is a penalty, and not liquidated damages. *March v. Allabough*, 103 Pa. 335, 340.

The purpose of a penalty is to insure the performance of a contract and not to fix the

measure of damages which may be recovered for a breach of it; and, except in actions to recover the penalty, the injured party can recover the full amount of his damages. The intention of the parties is generally the test to determine whether a promise to pay a fixed sum of money for any default in the performance of a contract is in the nature of a penalty or of liquidated damages, but a promise to pay a large sum of money in the event of a default in the payment of a much smaller sum is an exception to this rule, for the law makes interest the measure of damages for failure to pay money when it is due, and will not permit the parties to avoid the usury laws in this way. Such a promise will be treated as a penalty, and not as liquidated damages. Where a partnership agreement provided that, in the event of default by either party in the performance of its conditions, or on default in payment of any moneys due from one party to the other after demand, the defaulting party agreed to forfeit the sum of \$300 to the other as liquidated damages, such amount was in the nature of a penalty, and not liquidated damages. *Morrill v. Weeks*, 46 Atl. 32, 33, 70 N. H. 178.

The tendency and preference of the law is to regard a stated sum as a penalty, except where the actual damages cannot be ascertained by any standard. But where the damages which must result from the breach of a single contract are uncertain in their nature, any stipulation which the parties may make, ostensibly for the purpose of liquidating the damages, should receive favorable consideration. Where the sum is agreed to be paid for any of several breaches of contract, and the damage resulting from a breach of all of them are uncertain, and there is no fixed rule for measuring them, but the breach was apparently of various degrees of importance and injury, cases in this country are somewhat conflicting as to whether the sum should be held to be a penalty or as liquidated damages. But where the same is made payable for one breach and for many, for a breach attended with a small loss or a great loss, and the actual damages are easily computed, the inequality is at once seen. The stipulation as to a definite sum is so framed that it cannot possibly be construed to adjust the recompense to actual injury. The sum mentioned under such circumstances is to be treated as a penalty, and not as liquidated damages. *People v. Central Pac. R. Co.*, 18 Pac. 90, 94, 76 Cal. 29.

The word "penalty" prima facie excludes the notion of stipulated damages, although the use of either the word "penalty" or the words "liquidated damages" is not conclusive. A contract for the construction and delivery of two engines recited that the purchaser was desirous that the contract should contain a penalty in the way of stipulated damages, and provided that one of the engines should

be delivered on the 1st of April and the other on the 1st of May, the manufacturer agreeing to pay, as liquidated damages for any delay in delivery after the 1st of April as to the first engine, and after the 1st of May as to the second, the sum of \$50 per day for all time which the delivery should be delayed. The purchaser made a payment on the contract price after the default, without informing the vendor that he intended to claim the \$50 per day as liquidated damages. Held, that the agreement stipulated for a penalty, and not for liquidated damages, and could not be enforced. *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 54 N. E. 987, 994, 181 Ill. 582.

Conclusiveness of terms.

The use of the term "liquidated damages" in a contract, when fixing the sum to be paid on breach thereof, is not sufficient to control the construction, if the court can discover in the other parts of the instrument a reason even to doubt as to the intention of the parties. *Bagley v. Peddie*, 16 N. Y. 469, 471, 69 Am. Dec. 713; *Pastor v. Solomon*, 55 N. Y. Supp. 956, 957, 26 Misc. Rep. 125; *People v. Love*, 19 Cal. 676, 682.

The law will permit parties to determine by an agreement which enters into the contract what shall be the damages which he who violates the contract shall pay to the other; but it does not always sanction or enforce the bargain they may make on this subject. Where the parties make this agreement, but not in such wise that the law adopts it, then the damages thus agreed upon are a penalty, or in the nature of a penalty. And the question whether damages agreed upon are to be treated as liquidated or as in the nature of a penalty, and therefore reduced to the actual damage, often occurs, and it is not always of easy or obvious solution. "One rule for determining the question is this: that the action of the court shall not be defined and determined by the terms which the parties have seen fit to apply to the sum fixed upon. Though they call it a 'penalty,' or give it no name at all, it will be treated as liquidated damages; that is, it will be recognized and enforced as the measure of damages, if, from the nature of the agreement and the surrounding circumstances, and in reason and justice, it ought to be. And, although they call it 'liquidated damages,' it will be treated as a penalty if, from a consideration of the whole contract, it appears that the parties intended it as such, or if, where the injury is certain, the sum fixed upon is clearly disproportionate to such injury and the real claim which grows out of it." *Wibaux v. Grinnell Live-Stock Co.*, 22 Pac. 492, 494, 9 Mont. 154.

Though the use of a particular word will not be regarded as determinative of the question as to whether a sum stipulated to

be paid for breach of a contract is liquidated damages or a penalty, it may be remarked that while the phrase "liquidated damages" is frequently declared to signify no more than a penalty, a sum expressly designated a penalty has rarely been construed to be liquidated damages. *Kelly v. Fejervary*, 83 N. W. 791, 792, 111 Iowa, 693.

"Whether a sum agreed to be paid as damages for the violation of an agreement is to be considered as liquidated damages or as a penalty is held to depend on the meaning and intent of the parties as gathered from a full view of the provisions of the contract, the terms used to express such intent, and the peculiar circumstances of the subject-matter of agreement. * * * The mere use of the term 'penalty' or the term 'liquidated damages' does not determine this intention if, on the whole, the instrument discloses a different intent." *Yetter v. Hudson*, 57 Tex. 604, 612.

The word "penalty" in a contract providing for the payment of a certain sum as a penalty for a breach of the contract will never be construed to mean liquidated damages. *Radioff v. Haase*, 63 N. E. 729, 730, 196 Ill. 365.

Wherever the words "penal sum" or "penalty" are used in a contract, it must be construed as being so intended by the parties; but where a sum named is called "liquidated damages" it will be held as a penalty if it seems from the contract that it was so intended by the party and the justice of the case requires such a construction. *White v. Arleth* (U. S.) 29 Fed. Cas. 978, 981.

Where the word "penalty" is used in fixing a sum to be paid on breach of a contract, it is generally conclusive against its being held liquidated damages, however strong the language of the other parts of the instrument in favor of such construction. *Bagley v. Peddie*, 16 N. Y. 469, 471, 69 Am. Dec. 713.

The word "penalty" in a contract providing for the payment of a certain sum as a penalty for a breach thereof will be construed to mean liquidated damages where it appears that it was intended as a provision for liquidated damages. *Pastor v. Solomon*, 55 N. Y. Supp. 956, 957, 26 Misc. Rep. 125.

The use of the term "penalty" in a contract to designate a sum payable on a breach thereof, which, from the nature of the agreement and surrounding circumstances, is shown to be liquidated damages, does not have the effect of causing such liquidated damages to become a "penalty." *People v. Love*, 19 Cal. 676, 682.

Forfeit.

See *Forfeit—Forfeiture.*

LIQUIDATION.

Liquidation "is the act of settling, adjusting debts, or ascertaining their amounts or balance due." *Midgett v. Watson*, 29 N. C. 143, 145.

Mr. Justice Story said in *Fleckner v. Bank of United States*, 21 U. S. (8 Wheat.) 338, 362, 5 L. Ed. 631: "The ordinary sense of liquidation, as given by lexicographers, is to clear away—to lessen—a debt; and in common parlance, especially among merchants, to liquidate the balance is to pay it." *Richmond v. Irons*, 7 Sup. Ct. 788, 804, 121 U. S. 27, 30 L. Ed. 864.

"In its general sense, liquidation means the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors, and appropriating the amount of profit or loss." 3 Cent. Dict. 3474. The word was so used in a resolution of the directors of an insurance company to reinsure its risks and to liquidate its affairs. *L. D. Garrett Co. v. Morton*, 71 N. Y. Supp. 17, 19, 35 Misc. Rep. 10.

A bill of lading for goods sent to a purchaser, and not objected to by him, amounts to a liquidation of an account within a statute allowing interest on money due on the settlements of accounts from the day of "liquidating accounts" from the parties and ascertaining the balance. *Cooper v. Coates*, 88 U. S. (21 Wall.) 105, 22 L. Ed. 481.

As decision.

Act Cong. 1864, § 14, declares that the decision of the collector of customs is conclusive unless the party, if dissatisfied with his decision, gives notice thereof within ten days after the "ascertainment and liquidation of the duties by the proper officers of the customs," and within thirty days after the date of such ascertainment and liquidation appeals therefrom to the Secretary of the Treasury. Held, that "ascertainment and liquidation" is synonymous with "decision of the collector of customs." Such ascertainment and liquidation of the duties by the proper officers of the customs—that is, the proper officers in the collector's office or department—is the decision of the collector. When the duties are ascertained and liquidated in the usual manner by such officers, and the usual indicia thereof by checks and stamps are placed on the usual papers in the collector's office, such transaction is the decision of the collector of customs in the premises. *United States v. Cousinery* (U. S.) 25 Fed. Cas. 677, 679.

As notice of dissolution.

The words "in liquidation," written across the face of a note executed by a partnership, indicate in commercial usage that the firm was dissolved at the time of the

making of the note. *Burr v. Williams*, 20 Ark. 171, 188.

"Liquidation," as used in notes signed in the name of a partnership with the words "in liquidation" added to it, are no part of the signature or description of the firm, and they do not necessarily indicate a dissolution of the firm. They were probably added to denote the purpose for which the notes were given, and a mere addition of this kind need not be noticed in the declaration, and, if omitted, it does not amount to a variance. *Fairchild v. Grand Gulf Bank*, 6 Miss. (5 How.) 597, 604.

Payment implied.

"Liquidation," as used in Rev. St. § 2931, requiring notice of an intention to recover a tax alleged to have been wrongfully collected to be given within ten days from the "ascertainment and liquidation" of the same, means the ascertaining and demanding and receiving the same, necessarily implying payment. *Laidlaw v. Abraham* (U. S.) 43 Fed. 297, 298.

As statement.

"The liquidation of an account cannot mean anything less than a statement and adjustment of it by the parties interested." *McLellan v. Crofton*, 6 Me. (6 Greenl.) 307, 349.

LIQUIDATING PARTNER.

A liquidating partner is one of a dissolving firm, who receives and disburses the assets to the exclusion of the other partners, but with their assent, and by his own apparent voluntary action. Formal appointment is not necessary, nor must every act of his be without consultation with the others. *Garretson v. Brown*, 40 Atl. 293, 300, 185 Pa. 447.

Where a partnership is mutually dissolved, and one of the members of the firm is made the liquidator, the position which he occupies is one of agency. He becomes the sole authorizing agent of the partnership for the single purpose of winding up and settling its affairs. He represents creditors on the one hand, and all of the partners on the other, and for this reason he is sometimes spoken of as a trustee; but he is not accurately so described, inasmuch as he has in his possession no more property or power after being appointed liquidator than he had theretofore. *Smith v. Proskey*, 81 N. Y. Supp. 424, 425, 82 App. Div. 19.

LIQUOR.

See "Alcoholic Liquor"; "Contraband Liquors"; "Fermented Liquor"; "Intoxicating Liquor"; "Malt Liquor"; "Mixed Liquor"; "Spirituuous Liquors"; "Strong Liquor"; "Vinous Liquor."

The word "liquor" may be used in either of two senses. The first is practically synonymous with "liquid"; the second, as given in Webster's Dictionary is, specifically, alcoholic or spirituous fluid, either distilled or fermented, as brandy, wine, whisky, beer, etc. In common parlance the word is universally understood in the latter sense when used in speaking of a dealer in liquors. This being true, when the statute first prescribes a penalty for dealing in intoxicating liquors, and then prescribes a form of indictment to be used in prosecuting for a breach of this law, using therein the word "liquors," it is beyond cavil that the word is used in the special sense of intoxicating liquors as above defined, and that under such an indictment the sale only of such liquor can be shown. *Brass v. State* (Fla.) 34 South. 307, 308.

Liquor is said by Webster to be a liquid or fluid substance, a word extending in its general signification to water, milk, blood, sap, juice, etc.; but its most common application is to spirituous fluids, whether distilled or fermented; to decoctions, solutions, tincture. *Houser v. State*, 18 Ind. 106, 107.

The term "liquor" applies only to liquors containing a sufficient percentage of alcohol to cause intoxication. *Board of Com'rs of Excise of Tompkins County v. Taylor*, 21 N. Y. 173, 177.

The word "liquors," as placed on a card on which the name of a jurymen is placed, and which is placed in a box from which the names are drawn, is a sufficient indication of his occupation to comply with Pub. St. c. 170, § 31, requiring such cards to designate the occupation of a juror. *Commonwealth v. Bacon*, 135 Mass. 521, 525.

In a prosecution for the sale of intoxicating liquors the court instructed the jury that "the sale of intoxicating liquors may be proven by circumstantial evidence, and where it is shown that the person was sold or furnished liquor at a licensed saloon the presumption is that such liquor was intoxicating." The court, in discussing this charge, said: "Whether or not intoxicating liquors were sold by defendant to deceased was the most seriously contested question in this case. The word 'liquor' is defined by Webster: '(1) Any liquid or fluid substance; as water, milk, blood, sap, juice, and the like. (2) Especially alcoholic or spirituous fluid, either distilled or fermented; as brandy, wine, whisky, beer,' etc. If the witnesses, in describing what liquor had been sold to deceased, had uniformly described it merely as 'liquor,' it might be proper for the jury to assume that it was in that class specifically referred to in the second definition above given. But such was not this case. There was evidence that the liquor furnished by defendant to deceased, at least on one occasion, was seltzer, and within one of the definitions

first given above seltzer is clearly embraced. Under these circumstances it was erroneous to instruct the jury that whatever liquor is shown to have been sold in a licensed saloon is presumed to be intoxicating." *Dolan v. McLaughlin*, 64 N. W. 1076, 1078, 46 Neb. 449.

All wines, champagnes, and cider shall be comprehended within the term "liquors" for the purposes of an act relating to the inspection of liquors. *Baillinger's Ann. Codes & St. Wash.* 1897, § 2932.

Alcohol.

The term "liquor" does not include alcohol. *State v. Martin*, 34 Ark. 340, 341.

Beer.

"Liquors," as used in Tariff Act March 3, 1883 (22 Stat. 505, Schedule H), prohibiting any allowance for breakage, leakage, or damage in respect to wines, liquors, cordials, or distilled spirits, implies spirituous liquors, and does not include beer. The word "liquors" is frequently, if not generally, used to define spirits or distilled beverages, in contradistinction to those that are fermented. Thus, in the Century Dictionary, one of its definitions is "an intoxicating beverage, especially a spirituous or distilled drink, as distinguished from fermented beverages, as wine and beer, and does not include beer." *Hollender v. Magon*, 13 Sup. Ct. 932, 983, 149 U. S. 586, 37 L. Ed. 860 (reversing [C. C.] 88 Fed. 912).

Liquor is defined as meaning distilled or rectified spirits, wine, fermented or malt liquors. *Liquor Tax Law*, § 2. Evidence in an injunction suit to restrain the illegal sale of liquor that defendant sold beer is not sufficient to show a sale of liquor, as it will not be presumed that beer means fermented or malt liquor. *In re Hunter*, 69 N. Y. Supp. 908, 909, 34 Misc. Rep. 389.

Champagne.

"Liquors," as used in Rev. Code, c. 79, § 4, forbidding a credit of more than \$10 for liquors sold, includes champagne. *Kizer v. Randleman*, 50 N. C. 428, 429.

As fermented or spirituous liquor.

Liquor, according to Webster, may be any liquid or fluid substance; so that an indictment charging a sale of liquor does not charge any offense under a statute prohibiting the sale of spirituous, vinous, fermented, or malt liquors. *State v. Quinlan*, 41 N. W. 299, 300, 40 Minn. 55.

In its most comprehensive signification, liquor implies fluid substances generally, such as water, milk, blood, sap, juice; but in a more limited sense, and its more common application, it implies spirituous fluids, wheth-

er fermented or distilled, such as brandy, whisky, rum, gin, beer, and wine, and also decoctions, solutions, tinctures, and the like fluids in great variety. *State v. Giersch*, 4 S. E. 193, 194, 98 N. C. 720.

Liquor includes all fermented liquors. *Town of Mandeville v. Baudot*, 21 South. 258, 49 La. Ann. 236.

Most generally the term "liquors" implies spirituous liquors, and therefore proof that a defendant sold liquors is sufficient to show, in the absence of adverse testimony, that he sold spirituous liquors. *State v. Brittain*, 89 N. C. 574, 576.

"The word 'liquors,' as commonly used, includes all that are spirituous, vinous, or inferior fermented, including malt." *People v. Crilley* (N. Y.) 20 Barb. 246, 248.

LIQUOR DEALER.

See "Retail Liquor Dealer"; "Wholesale Dealer."

"Liquor dealers," as used in the Constitution giving the General Assembly power to tax liquor dealers, is employed in a generic sense, and includes all kinds and classes. There may be different classes and varieties included under the general description of "liquor dealers," and it is competent for the General Assembly to classify the different kinds of liquor dealers included within the description as used in the Constitution. *Timm v. Harrison*, 109 Ill. 593, 601; *Dennehy v. City of Chicago*, 12 N. E. 227, 229, 120 Ill. 627.

"Dealer," as used in Pen. Code, art. 186, providing for the punishment of "dealers" in spirituous liquors for selling such liquors on Sunday, cannot be construed to include one who has made but a single sale. *Archer v. State*, 10 Tex. App. 482, 483.

One who engages in the business of procuring from the manufacturers beer by the case and disposing of it by the bottle is dealing in liquors, and it can make no difference if it is true that the customers left their orders for specific quantities before the defendant undertook the procurement thereof. The word "dealer" is not confined to one who sells his own property only. If one open a place of business for the purpose of furnishing to all who may patronize him liquors in quantities of less than five gallons, he is engaged in the business of a retail liquor dealer, irrespective of the question of the manner or mode in which he procures the liquors from the manufacturers. *United States v. Allen* (U. S.) 38 Fed. 736, 738.

Since the passage of the Georgia act of December 24, 1890 (1 Acts 1890-91, p. 128), rendering it unlawful to sell spirituous liquors in any quantity whatever without first

obtaining a license, the phrase "dealers in spirituous liquors," when used in a statute, comprehends all persons who sell such liquors in any quantity. Consequently the fifteenth clause of the second section of the general tax act of 1892 is to be construed as imposing the tax therein specified upon dealers who sell by wholesale in the original packages corn whisky of their own manufacture in this state, the same as upon other dealers of such liquors. *Fincannon v. State*, 21 S. E. 53, 93 Ga. 418.

The statute of 1846 relating to the punishment of a dealer in spirituous liquors without a license does not mean that one should actually do the business in person, or even that it should be done in his presence, or by his express command. A merchant who keeps liquors in his store for sale, and clerks to deal it out in common with other commodities kept for sale, is equally as liable for sales made by such clerks as if made by him in person. It is a dealing by him. *State v. Dow*, 21 Vt. 484, 487.

The term "liquor dealer" does not characterize a person making only one sale of intoxicating liquors, but repeated sales at or about the same time is strong evidence that the person making the sales is a liquor dealer. *Mansfield v. State*, 17 Tex. App. 463, 472.

Club or association.

A club or association of persons not incorporated, combined together for social and literary objects, is a "dealer in malt liquors," and subject to a tax, though it is sustained by initiation fees and equal monthly assessments, where the liquor was paid for out of the general fund, and was served by glass to the members of the club. *United States v. Wittig* (U. S.) 28 Fed. Cas. 744, 745.

A benevolent association, which sells as such to its members tickets entitling them at a picnic to a glass of beer, is a "dealer in malt liquors," within the statute requiring a license for that purpose. *United States v. Giller* (U. S.) 54 Fed. 656, 658.

LIQUOR SHOP.

"A liquor shop is correctly described as a house where spirituous liquors are kept and sold." *Wooster v. State*, 65 Tenn. (6 Baxt.) 533, 534.

LIQUOR LICENSE.

See "License."

As franchise, see "Franchise."

As property, see "Property."

LIQUOR TAX CERTIFICATE.

A liquor tax certificate issued under the existing law is essentially different from the former license. The license was a personal

privilege, which the holder took subject to the conditions of law by which it was rendered revocable. The certificate represents a species of property transferable by the owner, and accordingly protected by the general rules of law in any proceeding having for its object the forfeiture or destruction of the right which it confers. In *re Cullinan*, 81 N. Y. Supp. 567, 568, 82 App. Div. 445 (citing *in re Lyman*, 160 N. Y. 96, 54 N. E. 577).

LIS.

"Lis" means a suit, action, controversy, or dispute. *State v. Guinotte*, 57 S. W. 281, 283, 156 Mo. 513, 50 L. R. A. 787 (citing *Whart. Law Dict.*).

LIS MOTA.

Within the rule that *ex parte* declarations, even though made upon oath, referring to a date subsequent to the beginning of the controversy, are rejected as not evidence, the term "*lis mota*," as used in this rule of evidence in the Roman law, was there applied strictly to the commencement of the action, and was not referred to an early period of a controversy. But in our law the term "*lis mota*" is taken in the classical and larger sense of controversy, and is understood to mean the commencement of the controversy, and not the commencement of a suit. *Westfeldt v. Adams*, 42 S. E. 823, 826, 131 N. C. 379.

LIS PENDENS.

Lis pendens is the pendency of a suit and an action is pendent after it is entered. *Parker v. Colcord*, 2 N. H. 36, 37.

A *lis pendens* is defined in *Wharton's Law Dictionary* as a pending suit. "*Lis*" means a suit, action, controversy, or dispute, and dispute is a conflict or contest, while controversy is a disputed question, a suit at law; and the *pendens* of the *lis* is not disturbed or in any manner affected by the fact of an appeal taken from one court to another. The litigation or contest still goes on. *State v. Guinotte*, 57 S. W. 281, 283, 156 Mo. 513, 50 L. R. A. 787.

"The doctrine of *lis pendens* is that real property, when it has been put in litigation by a suit in equity, in which it is specifically described, will, if the suit is prosecuted with vigilance, be bound by the final decree, notwithstanding any intermediate alienation; and one who intermeddles with property in litigation does so at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party from the outset. See *Tilton v. Codfeld*, 93 U. S. 168, 23 L. Ed. 858. *Mr.*

Bennett, in his work on *Lis Pendens*, p. 153, says: 'It is essential to the existence of a valid and effective *lis pendens* that three elements be present: First, the property must be of a character to be subjected to the rule; second, the court must have jurisdiction both of the person and the res; and, third, the property or res involved must be sufficiently described in the pleadings.' And this definition is quoted with approval in the case of *Leavell v. Poore*, 91 Ky. 324, 15 S. W. 858." *Boyd v. Emmons' Adm'r*, 45 S. W. 364, 366, 103 Ky. 393.

A *lis pendens* is notice of all facts apparent on the fact of the pleadings and of all the other facts of which the facts stated necessarily put the purchaser on inquiry. *Powell v. Campbell*, 20 Nev. 232, 239, 20 Pac. 156, 162, 2 L. R. A. 615, 19 Am. St. Rep. 350; *Parks v. Smoot*, 20 Ky. Law Rep. 1043, 1044, 48 S. W. 146, 105 Ky. 63.

Judge Story, in 1 Story, Eq. Jur. § 405, defines the doctrine of *lis pendens* as follows: "A purchase made of the property actually in litigation *pendente lite* for a valuable consideration, and without any express or implied notice, in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit." *Garver v. Graham*, 51 Pac. 812, 813, 6 Kan. App. 344.

"The doctrine of *lis pendens*, as generally understood and applied by the courts of this country, is not based upon presumption of notice, but upon a public policy, imperatively demanded by a necessity which can be met and overcome in no other way." It is careless "use of language which has led judges to speak of it as notice, because it happens to have in some instances similar effect with notice," *Freem. Judgm.* § 191. *Smith v. Kimball*, 13 Pac. 801, 808, 36 Kan. 474.

"*Lis pendens* is defined to be the jurisdiction, power, or control, which the court acquires over the property involved in the suit pending the continuance of the action; and until its final judgment therein it has for its object the keeping of the subject or res within the power of the court until the judgment or decree shall be entered, to make it possible for courts of justice to give effect to their judgments and decrees." *Tinsley v. Rice*, 31 S. E. 174, 176, 105 Ga. 285.

The underlying, if not the sole, object of the maxim, "*Pendente lite nihil innovetur*," is to keep the subject of the suit, or res, within the power of the court until the judgment or decree shall be entered, and thus make it possible for courts of justice to give effect to their judgments and decrees. This gives a correct general idea of the doctrine of *lis pendens*, which is said to arise

out of necessity, and is constructive notice to the world of the issues involved in pending litigation; and he that purchases property which is the subject of litigation from one of the parties litigant takes title subject to the judgment which may be therein rendered. *Bowen v. Kirkland*, 44 S. W. 189, 194, 17 Tex. Civ. App. 346.

Lis pendens is notice of all facts apparent on the face of the pleading, and all those other facts of which the facts so stated put a purchaser on inquiry. *Lis pendens* applies only to rights or interests acquired from a party after the institution of the suit, and not to the case of a right previously contingent or conditionally becoming perfect. *Parks v. Smoot*, 48 S. W. 146, 105 Ky. 63.

Lis pendens is created by the institution of suit, and is operative against all persons coming in subsequently by purchase or otherwise; or creates a specific lien if successfully prosecuted to a final decree, the decree taking effect by relation from the day of the service of the summons to answer. *Hines v. Duncan*, 79 Ala. 112, 117, 58 Am. Rep. 580.

A *lis pendens* is for the purpose of giving notice of the jurisdiction or control which the court acquires over property involved in a suit pending the continuance of the action, and where matters in dispute have been finally determined the filing of a *lis pendens* is without authority of law. *Washington Dredging & Improvement Co. v. Kinnear*, 64 Pac. 522, 24 Wash. 405.

Chancellor Kent, in *Murray v. Ballou*, 1 Johns. Ch. 566, 576, says: "The established rule is that a *lis pendens* duly prosecuted, and not collusive, is notice to a purchaser so as to effect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpoena after the bill is filed." And a late writer (2 Pom. Eq. Jur.) says that "during the pendency of an equitable suit neither party to the litigation can alienate the property in dispute so as to affect the rights of his opponent." *Walker v. Goldsmith*, 12 Pac. 537, 542, 14 Or. 125.

A *lis pendens* only relates to and affects voluntary alienations of property pending a suit in respect to it by or from the defendants therein, and in no way affects independent parties asserting adverse rights in respect to it. It only operates as a notice requiring all persons to beware of acquiring rights in the subject-matter of the litigation from any of the parties named therein during the pendency of the suit. In *Sheffield v. Robinson*, 73 Hun, 173, 25 N. Y. Supp. 1098, the court said: "The object of the *lis pendens* is to give notice of the pendency of the action to all persons who may subsequently acquire or seek to acquire rights in property, but it is not required for the protection of

the parties to the action, and an omission of the same is not a defense to the action." *Stuyvesant v. Well*, 57 N. Y. Supp. 592, 597, 26 Misc. Rep. 445.

In custodia legis distinguished.

There is necessarily a difference in the doctrines described as "*lis pendens*" and "*in custodia legis*." As illustrating the limitations of the doctrine of *lis pendens*, the case of *Boshear v. Lay*, 53 Tenn. (6 Heisk.) 163, may be referred to, where it is held that a party purchasing property *pendente lite*, the property being involved in litigation, is not affected with notice unless the pleadings clearly show the specific property in controversy. In the opinion it is stated that the principle of *lis pendens* is that the proceedings must be of such character as to point out to all the world the property or right affected by them. To effect a notice that he is buying property involved in litigation it must appear from the proceedings so pending that the specific property was so involved. *Ewin v. Lindsay* (Tenn.) 58 S. W. 383, 394.

As notice.

A *lis pendens* is constructive notice to a purchaser that he will be bound by a decree to be entered in a pending suit. *Harrington v. Slade* (N. Y.) 22 Barb. 161, 166.

Lis pendens is only constructive notice of that which is involved in the litigation. *Hoffman v. Blume*, 64 Tex. 334, 336.

The doctrine of *lis pendens* is not founded on any idea of constructive notice, but upon the public necessity of preserving property, the subject of litigation, to await the result of the pending suit. It has no application to suits in personam not involving the title or right to charge particular property. *Greenwood v. Warren*, 23 South. 686, 687, 120 Ala. 71.

It is frequently said that *lis pendens* is notice, but that is a loose mode of expression, not warranted by the reason or spirit of the rule. If *lis pendens* was notice, then it should bind the purchaser like actual notice in any subsequent suit prosecuted for the same cause, but this it does not. A *pendente lite* purchaser should rather be regarded in the attitude of a party, or at least of a privy, to the suit, for his rights are absolutely concluded by the final determination of the suit, as though he were a party or privy. Where the legal estate is conveyed to a third person pending a suit for the recovery of the property, whether the title will remain with him, notwithstanding the successful prosecution of the suit, subject to be divested by a new suit, or whether the decree and proceedings under it are made, by relation, to take effect from the institution of the suit, so as to totally vacate

the intermediate conveyance, is a question of some difficulty, on the score of authority. The inquiry, however, has more of nicety than substantial utility, for, if the result of the suit concludes the question as though the purchaser had been a party to the suit, it must be conclusive between them in any other litigation concerning the actual right to the property. However, in order to maintain *lis pendens* in effect, suit must at least be prosecuted with diligence, though it does not distinctly appear what degree of intermission will deprive the complainant of the protection of the rule. But where during the pendency of the suit one of the defendants died, and the suit was not revived against his heirs for over two years, the unexplained lapse of time shows such negligence as to lose the complainant the benefit of the rule of *lis pendens*. *Watson v. Wilson*, 32 Ky. (2 Dana) 406, 408, 409, 26 Am. Dec. 459.

Notice of *lis pendens* distinguished.

In *Empire Land & Canal Co. v. Engley*, 33 Pac. 153, 154, 18 Colo. 388, it is said that the distinction between the term "*lis pendens*" and the phrase "notice of *lis pendens*" is not always observed. The former is a common-law term. The latter is regulated by statute. At common law the general rule is that all persons are bound to take notice, at their peril, of suits affecting the title to property, and purchasers *pendente lite*, either with or without notice, take no better title than their grantor shall be adjudged to have. The hardship of this rule in cases of certain equitable liens and secret trust estates led to the adoption of statutes providing for the registry of the notice of the pendency of certain actions. This, it seems, is the statutory notice of *lis pendens*.

Service required.

The filing of a bill, in the absence of statutory provisions, does not make a *lis pendens*. A suit in equity or at law does not become *lis pendens* until service of process. *Wheeler v. Walton & Whann Co.* (U. S.) 65 Fed. 720, 722.

Specification of property required.

Lis pendens is but a constructive notice, and, to make it available, the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril. This is necessary to justice, for, as liberty is very much, though necessarily, invaded by executing a decree over a party's head without allowing him even a hearing, it is but fair to grant him the means of informing himself when he is in a likely way of getting into such danger. So an action to enforce a vendor's lien against the interest

of one having title to an undivided half of certain land is no notice to a purchaser of the other undivided half interest that the plaintiff in such action has a lien or claim on the half interest so purchased, and in which the defendant in such action never had any. *Russell v. Kirkbride*, 62 Tex. 455, 459.

LIST.

See "Separate List"; "Tax List"; "True List."

The list and inventory mentioned in Rev. St. § 1697, requiring an assignee for creditors to file in the office of the clerk a correct inventory of his assets and a list of his creditors, which inventory and list shall each be verified by his oath, and have affixed a certificate of the assignee, do not include the oath and certificate which are extraneous and distinct from them, and are merely the verification and certificate of them. They do not in any sense affect the essential qualities or character of the inventory or list, or make them more correct and perfect than they are inherently. *Steinlein v. Halstead*, 8 N. W. 881, 52 Wis. 289.

Mansf. Dig. §§ 5904, 5908, requiring a justice of the peace to make out two lists of the road hands apportioned to each road overseer, means a simple series of names, in a brief form; and a list of plantations and designation of all the hands residing on them is not sufficient, though it furnishes data from which a list of the hands may be made. *Chiles v. State*, 45 Ark. 143, 144, 147.

"List," as used in Laws 1860, c. 1, §§ 18, 21, providing that, in case a person refuses or neglects to make out the requisite statement of his personal property for taxation, the assessor shall list it, means to describe it so as to show, more or less definitely, according to its character, to what property the valuation relates. *Thompson v. Davidson*, 15 Minn. 412, 415 (Gil. 333, 335).

LIST OF CREDITORS.

The list of creditors required of the defendant debtor by Bankr. Act July 1, 1898, c. 541, § 59d, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445], when he sets up as a defense to a petition by a single creditor that the number of his creditors is more than 12, should contain, besides the bare names and addresses of such creditors, at least a statement of the amount due each, the date of the debt, when it is due, whether due by note or account or by some other form of contract, the consideration therefor, whether owed jointly with another as partner or otherwise, and such full particulars as will enable the petitioning creditor to ne-

gotiate with others to join with him in the petition, and save the necessity and cost of a reference to ascertain the facts. *Gage & Co. v. Bell* (U. S.) 124 Fed. 371, 372.

LISTING.

While the words "listing" and "assessing" are used, in relation to taxation, in a somewhat different sense, but always as a part of the same process of getting the property upon the tax roll, the use of the word "listing" in the title of an act to authorize boards of supervisors to provide for discovery of property withheld from taxation, and to list the same and collect taxes thereon, includes an assessment, so that the statute is not unconstitutional. *Bereshelm v. Arnd*, 90 N. W. 506, 508, 117 Iowa, 83.

LITERAL INTERPRETATION.

The "literal interpretation" of a statute, according to Lieber's definition, is finding out the true sense by making the statute its own expositor. If the true sense can thus be discovered, there is no resort to construction. It is, beyond question, the duty of courts, in construing statutes, to give effect to the intent of the lawmaking power, and seek for that intent in every legitimate way, but first of all in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation. *State v. Manson*, 58 S. W. 319, 321, 105 Tenn. 232 (quoting *Suth. St. Const.* p. 237, § 236).

LITERARY.

A historical society, the object of which is the gathering up of facts, the writing out of them, and reading the same at meetings, whereupon discussions arise, etc., is properly incorporated under the statute for the incorporation of literary societies. *Carpenter v. Historical Society* (N. Y.) 2 Dem. Sur. 574, 576.

Laws 1872, c. 649, providing that any five or more persons of full age may associate themselves together for benevolent, charitable, literary, or scientific purposes, does not authorize five or more persons to associate themselves together for the formation of a medical college; and, according to the ordinary use of language, a medical college is not a scientific or literary institution, and it would not be generally classified as such. *People v. Gunn*, 96 N. Y. 317, 321.

A house merely occupied as a dwelling house, and not as a place where any of the

exercises and recitations of a college are had—a house whose size and value may wholly extend on the extent of a professor's family, not one of whom have any connection with the college—cannot be said to be a building occupied for literary purposes, within the meaning of Act Ohio 1831 exempting the buildings, or any of them, belonging to schoolhouses, academies, or colleges, occupied for literary purposes. *Kendrick v. Farquhar*, 8 Ohio (8 Ham.) 189, 197.

LITERARY COMPOSITION.

"A literary composition, within the meaning of the copyright laws, is an original result of mental production, developed in a series of written or printed words, arranged for an intelligent purpose, in an orderly succession of expressive combinations. A literary composition is of an abstract, incorporeal nature. Its existence is independent of that of any material on which it may have been produced, or copies of it may have been inscribed or printed. The incorporeal contents of the original sheets and of written or printed copies are thus one and the same composition." *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 192.

Every letter is, in the general and proper sense of the term, a "literary composition," the sole and exclusive right of publishing which is vested in the writer, without whose consent they cannot be published either by a person to whom they are addressed or by any other. Such letter is a literary composition, and nothing else, and it is so however defective it may be in sense, grammar, or orthography. Every writing in which words are so arranged as to convey the thoughts of the writer to the mind of the reader is a literary composition, and the definition applies just as certainly to a trivial letter as to an elaborate treatise or a finished poem. Literary compositions differ widely in their merit and value, but not at all from the facts from which they derive their common name. It cannot be said that letters are not to be regarded as literary compositions unless it appears that they were originally written with the intent to publish them, or that their author would derive from their publication a certain profit, or from their intrinsic merits their publication would be a benefit to the world. Intended publication, pecuniary value, or intrinsic merit do not furnish the test by which to determine whether or not letters are literary compositions. *Woolsey v. Judd*, 11 N. Y. Super. Ct. (14 Duer) 379, 396.

LITERARY INSTITUTIONS.

"Literary," as used in 6 & 7 Vict. c. 36, § 1, exempting from parochial and other rates property belonging to any society instituted for purposes of literature, exclusively,

would not include a society organized for religious purposes. *Regina v. Jones*, 8 Q. B. 719, 725, 728.

Pub. St. c. 11, § 5, cl. 3, as amended by St. 1889, c. 465, exempting literary, benevolent, charitable, and scientific institutions from taxation, does not include a corporation having for its paramount object the dissemination of theosophical ideas, and the procuring of converts thereto, even though, in furtherance of such object, books are collected, instruction given, and literary work done. *New England Theosophical Corp. v. Board of Assessors*, 51 N. E. 456, 457, 172 Mass. 60, 42 L. R. A. 281.

Rev. St. 1878, § 2039, as amended by Laws 1891, c. 359, providing that the power of alienation should not be suspended beyond two lives in being, except in the case of land given to "literary corporations," etc., cannot be construed to include a religious corporation, since, if that were so, there would have been no necessity for the Legislature to declare that a religious corporation should be construed to be a charitable corporation, within such section. *Milwaukee Protestant Home for the Aged v. Becher*, 68 N. W. 774, 776, 87 Wis. 409.

Laws 1852, providing that property set apart for the use of any literary institution shall be exempt from taxation, should not be construed to include a private boarding school; the words "literary institution," as used in the statute, having reference only to schools of a public nature. *Common Council of City of Indianapolis v. McLean* 8 Ind. 328, 332.

Acts 1882, § 2, providing that all "scientific or literary colleges or universities" organized under certain acts which should have reported to the regents within a certain time were declared legally incorporated, cannot be construed to include a medical college. *People v. Gunn*, 96 N. Y. 317, 323.

LITERARY PROPERTY.

"The ordinary definition of 'literary property' as an exclusive right of the proprietor to multiply copies of the composition is for general purposes too narrow, because, where the proprietorship exists, the circulation of copies is not the only method in which the subject may be properly used. That the definition is thus too narrow for specific purposes is seen in the case where the question to be decided arises from the use of a literary composition in another mode—that of theatrical composition. Literary property may be described as the right which entitles an author and his assigns to all the use and profit of his composition to which no independent right is, either by act or omission on his or their part, vested in another person. This definition or description cannot be ap-

plied without a specification of the uses of the literary composition. Their specification includes all such methods of communicating the knowledge of the contents as are not exclusively confidential. Such communications are effected by the reciting or audible reading of the composition, or by circulating it. The recitation or lecture or circulation may be private or public." *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 192.

In order to decide what is an infringement of an author's rights, we must inquire what constitutes literary property, and what is recognized as such by the act of Congress, and secured and protected thereby. An author may be said to be the creator or inventor both of the ideas contained in his book, and the combination of words to represent them. Before publication, he has the exclusive possession of his invention. His dominion is perfect, but when he has published his book, and given his thoughts, sentiments, knowledge, or discoveries to the world, he can no longer have an exclusive possession of them. Such an appropriation becomes impossible, and is inconsistent with the object of publication. The author's conceptions have become the common property of his readers, who cannot be deprived of the use of them, or their right to communicate them to others clothed in their own language, by lecture or by treatise. His exclusive property in the creation of his mind cannot be vested in the author as an abstraction, but only in the concrete form which he has given them, and the language in which he has clothed them. When he has sold his book, the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed. This is what the law terms "copy" or "copyright." A translation may be called a transcript or copy of the thoughts or conceptions of the author, but in no correct sense can it be called a copy of the book, and hence a translation of a book is not a violation of the literary property rights of the author or of the copyright. *Stowe v. Thomas*, 2 Am. Law Reg. 210, 228.

In discussing the right of an author in his literary production, the court said: "The property which a composer ordinarily has in his composition is a pecuniary value which it has to him, and not merely the amount of fame he may acquire; and such pecuniary value is necessary and wholly dependent upon the means which he may lawfully employ to bring the production before the public, and the approval of the public of his work, and there is no other property in that description of literary composition. When the right of property in the invention or creation of an author is recognized as an inherent right

by the common law, it assumes that the thing to be secured and protected is of value to the owner. The law does not regard as property a thing entirely worthless." *Palmer v. De Witt*, 32 N. Y. Super. Ct. (2 Sweeny) 530, 552.

The literary property does not depend at all upon whether or not the manuscript sought to be protected is intended to be published, nor upon its pecuniary value or intrinsic merits as a literary composition. The right itself entitled the author to determine for himself whether the manuscript shall be published at all, and in all cases to forbid its publication by another. The right is absolute and exclusive, and exists as long as the manuscript may exist unpublished, and is, if the author or his representatives may so will, perpetual. It appears that the object or intention with which the manuscript was originally written has no effect in limiting the literary property which the author has therein; it being held that the writer of letters, whether they are literary compositions or family letters or letters of business, possesses the sole and exclusive right of publishing them. *Woolsey v. Judd*, 11 N. Y. Super. Ct. (4 Duer) 379, 385.

LITERARY PROPRIETOR.

The term "literary proprietor," within the meaning of the copyright laws, includes an author and his assigns. *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 192.

LITHARGE.

"Litharge," which is used as one of the ingredients of an elastic packing, is an oxide of lead. *Jenking v. Johnson* (U. S.) 13 Fed. Cas. 525, 527.

LITHOGRAPH.

A lithograph is a print from a drawing on stone, as a lithographic picture. Worcester says: "A mark, form, character; a figure made by impression." *Arthur v. Moller*, 97 U. S. 365, 368, 24 L. Ed. 1046.

"Lithograph," as used in the provision in section 3 of the copyright act of March 3, 1891, c. 565, 26 Stat. 1107 [U. S. Comp. St. 1901, p. 3407], that "in the case of a book, photograph, chromo, or lithograph," the two copies required to be delivered to the librarian of Congress shall be manufactured in this country, represents only a subdivision of the matters embraced in the word "print" in the same section, which gets its meaning and limitation from its immediate association with the words "engraving, cut." *Oliver, Ditson Co. v. Littleton* (U. S.) 67 Fed. 905, 906, 15 C. C. A. 61.

LITHOGRAPHIC PROCESS.

Articles consisting of lithographic prints, pasted upon sheets of paper which project beyond the prints, and are embossed so as to form frames—such frames being of more value than the prints—are dutiable as articles "produced in part by lithographic process," under Tariff Act Oct. 1, 1890, par. 420. *United States v. Weiller* (U. S.) 65 Fed. 418, 420, 12 C. C. A. 668.

LITIGATED.

See "Might have been Litigated."

Facts in controversy bearing such relation to a judgment rendered as to be necessarily within the issue presented, and without proof of which the judgment could not have been rendered, are the only ones which can in any legal sense be said to have been litigated in any judicial proceeding, so as to come within the rule of *res judicata*. *Eastman v. Symonds*, 108 Mass. 567, 569.

"Litigated motions," as used in a rule of court providing that such motions must be heard in part one of the special term, mean motions which can be heard only on notice. *Sturz v. Fischer*, 36 N. Y. Supp. 893, 15 Misc. Rep. 410.

LITIGATION.

Under the provision of the state Constitution authorizing counties to levy taxes, among other purposes, for litigation, the "litigation" referred to is such as involves the right of the county as a corporation only, and moneys collected for general county purposes cannot, by those persons charged with the disbursement of such funds, be legally appropriated to the payment of attorney's fees to counsel employed to enforce the provisions of the liquor law. *Koger v. Hunter*, 29 S. E. 141, 102 Ga. 76.

"Litigation," as used in a fire policy providing that it shall be void if the title or possession be now or shall hereafter become involved in litigation, means "a litigation in which there could be a recovery of the assured's title in part or in whole. I do not mean that the litigation should show that there would be a recovery against the assured, but only that the litigation should be of such a character that there might be some recovery against him." *Williams v. Buffalo German Ins. Co.* (U. S.) 17 Fed. 63, 66.

"Litigation pending," as applied to a purchase of public land during litigation, so as to charge the purchaser with the title only of a purchaser pendente lite, means an actual contest, involving contested and conflicting claims, and hence does not include an application to change the entry, and transfer a payment from a tract of land alleged

to have been erroneously entered to that intended to be entered as authorized by Rev. St. U. S. § 2372; the applicant in such a case seeking a mere matter of favor or grace, and not attempting to enforce a right. *Manuel v. Fabyanaki*, 46 N. W. 208, 209, 44 Minn. 71.

LITIGIOUS RIGHT.

A right is said to be litigious whenever there exists a suit and contestation on the same. Civ. Code La. 1900, art. 2653; *Sanders v. Ditch*, 34 South. 860, 866, 110 La. 884; *Cucullu v. Hernandez*, 103 U. S. 105, 26 L. Ed. 322.

Litigious rights are those which cannot be exercised without undergoing a lawsuit. Civ. Code La. 1900, art. 3556, subd. 18; *Sanders v. Ditch*, 34 South. 860, 866, 110 La. 884.

In 1 *Brown*, Civ. Law, p. 256, things litigious are referred to as those about which there is any dispute. It was held that a right was not characterized at Rome as litigious until it was controverted in a judicial proceeding, and an authority is quoted. In France, according to Pothier in his *Treatise on Sales* (page 353), a right was regarded as litigious not only after the inception of the suit, but also before, when a suit might be reasonably apprehended. But by the Code a right is not considered as litigious until after it is put in contest in a suit. *Prevost's Heirs v. Johnson* (La.) 9 Mart. (O. S.) 123, 183; *White v. Gay's Ex'rs*, 1 Tex. 384, 387.

LITTLE.

A devise of what little property remains after the payment of testator's debts, construed in connection with Gen. St. c. 113, § 22, which provides that a devise or bequest shall extend to any real or personal estate over which testator has the discretionary power of appointment, and to which it would apply if the estate were his own property, carries with it land in which testator has a life estate, with power of appointment by deed or will. *Payne v. Johnson's Ex'rs*, 24 S. W. 238, 240, 95 Ky. 175.

"A little more or less," as used in a grant of public land describing premises as containing three-fourths of a square league of land, a little more or less, should be disregarded as immaterial. We reject the words "a little more or less," as having no meaning in a system of location and survey, like that of the United States, and the claim of the grantee is valid for the quantity clearly expressed. *United States v. Fossat*, 61 U. S. (20 How.) 413, 415, 423, 15 L. Ed. 944 (cited in *United States v. Cameron* [Aris.] 21 Pac. 177, 178).

Where, in a conveyance of land, incapable of determination by metes and bounds, it was stated to consist of a little more than three leagues, it was held that the words "a little more than" were not susceptible of any definite construction, but were probably inserted as an authority to slightly increase the quantity for convenience of boundary or similar reasons. *Marsh v. United States* (U. S.) 16 Fed. Cas. 820, 821.

LIVE—LIVING.

In a policy of fire insurance providing that the insured should, if required, furnish a certificate of the notary living nearest the place of fire, stating that he had examined the circumstances, and believed the insured had honestly sustained loss to a certain amount, "living" is not synonymous with "residing." *Paltrovitch v. Phoenix Ins. Co.*, 23 N. Y. Supp. 38, 39, 68 Hun. 304.

A policy of fire insurance requiring that the insured should, if required, furnish a certificate of the "notary living nearest the place of fire," stating that he had examined the circumstances, and believed the insured had honestly sustained loss to a certain amount, means the notary whose place of business was nearest to the fire, and who could be found during business hours, though there were other notaries who lived nearer, but who were not housekeepers, and did not have signs out at the houses where they lived, and did not transact business there. *Paltrovitch v. Phoenix Ins. Co.*, 23 N. Y. Supp. 38, 39, 68 Hun. 304.

As resides.

"Living," as used in Gen. St. c. 107, § 14, requiring a libel for divorce to be held in the county where the divorced party is still living, means residence or having a domicile, and does not apply to another county where such party is merely serving a term in State Prison. *Hanson v. Hanson*, 111 Mass. 158, 159.

Testator devised to his daughter the farm on which F. "now lives." F. then occupied, under agreement with the testator, about 140 acres of land, composed of three separate purchases, containing 100, 18, and 23 acres, respectively. A small portion only of each of the two smaller lots was cultivated, and the remainder was woodland. The 100 acres upon which F. resided contained all the buildings. Held, that the word "lives" was not used in the sense of "dwell" or "reside," but in the general sense of "subsisting," and the devise carried all the land used and occupied by F. *Kendall v. Miller* (N. Y.) 47 How. Prac. 446, 449.

The words "to live," "to reside," "to dwell," "to have one's home or domicile," are usually, in our statutes, equivalent and

convertible terms. Relating to questions of residence, they refer to the domicile of the party, or the place where he is deemed, in law, to reside, which is not always the place of one's present actual abode. *Allgood v. Williams*, 8 South. 722, 723, 92 Ala. 551.

A witness lives where he can be found, and is sojourning, residing, or abiding for his health or any other lawful purpose, within the meaning of Rev. St. § 863 [U. S. Comp. St. 1901, p. 661], authorizing the taking of a deposition when the witness lives a greater distance from the place of trial than 100 miles. *Mutual Ben. Life. Ins. Co. v. Robison*, 58 Fed. 723, 732, 7 C. C. A. 444, 22 L. R. A. 325.

Gen. St. c. 107, § 112, declares that no divorce shall be decreed for any cause if the parties have never "lived together as husband and wife" in this state. Held, that the true interpretation of the provision "lived together as husband and wife" is that the parties must have had a domicile in Massachusetts, and not merely lived together as travelers passing through the state, or as visitors for a purpose that is merely temporary, or with an intent to acquire a domicile. The remedy is intended to be for the benefit of citizens of the state of Massachusetts only, and not to enable the court to dissolve marital relations existing between citizens of other states, neither of whom has ever had a domicile in Massachusetts. *Ross v. Ross*, 103 Mass. 575, 576.

The term "living within the county," within the meaning of St. 1791, c. 58, authorizing a complaint against a person traveling on Sunday before a justice of the peace in the county where the offense is committed, if such person lives in such county, cannot be extended to include all persons being in the county, without regard to their place of residence. *Pearce v. Atwood*, 13 Mass. 324, 340.

In Gen. St. c. 107, §§ 11, 12, providing that no divorce can be granted for any cause occurring in any other state or country, unless, before such cause occurred, the parties had lived together as husband and wife in this state, and one of them lived in this state when the cause occurred, except when the libellant has resided in this state five consecutive years next preceding the time of filing the libel, the words "to live" and "to reside" are obviously synonymous, and both relate to the domicile of the party, or the place where he is deemed, in law, to reside, which is not always the place of one's present actual abode. *Shaw v. Shaw*, 98 Mass. 158, 159.

An averment that the complainant lives in the state is not a sufficient allegation of citizenship. One may live even for many years in one state, and at the same time re-

tain his citizenship in another. *Gale v. Southern Bldg. & Loan Ass'n* (U. S.) 117 Fed. 732, 734.

Death of beneficiary referred to.

The phrase "without living heirs of their body," in a will devising property to testator's children, and directing that, in the event of the death of any of the children without living heirs of their bodies, their shares shall go, etc., imports a definite failure of issue, and refers to the death of any one of the children of the testator without heirs of his body, or issue living at the time of his death. *Glover v. Condell*, 45 N. E. 173, 179, 163 Ill. 566, 35 L. R. A. 360.

Where a testator having two daughters devised to each of them, and the heirs of their body, forever, certain personal chattels, but provided that, if they should die without having a lawful heir of their body to live, the said chattels should be equally divided among the survivors, it was held that the words "heirs of her body to live" meant living children. *Keating v. Reynolds* (S. C.) 1 Bay, 80, 87.

In a will devising a homestead to two beneficiaries, their heirs and assigns, or to the "one living, should either die," the latter phrase was construed as referring to the death of a beneficiary in the lifetime of the testator. *Miller v. Von Schwarzenstein*, 64 N. Y. Supp. 475, 478, 51 App. Div. 18.

"Living issue," within the meaning of the devise to a certain beneficiary, but with a remainder over in case the first beneficiary dies without issue then living, includes a child born after the death of the first beneficiary. *Appeal of Laird*, 85 Pa. 339, 343.

Death of testator referred to.

A testator gave his residuary estate upon trust to pay an annuity during her life, and to accumulate the surplus income until the expiration of six months after A.'s death, and then to divide the residue and accumulation into as many shares as there should be children living of A. and B. who should have lived to attain 21, or, in case of any of them being dead under that age, who should have left issue, to pay and apply one share to each of the children of A. and B. which should have lived to have attained 21, and to the issue of each child who should have died under that age. Held, that the word "living" did not refer to the period of distribution, but to the testator's death, so that each child on attaining 21 took a vested interest absolutely. *Kidd v. North*, 27 Eng. Law & Eq. 479, 481.

"Living," as used in a will bequeathing "to my sister," etc., a certain sum, "if she be living," means if she be living at the testator's death. *McCoury's Ex'rs v. Leek*, 14 N. J. Eq. (1 McCart.) 70, 76.

In an assignment of a life policy and all moneys payable under it to the beneficiary, if living, the phrase "if living" was construed to mean if the beneficiary was living at the time of the death of insured. *Burton v. Burton*, 67 N. Y. Supp. 333, 339, 56 App. Div. 1.

Time of distribution referred to.

The word "living," in a will providing for distribution after death of all of testator's grandchildren, and when the youngest grandchild living of his son was 22 years old, was held to refer, not to the death of testator, but to the time of distribution; there being many parts of the will which would be meaningless with the former construction, but all having a meaning with the latter construction. In *re Gerber's Estate*, 46 Atl. 497, 196 Pa. 366.

Where the testator by his will gave to his wife certain money, "to be laid out in good bank stock, for her to have the interest of the same during her lifetime, and after her decease to be equally divided among his living children," the term "living children" necessarily implies a gift to the surviving children, to the exclusion of those who have deceased, and excludes those who, living at the death of the testator, have died during the lifetime of his wife, and were not living at the time for distribution. *Hill v. Rockingham Bank*, 45 N. H. 270, 278.

LIVE AND DEAD STOCK.

Testatrix devised to certain beneficiaries all her negro, mulatto, and othe. slaves, men, women, and children, and all her cattle, mules, horses, "and other live and dead stock upon the plantation," and all her other real estate in Jamaica. Held, that the intent to give everything connected with the plantation—particularly all stock—was expressed by the phrase "other live and dead stock on the plantation," and the title to the growing crops passed thereunder. *Blake v. Gibbs*, 5 Russ. 13.

Wine or books.

A bequest of the use of a house, with all the furniture and stock, carriages, and horses, and "other live and dead stock," does not include wine and books in the library. *Porter v. Tournay*, 3 Ves. 310.

LIVE ANIMALS.

"Live animals," as used in 14 Stat. 48, imposing a duty of 20 per cent. ad valorem on all live animals imported from foreign countries, includes singing birds. *Reiche v. Smythe* (U. S.) 20 Fed. Cas. 479, 480.

LIVE APART.

A statute dispensing with the concurrence of a husband in a conveyance of prop-

erty by a wife, when living apart from his wife, construed not to include a temporary absence of the husband for business purposes in the pursuit of his ordinary calling. *Ex parte Gilmore*, 3 Man. G. & S. 967.

LIVE IN ADULTERY.

On a trial for living in adultery, under Code 1886, § 4012, the jury were properly instructed that occasional acts of adultery do not make out the offense; but if there was adulterous intercourse, and such a condition of the minds of the parties that, when opportunity offered, the act would be repeated, defendant was guilty; and that this condition makes a living in adultery. *Bodiford v. State*, 86 Ala. 67, 5 South. 559, 11 Am. St. Rep. 20.

A single or occasional act of criminal intercourse, without having cohabited, is not a "living together in adultery," within a statute punishing such an offense. *Morrill v. State*, 5 Tex. App. 447, 450.

A single act of adultery—the voluntary sexual intercourse of a married person with one not the husband or wife—is not the offense of "living together in adultery," but an element or constituent of that offense. *Brown v. State*, 18 South. 811, 812, 108 Ala. 18.

"Living in adultery," as used in Code, § 3231, providing that persons living in adultery or fornication shall be subject to fine and imprisonment, means that the persons must have lived together in the same house continually as man and wife; and hence proof of one act of criminal intimacy was not sufficient to constitute the offense, though such act was the result of previous arrangement and understanding between the parties. *Smith v. State*, 39 Ala. 554, 555.

"Living in adultery," as used in a statute providing that persons living in adultery shall be guilty of a misdemeanor, is not synonymous with "living together"; and while one act of illicit connection would not constitute living together in adultery, yet, when two persons live together in a state of cohabitation, one of them being married to some other person, both would be guilty of living together in adultery, though only one of them be married at the time; and repeated adulterous meetings at any given place, or even at different places, is sufficient to constitute the offense of adultery, and it is not necessary, in order to constitute a living together in adultery, that the parties should reside together, or should have their board, lodging, and washing in common, but their frequent acts of illicit intercourse with each other—one of them being married to some other person—is the crime the law intends should be punished. *Parks v. State*, 4 Tex. App. 134, 140.

"Living in adultery," as used in Clay's Dig. p. 431, § 3, providing that, if any man and woman shall live together in adultery or fornication, they shall be guilty of a misdemeanor, does not mean that the defendant should have abandoned his own home and taken up his abode with the adulteress, or that he should have taken her to his own house, or made her supreme in his affections, and excluded his wife from the conjugal bed; and hence, where a married man visited and roomed with his paramour one night in every week for seven months at her residence, a half mile from his own house, he was guilty of the offense of living with her in adultery, within the meaning of the statute, since such a course of conduct, persevered in for such a time, must become open and notorious, and, so far as the outrage on decency and morality is concerned, can be little less objectionable than making his paramour the partner of his own bed and board. *Collins v. State*, 14 Ala. 608, 610.

"Living in adultery," as used in the statute providing that persons who shall live together in adultery or fornication shall be liable to fine and imprisonment, is a state or condition of cohabitation, as distinguished from a single or occasional criminal act; and if the parties for a single day live together in adultery, intending a continuance of the connection, the offense is complete, though the relation may be interrupted or broken off by prosecution, or fear of prosecution, or from any other cause. *Hall v. State*, 53 Ala. 463, 465.

It may be true, and doubtless is the law, that occasional acts of illicit intercourse, each had by a previous understanding or agreement for the particular act, not contemplating a continuance of the unlawful cohabitation or connection, but made in each instance for the single occasion, would not be a violation of the statute against living in a state of adultery or fornication, but there may be a state or condition of cohabitation which is unlawful and prohibited by the statute, although the proof may not show more than occasional acts of illicit intercourse. *Walker v. State*, 16 South. 7, 104 Ala. 58.

"Living in adultery," as used in Wag. St. p. 500, § 8, providing that every person who shall live in a state of open and notorious adultery shall be guilty of a misdemeanor, means an open and notorious living or cohabiting together; and, in order to constitute the crime, the parties must reside together publicly in the face of society, as if the conjugal relation existed between them, and only occasional acts of illicit intercourse are not sufficient to constitute the offense. *State v. Crowner*, 56 Mo. 147, 150. To the same effect, see *Goodwin v. Owen*, 55 Ind. 243, 249; *People v. Gates*, 46 Cal. 52, 53;

Swancoat v. State, 4 Tex. App. 105, 107; *State v. Gartell*, 14 Ind. 280.

LIVE IN MY FAMILY.

The phrase "to live in my family," in a contract with a mother-in-law "to live in my family," "involves, to some extent, services or attention toward the mother-in-law. She is not to be fed as a brute, nor to be sheltered as a horse, simply. She is entitled to decent physical comforts, and these, it will be admitted, are implied in every such contract." But where the contract does not state the extent of such physical comforts to be so provided, the extent thereof cannot be determined by the court, or specific performance enforced. *Rutan v. Crawford*, 16 Atl. 180, 183, 45 N. J. Eq. (18 Stew.) 92.

LIVE STOCK.

All cattle, horses, mules, asses, sheep, and hogs are deemed live stock. *Pol. Code Idaho 1901*, § 660.

For the purposes of the chapter relating to railroad corporations, the terms "live stock" and "stock" shall include all classes of horses, asses, mules, neat cattle, sheep, and swine. *Rev. St. Wyo. 1899*, § 3216.

Neat cattle, horses, mules, asses, sheep, and goats are live stock. *Rev. St. Wyo. 1899*, § 1987.

Fowls.

"Live stock," as used in the order of the Secretary of War, May 13, 1863, directing the commanders of departments to prohibit the purchase and sale of horses, mules, and live stock intended for exportation, etc., does not include fowls. *The Matilda A. Lewis (U. S.)* 16 Fed. Cas. 1108, 1109.

Hogs.

"Live stock," as used in Code, § 1289, requiring railroad companies, in order to exonerate themselves from liability for injuries to stock, to fence their roads against live stock running at large, includes all live stock and not merely horses and cattle, and therefore includes hogs. *Lee v. Minneapolis & St. L. Ry. Co.*, 23 N. W. 299, 300, 66 Iowa, 131.

Horses.

"Live stock," as used in an insurance policy insuring live stock against lightning, includes horses. *Hapeman v. Citizens' Mut. Fire Ins. Co.*, 85 N. W. 454, 126 Mich. 191, 86 Am. St. Rep. 535.

"Live stock," as used in Code, § 1289, providing that any corporation operating a railway that fails to fence the same against live stock running at large at all points where the right to fence the same exists shall be

liable to the owner of any such stock injured or killed by reason of the want of such fence, should be construed to include horses harnessed and hitched to a wagon, thus constituting a team. The word "stock," as employed in agriculture, means, according to Webster, domestic animals or beasts collected, used, or raised on a farm, as cattle or sheep, called also "live stock." While it may be admitted that the term "stock" does not embrace the idea of a team, it cannot be denied that the term "team" embraces the idea of live stock. The term "team" means two or more horses, oxen, or other beasts harnessed together to the same vehicle for drawing. A team, therefore, is composed of live stock, and cannot exist without it. It would be exceedingly technical to hold that two horses, when harnessed and hitched together to a wagon, ceased to fall under the designation of live stock. *Inman v. Chicago, M. & St. P. Ry. Co.*, 15 N. W. 286, 287. 60 Iowa, 459.

LIVE STOCK DEALER.

As tradesman, see "Trader—Tradesman."

LIVE TOGETHER.

The question whether the word "living," in a charge that a married woman was living with a man other than her husband, imputed to her any improper conduct, was a question for the jury. *Shea v. Sun Printing & Publishing Ass'n*, 70 N. Y. St. Rep. 438, 439, 35 N. Y. Supp. 703.

A statute making an unmarried man and an unmarried woman who live together and have carnal intercourse with each other guilty of fornication does not mean that the parties shall actually reside together—that is, board, lodge, and have their washing together in common—to make their acts of illicit intercourse with each other fornication, but it is their habitual acts of illicit intercourse with each other which constitute the crime. *Powell v. State*, 12 Tex. App. 238, 239.

"Living together," as used in Pen. Code, art. 333, 337, providing that fornication may be committed by the parties living together and having carnal intercourse with each other, or by having such intercourse without living together, means that the parties must dwell or reside together; abide together in the same habitation, as a common or joint residing place. *Thomas v. State*, 12 S. W. 1008, 1009, 28 Tex. App. 300.

"Living together," as used in Pen. Code, art. 333, providing that the living together of certain persons shall constitute the crime of adultery, means that the parties must actually live—that is, dwell and reside—together. *Bird v. State*, 11 S. W. 641, 642, 27 Tex. App. 635, 11 Am. St. Rep. 214; *Massey v. State*

(Tex.) 65 S. W. 911, 912; *Burnett v. State*, 70 S. W. 207, 44 Tex. Cr. R. 226.

LIVE WITH.

Within the rule of law laid down in *Tayman v. Tayman*, 2 Md. Ch. 393, that, if the wife be living with her husband, an allowance of alimony pendente lite would be unnecessary and improper, would not include a case where the wife, with her children, occupied the same house with her husband, but the husband occupied a separate room, and did not eat at the same table; there being no cohabitation as husband and wife at the time of the filing of the bill for divorce, nor for several months previous. *Cowan v. Cowan*, 18 Pac. 213, 221, 10 Colo. 540.

"Living with me," as used by a testator in bequeathing a year's wages to each of the servants "living with me," means those living in the testator's service, and not necessarily those living in the same house. *Blakewell v. Pennant*, 9 Hare, 551, 553.

LIVELIHOOD.

Acts 39 & 40 Geo. III, c. 104, permitting persons earning their livelihood within the city of London to be sued therein, means seeking the whole of a livelihood there, and not obtaining it partly within and partly without the city. *Stephens v. Derry*, 16 East, 147.

LIVELY.

That a person was driving a team on a lively trot in a city is not, as a matter of law or fact, negligent. *Crocker v. Knickerbocker Ice Co.*, 92 N. Y. 652.

LIVES.

See "Joint Lives."

LIVING.

In a will giving specific legacies to testator's grandchildren, and directing that his railroad stock, bank stock, and government bonds be kept at interest, and dividends paid to his living grandchildren until all his grandchildren's legacies be paid, "the testator probably meant grandchildren whose legacies had not lapsed by their death, intending thus to confine the payments to those who were or might be entitled to the legacies." *House v. Ewen*, 37 N. J. Eq. (10 Stew.) 368, 376.

Children en ventre sa mere.

A child en ventre sa mere at its father's death is deemed living, and entitled to participate in a devise to children living at their father's death. *Beale v. Beale*, 1 P. Wms. 244; *Clarke v. Blake*, 2 Brown, Ch. *320; *Hall v. Hancock*, 32 Mass. (15 Pick.) 255, 258, 26 Am. Dec. 598.

A will providing that the residue of the testator's estate should be divided equally among such of his children and grandchildren as might be living at his decease includes a grandchild born within nine months after the testator's death, since a child en ventre sa mere must be considered a child living, so as to take a beneficiary interest in the bequest, where the description is "children living." *Hall v. Hancock*, 32 Mass. (15 Pick.) 255, 258, 26 Am. Dec. 698.

LIVING STREAM.

The word "living," as used in referring to a stream as a living stream, is employed in the sense of permanent or continuous. *New York, C. & St. L. R. Co. v. Speelman*, 40 N. E. 541, 543, 12 Ind. App. 372 (citing *Board of Com'rs of Parke County v. Wagner*, 38 N. E. 171, 173, 138 Ind. 609).

LIVERY OF SEISIN.

"Livery of seisin is investiture or delivery of corporeal possession of the land or tenement. 2 Bl. Comm. 310; Co. Litt. 9. But whether the estate be in fee simple or in tail or for life, livery of seisin was, at the common law, equally requisite." *Micheau v. Crawford*, 8 N. J. Law (3 Halst.) 90, 108.

The term "livery of seisin" means delivery of possession. *Northern Pac. R. Co. v. Cannon* (U. S.) 46 Fed. 224, 232.

LIVERY STABLE.

As storehouse, see "Storehouse."

A livery stable is defined to be a place where horses are groomed, fed, and hired, and where vehicles are let. Act April 22, 1899, providing that boroughs shall have power to enact ordinances establishing reasonable rates of license taxes on hacks, carriages, etc., used in carrying persons and property for pay, does not authorize the imposition of a license tax on the vehicles used by the keeper of a livery stable; the statute being applicable to proprietors of hacks, cabs, etc., that stand for hire in the streets. *Kittanning Borough v. Montgomery*, 5 Pa. Super. Ct. R. 196, 198.

LIVERY STABLE KEEPER.

As laborer, see "Laborer."
As merchant, see "Merchant."
As teamster, see "Teamster."
As trader, see "Trader—Tradesman."

LLOYD'S INSURANCE.

A Lloyd's insurance originally was an insurance based on a fund made up of deposits

by each one of the members, from which, when a loss was adjusted, the agent took the means of payment. In this country, in adopting the Lloyd's system of insurance, money representing the entire insurance was not deposited; but in lieu of such a deposit the members each contributed a certain sum to make up a fund, and each contracted with agents who were the representatives of the association to pay in from time to time so much as should be needed to pay losses. Under the Lloyd's system of insurance, after the loss was adjusted, the insured received from the fund so provided the amount of the loss. The fund deposited was, in the strictest sense, a trust fund for the benefit of persons holding policies. Under the Lloyd's system, as adopted in this country, the trust in favor of the insured consists of the amount deposited by each member, and the covenant on the part of each member to pay in money to answer the amount due from him upon such loss. *Durbrow v. Eppens*, 46 Atl. 582, 585, 65 N. J. Law, 10.

LOAD.

See "Car Load."

"Load," as used in a contract for the sale of a load of barley, is to be construed as meaning the equivalent in bushels to the carrying capacity of the conveyance usually employed for transporting such grain. *Flanagan v. Demarest*, 26 N. Y. Super. Ct. (3 Rob.) 173, 181.

The words "vehicle and load," in Highway Law, § 154, providing that no town should be liable for damages resulting from the breaking of any bridge by transportation on the same of any vehicle and load together weighing four tons or over, were construed to include both the threshing machine and separator whose combined weight caused a bridge to break. *Heib v. Town of Big Flats*, 73 N. Y. Supp. 86, 87, 66 App. Div. 88.

A charter party contained a warranty that the charterer should not load the vessel more than her registered tonnage. It was held that such provision extended to all kinds of merchandise, and was not restricted by succeeding words describing particular articles, nor can such terms include, according to their obvious, strict, and natural meaning, things put on board as necessary parts of the ship's stores or provisions or equipment. Thus they would not apply to guns and ammunition for the defense of the vessel, nor to spare chains and anchors, nor to coal carried to be consumed on board, nor to salt or grain for provisions, according to the duties resting on the owner by law, and the rights reserved to him in the charter party; nor do they include articles shipped for the purpose of serving as ballast or dunnage. If the warranty not to load more than the ship's

registered tonnage had extended to goods of every description, and the tonnage used had been of the ordinary kind—planks or pieces of wood placed against the sides and bottom of the hold to receive, support, and protect the cargo—it could hardly have been contended that their bulk or weight should be ascertained and computed in ascertaining the burden or tonnage of the vessel. The true meaning and whole effect of the warranty was to forbid the loading of an amount greater than prohibited articles as cargo in a ship properly fitted to receive it. *Thwing v. Great Western Ins. Co.*, 103 Mass. 401, 406, 4 Am. Rep. 567.

As wagon load.

Where a city ordinance made it unlawful to sell coal without weighing it on the city scales, and paying 10 cents for the weighing of any load or part of a load, it was held that though the word "load," used in the ordinance, was so indefinite that it might be said to include a car load as well as a wagon load, yet, owing to the fact that it was the evident intention of the ordinance to protect the residents of the city from fraud or imposition in weighing coal, the word "load" should be construed to refer to wagon load, and to have no application to sales of very small quantities, such as a bucket or wheelbarrow load of coal. *Wills v. City of Ft. Smith*, 66 S. W. 922, 923, 70 Ark. 221.

Weight of vehicle.

"Ordinarily, when mention is made of a load, reference is had only to the material placed upon the carriage, and which is designed for removal from one place to another, not to the carriage itself, or to anything used or employed simply as means by which the removal or transportation of that material is effected." The word is used in this sense in Comp. St. p. 180, § 32, providing that no person shall recover against any town, damages sustained on account of the insufficiency or want of repair of any highway, which has arisen in consequence of the passing on such highway, of any carriage bearing a load exceeding 10,000 pounds in weight, and hence the weight of the carriage or wagon rack is not to be added to that of the load in computing the weight thereof. *Howe v. Town of Castleman*, 25 Vt. 162, 167.

LOADED ARMS.

A rifle which is loaded, but which, for want of proper priming, will not go off, is not a loaded arm, within 1 Vict. c. 85, § 3, relating to the offense of aiming a loaded arm at any person. *Reg. v. James*, 1 C. & K. 530, 531.

9 Geo. IV, c. 31, §§ 11, 12, punishing attempts to discharge loaded arms at persons, means some implement or weapon ordinarily

used for offensive purposes, and projecting a missile impelled by explosives; and a tin box containing gunpowder and detonators intended to ignite the powder when any one opened the box is not a loaded arm. *Rex v. Mountford*, 7 Car. & P. 242.

Within St. 9 Geo. IV, c. 31, §§ 11, 12, prohibiting the carrying of loaded arms, a firearm which is susceptible in its then condition of being fired is a loaded arm. Hence, if a pistol be loaded with gunpowder and balls, but its touchhole is plugged so that it cannot possibly be fired, it does not constitute a loaded arm, within the statute. *Rex v. Harria*, 5 Car. & P. 159.

LOADING.

In a contract for the transportation of stock by railroad, by which the owner assumes all risk of injuries which the animals may receive in loading and unloading, the provision for loading and unloading the cattle had respect to the terminus of the transportation, and not to loading and unloading at any intermediate station. *Penn v. Buffalo & E. R. Co.*, 49 N. Y. 204-208, 10 Am. Rep. 355.

A policy of marine insurance providing that the adventure should begin "from the loading of the goods on board said vessel," without any words giving or calling for any further description of the place of loading, will be construed to mean from the loading at the port of departure. *Clark v. Higgins*, 132 Mass. 586, 590.

The clause "while the vessel is at B. loading," as used in a policy of insurance on a vessel, reciting that the risk was to be suspended while the vessel is at B. loading, means that the risk was to be suspended while the vessel was at B. for the purpose of loading, whether actually engaged in the process of loading or not. *Reed v. Merchants' Mut. Ins. Co.*, 95 U. S. 23, 30, 24 L. Ed. 348.

In life insurance.

"Loading" is the sum added to the net premium for a life insurance policy, deemed sufficient to pay expenses and provide for contingencies. *Fuller v. Metropolitan Life Ins. Co.*, 41 Atl. 4, 10, 70 Conn. 647.

LOADING OFF SHORE.

See "Off Shore."

LOAF SUGAR.

"Loaf sugar," as used in Tariff Act 1816, c. 107, laying a duty on loaf sugar, means, in a commercial sense, in the business of buying and selling sugar in loaves. The name doubtless carries in some degree an

implication of quality arising from the fact that quality is usually associated with form, but the designation is primarily derived from and depends upon the form. Crushed sugar is not known as, or even called, "loaf sugar." Whatever may be its quality, it is still not loaf sugar, for it wants the form. *United States v. Breed* (U. S.) 24 Fed. Cas. 1222, 1223.

LOAN.

See "Maritime Loan"; "Temporary Loan."
See, also, "Lend."

To loan is to deliver to another for temporary use on condition that the thing be returned, or to deliver for temporary use on condition that an equivalent in kind shall be returned, with a compensation for its use. (Webster.) *Ramsey's Estate v. Whitbeck*, 81 Ill. App. 210, 217, 218.

To loan is to lend a thing to another, either gratuitously or for reward. In order to constitute a loan, there must be a thing loaned, a lender, and a borrower, as well as a contract between the parties. *State v. Brandt*, 41 Iowa, 593, 610.

"Except with respect to money, 'to loan' implies that the thing is delivered to another for use without reward, and to be returned in specie." *Coker v. State* (Ala.) 8 South. 874, 875 (citing *Nichols v. Fearson*, 32 U. S. [7 Pet.] 109, 8 L. Ed. 623).

A loan for use is a contract by which one gives to another the temporary possession and use of personal property, and the latter agrees to return the same thing to him at a future time, without reward for its use. *Civ. Code Cal.* 1903, § 1884.

A loan is said to be that which is furnished for temporary use, with a condition that it shall be returned, or its equivalent, with a compensation for the use. The payment of usance or interest at given times and at a given rate is one of the unerring tests of a loan of money. *Rodman v. Munson* (N. Y.) 13 Barb. 63, 75.

A loan for consumption is a transfer of personal property, such as corn or money, to be consumed by the borrower, and to be returned to the lender in kind or quality. *Kinne v. Kinne* (N. Y.) 45 How. Prac. 61, 65 (citing *Bouv. Law Dict.* vol. 2, p. 156, tit. "Mutuum").

A loan has been properly defined as an advancement of money upon a contract or stipulation, express or implied, to repay it some future day. *Brittin v. Freeman*, 17 N. J. Law (2 Har.) 191, 231.

A loan implies that the use of a thing is parted with for a limited time and for a special purpose, the right of property re-

maining in the lender. An estate which can never revert back cannot be a loan. As defined by Kent, a loan is the bailment of an article for a certain time, to be used by the borrower without paying for the use. *Booth v. Terrell*, 16 Ga. 20, 25.

A loan results where one man hands his money over to another for a definite time, generally for interest, but with the expectation that it is to be returned. *City of Philadelphia v. Kelly*, 81 Atl. 47, 48, 166 Pa. 207.

A loan is made when the borrower receives money, over which he exercises dominion, and which he expressly or impliedly promises to return. *Griffen v. Train*, 81 N. Y. Supp. 977, 981, 40 Misc. Rep. 290.

"By a loan of money is meant the delivery by one party to, and the receipt by the other party of, a given sum of money, on an agreement, express or implied, to repay the sum loaned, with or without interest. A loan is usually made at the request and for the benefit of the borrower, and differs from the commodatum of the civil law in this: that in the latter the specific thing loaned was to be returned, whereas by the other the thing loaned may be consumed, and the depositary discharge himself by returning another thing of the same value, or its equivalent in money." *Payne v. Gardiner*, 29 N. Y. 146, 167.

"Loaning the credit," as used in Const. 1870, art. 2, § 29, prohibiting the loaning of the credit of a city, county, or town to or in aid of any person, company, or association, except on an election first held by the qualified voters, and the assent of three-fourths of the votes cast at such election, means supporting the credit of such other person, etc., by guaranties, indorsements, or contracts of like character, and possibly donations or loans in aid of the enterprise, which must be a corporate purpose. *Green v. Dyersburg* (U. S.) 10 Fed. Cas. 1099, 1103.

Defendants signed a writing which recited that they had received of plaintiff a certain sum of money, to operate with in buying and selling crude oil for him, "and we are to pay said [plaintiff] the principal and proceeds over and above cost and trouble of buying and selling, use of tanks," etc. Held, that the transaction was a loan. *Brewster v. Bates*, 30 N. Y. Supp. 780, 782, 51 Hun, 294.

The term "loans on stocks and bonds," used in describing an item of property assessed to a savings bank, sufficiently described the property. *Savings & Loan Soc. v. City and County of San Francisco*, 63 Pac. 665, 666, 131 Cal. 356.

Accommodation paper.

When an accommodation note or bill, made for the sole purpose of raising money,

is discounted for that purpose, and with knowledge on the part of the party discounting it that it was made for that purpose only, the cases call it a "loan," and hold it subject to the usury laws. *Niagara County Bank v. Baker*, 15 Ohio St. 68, 74, 75.

If the borrower receives a note of the lender, to be used in raising money, the transaction is a "loan," within the usury laws. *Fulton Bank of New York v. Benedict* (N. Y.) 1 Hall, 529, 609 (citing *Schermerhorn v. Talman*, 14 N. Y. 93).

The words "loan and trust," within the state of Kansas authorizing the organization of a corporation to buy and sell personal property, etc., and to transact business of a loan and trust company, do not appear to have been defined by statute or decision in Kansas; and it must be assumed that the general rule is applicable that such companies have no implied power to lend their credit or to bind themselves by accommodation indorsement. They may guaranty paper owned by them, and the paper which they negotiate in due course of business, and the proceeds of which they received, but the naked power to guaranty the paper of one-third party to another is not incidental to the powers ordinarily exercised by them. *Ward v. Joslin*, 22 Sup. Ct. 807, 809, 186 U. S. 142, 46 L. Ed. 1093.

As an advance.

"Loan" has been defined as an advance of money on a contract or stipulation, express or implied, to repay at some future day. *Brittin v. Freeman*, 17 N. J. Law (2 Har.) 181, 231.

"Loaned," as used in the following devise: "I have loaned to my children as hereinafter set forth, which loans I wish to be considered as advances to them," etc. "To this time I have advanced to my son J. \$7,200"—is used interchangeably with "advanced." *Appeal of Wright*, 93 Pa. 82, 87; *Id.*, 89 Pa. 67, 70.

"Loan," as used in Code Pub. Gen. Laws, art. 23, § 69, providing that no loan of money shall be made by any corporation to any stockholder, but that the section shall not apply to any building or homestead association, or any association for the loaning of money on real or personal property, is not synonymous with the word "advance," as used in section 113, giving power to an insurance company to advance money on any property, real or personal. *Fisher v. Parr*, 48 Atl. 621, 628, 92 Md. 245.

Advances are not always loans, but may mean, in an offer to make advances on a legacy, that the legacies are to be purchased. *Trust & Deposit Co. of Onondaga v. Verity*, 67 N. Y. Supp. 918, 920, 83 Misc. Rep. 4.

Application of money.

To constitute a loan, it is not essential that the manual delivery of the money should be made by the lender to the borrower. An agreement to advance money as a loan, and application of it as directed by the borrower, created the relation of debtor and creditor, vested title to the money in the borrower, and stamped the transaction as a loan. *Hirshfeld v. Howard* (Tex.) 59 S. W. 55, 58.

Bond issue.

A "loan of credit," within the meaning of the constitutional provision that the General Assembly shall not authorize any county, city, or town to loan its credit, etc., to any association, company, or incorporation, unless, etc., includes the act of a municipality in issuing its bonds to assist a railroad company in building its road or erecting its shops, which are necessary and useful in operating its road. *Jarrott v. Moberly* (U. S.) 13 Fed. Cas. 366, 367.

As borrow.

In a charter of a building association, stating the object of the association to be the accumulation of a fund by small monthly installments to enable the parties to purchase real estate, loan money, and effect other similar purposes, the term "loan" should be construed in the sense of "borrow," conferring upon the corporation the power to loan its fund to its members. The word "loan" is sometimes, though improperly, used in the sense of "borrow." *Massey v. Citizens' Building & Savings Ass'n*, 22 Kan. 624, 631.

Credit.

While, in a broad sense of the word, the credit given for the price of goods sold may be called a "loan," it is not a loan in the ordinary and usual sense of the word, nor within the meaning of St. 1892, c. 428, entitled "An act relating to the discharge of small loans, and the redemption of the security given for such loans," and providing that no mortgage of household furniture on which interest is charged at the rate of 18 per cent. per annum, and made to secure a loan, etc., shall be valid, etc.; and hence the statute does not apply to a mortgage given by the purchaser of furniture to the seller at the time of sale to secure a part or the whole of the purchase price. *Day v. Cohen*, 43 N. H. 109, 165 Mass. 304.

The terms "loan or borrowing" have an apt, fixed, and certain meaning in common language, and would no more be taken to mean giving day or credit on an absolute sale of property than to express any other idea the most foreign to the subject which the mind can conceive. *Henry v. Thompson* (Ala.) Minor, 209, 223.

As debt.

"Loans and advances," as used in a will directing that certain loans and advances made to testator's son-in-law, and secured by mortgages, should be deducted from his daughter's distributive share of his estate, included only sums advanced so as to be an existing debt, and not sums voluntarily expended by the testator in improvement of the estate mortgaged to secure the loans and advances. *Marquise de Portes v. Hurlbut*, 14 Atl. 891, 892, 44 N. J. Eq. (17 Stew.) 517.

Debt distinguished.

A loan is something quite different from a debt. A loan contracted creates a debt, but there may be a debt contracted without contracting a loan. By "temporary loan" we understand something different from the general term "loan." Under the term "loan" simply the time for payment may be fixed, in the discretion of the parties to the contract. Hence a corporation may have the power to contract a debt for property which it is authorized to purchase, and not have the power to borrow money or contract a loan or issue its bonds as stock for the purpose of raising money on them. *Ketchum v. City of Buffalo* (N. Y.) 21 Barb. 294, 305.

Deposit.

See, also, "Deposit."

"Loaning out," as used in Rev. St. § 1327, prohibiting public officers from loaning out the public moneys, etc., does not include a deposit of such money in a bank. *State v. Rubey*, 77 Mo. 610, 619.

A general deposit in a bank is a loan. *Ricks v. Broyles*, 78 Ga. 610, 3 S. E. 772, 6 Am. St. Rep. 280.

"Loan," as used in the national currency act of June 3, 1864, prohibiting national banks from making any loan or discount on the security of the shares of their own capital stock, should be construed to include placing by one bank of its funds on permanent deposit with another bank, for a deposit is nothing but a loan, and is within both the spirit and letter of the provision, whether interest be obtained or not. The banker is accountable for deposits he receives as a debtor, and the individual borrower of money from the bank sustains no other relation to it. In both cases money is borrowed, to be returned in a greater or less period of time, according to the contract of the parties. *First Nat. Bank v. Lainer*, 78 U. S. (11 Wall.) 369, 374, 20 L. Ed. 172.

Under Const. art. 8, § 9, providing that moneys belonging to the permanent educational fund of the state cannot be invested or loaned except on United States or state or registered county bonds, it was held that

the depositing of public funds in banks constitutes a loan and investment of the money so deposited. The fact that a person borrows money for an indefinite length of time, payable on demand of the depositor, does not make the transaction any less a loan than if the money had been taken for a fixed long period of time, and the same is regarded as true of deposits in a bank. *State v. Bartley*, 58 N. W. 172, 177, 39 Neb. 353, 23 L. R. A. 67.

Where the relation between a depositor in a bank and his banker is that of debtor and creditor, simply, the transaction cannot in any proper sense be regarded as a loan, unless the money is left, not for safe-keeping, but for a fixed period, at interest, in which case the transaction assumes all the characteristics of a loan. In *re Law's Estate*, 22 Atl. 831, 832, 144 Pa. 499, 14 L. R. A. 103.

A loan of money is a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed, and hence a deposit of money with a banker for safe-keeping is not a loan. *Allibone v. Ames*, 68 N. W. 165, 166, 9 S. D. 74, 33 L. R. A. 585.

The word "loan," and not "deposit," designates the act of an administrator in placing money in a bank, taking therefor a certificate of deposit payable after one year, with interest; and the administrator is liable for loss of the money, resulting from the subsequent insolvency of the bank. *Appeal of Baer*, 18 Atl. 1, 127 Pa. 360, 4 L. R. A. 609.

A deposit is where a sum of money is left with a banker for safe-keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or it may not bear interest, according to the agreement. While the relation between the depositor and banker is that of debtor and creditor, the transaction cannot in any proper sense be regarded as a loan, unless the money is left, not for safe-keeping, but for a fixed period at interest, in which case the transaction assumes the characteristics of a loan. *Hunt v. Hopley*, 95 N. W. 205, 206, 120 Iowa, 695 (citing *State v. McFetridge*, 84 Wis. 473, 54 N. W. 1, 20 L. R. A. 223).

The term "loan," in Cr. Code 1873, § 124, defining embezzlement of public funds, which provides that if any officer charged with the collection, safe-keeping, or disbursement of public funds shall loan, with or without interest, any portion of the public money, every such act shall be deemed embezzlement of so much of said money as shall be thus loaned, is employed in a restricted sense, and includes those transactions only in which the conventional relation of bor-

rower and lender exists, and has no application to the deposit in bank for safe-keeping of public funds by the custodian thereof, who so far retains his control over them that they may be by him at any time reclaimed. *State v. Hill*, 66 N. W. 541, 552, 47 Neb. 456.

Under Rev. St. c. 38, § 81, prohibiting any public officer from using by way of investment or loan for his use any portion of moneys, etc., intrusted to him for safe-keeping, money deposited upon a deposit account (i. e., money lodged in a bank for safe-keeping, and not capable of being withdrawn, except after certain specified notice) would be a loan, and, if so deposited by an officer for his own use, with or without interest, would be a violation of the statute. But money deposited by an officer for safe-keeping, and not for any definite length of time, and not for his own use, and subject to be withdrawn at any time, would not be a loan, as the word "loan" is used in the statute. *Ramsey's Estate v. Whitbeck*, 81 Ill. App. 210, 217, 218 (quoting *Webst. Dict.*).

Discount.

See "Discount."

Donations.

"Loan any credit," in the Constitution, declaring that no municipal corporation shall become a stockholder in any joint-stock company or loan its credit in aid of such company, means simply to prohibit subscriptions and the extending of credit to such company, and in no wise prohibit the donation of money to an association. To donate money is one thing, and to become a stockholder or loan credit, is another. The framers of the Constitution might very consistently have desired to protect the counties from the uncertain liabilities of stockholders or sureties, and still have permitted a donation of money. *Gibson v. Mason*, 5 Nev. 283, 301.

"Loan its credit," as used in a constitution providing that the General Assembly shall not authorize any county, city, or town to become a stockholder in, or loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters at an election held therein, shall assent thereto, cannot be construed to include the purchase of lands and the donating of them by a city to a railroad company, though the money used in such purchase was obtained on its bonds. *Jarrott v. Moberly* (U. S.) 18 Fed. 366, 370.

Forbearance.

See, also, "Forbearance."

"The word 'loan,' in the language of Mr. Comyn, must not be too strictly construed, for there are many cases in which, though

no loan originally occurred, yet, by some subsequent agreement between the debtor and creditor, usury may be generated. It is not necessary to the creation of a loan that money should be paid, on one hand, and received, on the other, for the circumstance of a man's money remaining in another's hands in consequence of an agreement for that purpose will equally constitute a loan." *McAdams v. Randolph*, 41 N. J. Law (12 Vroom) 218, 221 (quoting *Comyn, Usury*, 157).

"Loan of money," as used in a statute which provides that no person shall directly or indirectly receive more than 10 per cent. interest per annum for the loan of money, includes an extension of a loan. *Kendig v. Linn*, 47 Iowa, 62, 63.

A loan is defined to be anything furnished for a temporary use to a person at his request, on condition that the specific thing shall be returned, or its equivalent in kind. Upon a settlement between plaintiff and defendants of a transaction in which defendants acted as brokers for plaintiff, a certain sum was found due plaintiff, which he demanded; but, at the request of defendants, he accepted a part of the amount, and left the remainder on deposit with defendants until the 1st of the following month. Held, that this converted what was an obligation incurred in a fiduciary capacity into an ordinary loan. *Jerome v. Morgan* (N. Y.) 13 Daly, 225, 226.

As give.

"Loan," as contained in a provision of a will stating that "I loan to my wife" during her natural life all the residuary estate, was equivalent to the word "give." *Chapman v. Chapman*, 18 S. E. 913, 90 Va. 409.

The word "loan," in an item of a will giving and bequeathing certain slaves to testator's wife, to her and her heirs forever, and giving and bequeathing to her certain perishable property in fee simple, and then providing, "I loan my wife certain land in lieu of dower," cannot be construed to mean "give," notwithstanding the fact that Code, § 2454, provides that the word "loan," when occurring in a will, will be construed to mean "give," unless the text requires a restricted meaning, as the text clearly shows that the word was used in a restricted meaning, and therefore the wife is only entitled, under the law, to a life estate in the land in question. *Britt v. Rawlings*, 13 S. E. 336, 87 Ga. 146.

The word "loan," in a will stating that "I loan," certain slaves "to my daughter during her natural life, then to her bodily heirs," is to be construed to mean give. *Jones v. Jones*, 20 Ga. 699, 700.

A loan implies that a thing is loaned without reward. Being in its primary sig-

nification a gratuitous bailment, it may be determined by the lender at his pleasure. A loan is terminated by the demand made for the return of the property loaned, and the refusal to deliver it up is therefore a conversion, for which an action of trover will lie. *Cadwallader v. Wagner* (Pa.) 7 Kulp, 465, 466.

As money loaned.

A loan is (1) a lending; (2) that which is lent; (3) a permission to use—so that *ex vi termini* a loan imports that the thing loaned has passed out of the possession of the lender into that of the borrower, and the term "loan" ordinarily means money loaned, so that an assessment on loans on stocks and bonds is sufficiently definite to describe the property. *Savings & Loan Soc. v. City & County of San Francisco*, 63 Pac. 665, 666, 131 Cal. 356.

"Loan," as used in 1 Rev. St. p. 772, §§ 1, 2, prohibiting a greater rate of interest than 7 per cent. for the loan or forbearance of any money, goods, or things in action, means only a loan which in substance and effect is a loan of money. *Dry Dock Bank v. American Life Ins. & Trust Co.*, 3 N. Y. (3 Comst.) 344, 354.

"Loan," as used in Civ. Code, § 571, providing that corporations organized for the purpose of accumulating and loaning the funds of their members may loan and invest the funds thereof, is technically limited to transactions in which the corporation delivers to the borrower, and the borrower receives from it, a given sum of money upon his agreement with it to repay the same. *Savings Bank of San Diego County v. Barrett*, 58 Pac. 914, 915, 126 Cal. 413.

Mortgage for pre-existing debt.

A loan or discount is an advance of money to be repaid at a future day. When the interest is taken in advance, it is a discount, but when it is to be paid at the expiration of the credit, or quarterly or yearly, where an extended credit is given, it is a loan. A mortgage for a pre-existing debt is neither a loan nor a discount. It wants the chief ingredient of a loan or discount, namely, an advance of money. *Bailey v. Murphy* (Mich.) Walk. Ch. 424, 425.

Obligation to repay imported.

Where a certificate of a loan of 30 per cent. of the premium on a life insurance policy designates the sum as a loan, and the amount bears interest, it will be held to be an indebtedness, since a loan imports an obligation to pay back. *Omaha Nat. Bank v. Mutual Ben. Life Ins. Co.* (U. S.) 81 Fed. 935, 938.

Any voluntary parting with possession.

"Loan," as used in Code 1886, § 1818, providing that all loans of personal property

not in writing shall vest an absolute estate in the possessor after three years, as against purchasers and creditors, was held in *Meyers v. Peek*, 2 Ala. 648, "not to be technically construed; that it was not necessary to show that the possession was acquired under a strict contract of bailment, technically called 'commodatum,' or loan for use, but that if the owners of personal property parted with the possession voluntarily, either with or without an express contract, there must be a will or deed in writing declaring a loan, and duly recorded." *Carr v. Lester*, 8 South. 35, 90 Ala. 349.

Sale distinguished.

When one procures liquor, and agrees, as the only consideration for the same, to return an equal quantity of liquor of the same kind, such a transfer is, in common parlance, usually denominated a "loan," and does not come within the legal meaning of the word "sale." *Robinson v. State*, 27 S. W. 233, 234, 59 Ark. 341; *Skinner v. State*, 25 S. E. 364, 97 Ga. 690. Contra, see *Commonwealth v. Abrams*, 150 Mass. 393, 23 N. E. 53; *Keaton v. State*, 38 S. W. 522, 523, 36 Tex. Cr. R. 259.

It was not a loan by a city, where it purchased a lot and agreed to pay the consideration therefor, for the city got no money thereby, but merely the property and agreed to pay for it. *City of Richmond v. McGirr*, 78 Ind. 192, 196.

Security.

A loan of money is a lending, on one side, and a borrowing, on the other. A stipulation to repay the principal in money is not necessary to constitute a loan. It is enough if the principal is secured, and not bona fide put in hazard; and it matters not what the nature of the security is, if it is sufficient. The true ground is not that there must be a stipulation to repay the principal, at all events, in money, but that it must in some way be secured, as distinguished from being put in hazard; but whether it is secured by pawn or pledge or a conveyance of land, or is, by agreement, to be returned in lands, goods, or money, is not material. *Tyson v. Rickard* (Md.) 3 Har. & J. 109, 114, 5 Am. Dec. 424.

Unliquidated damages.

Unliquidated damages do not fall within the meaning of the words "the loan or use of money," and for that reason no interest is demandable upon them. *Klages v. Philadelphia & R. Terminal R. Co.*, 28 Atl. 862, 160 Pa. 386.

LOAN AND TRUST COMPANY.

As bank, see "Bank (In Commercial Law)."

LOAN ASSOCIATION.

See "Building and Loan Association."
As benevolent association, see "Benevolent Association."

LOAN COMPANY.

As used in Laws 1874, c. 324, requiring every loan company to make a certain report, includes a corporation authorized to loan its money, though its business was not confined to the loaning of money. *People v. Mutual Trust Co.*, 96 N. Y. 10, 14.

LOAN FOR CONSUMPTION.

The "loan for consumption" is an agreement by which one person delivers to another a certain quantity of things, which are consumed by the use, under the obligation by the borrower to return to him as much of the same kind and quality. *Civ. Code La.* 1900, art. 2910.

LOAN FOR EXCHANGE.

A "loan for exchange" is a contract by which one delivers personal property to another, and the latter agrees to return to the lender a similar thing at a future time, without reward for its use. *Civ. Code Cal.* 1903, § 1902; *Rev. Codes N. D.* 1899, § 4053; *Civ. Code S. D.* 1903, § 1406; *Rev. St. Okl.* 1903, § 2877; *Civ. Code Mont.* 1895, § 2570.

LOAN FOR USE.

A loan for use is a contract by which one gives to another the temporary possession and use of personal property, and the latter agrees to return the same thing to him at a future time, without reward for its use. *Rev. Codes N. D.* 1899, § 4041; *Civ. Code S. D.* 1903, § 1394; *Civ. Code Mont.* 1895, § 2550; *Rev. St. Okl.* 1903, § 2865.

The loan for use is an agreement by which a person delivers a thing to another to use it according to its natural destination, or according to the agreement, under the obligation on the part of the borrower to return it after he shall have done using it. *Civ. Code La.* 1900, art. 2893.

LOAN OF MONEY.

A loan of money is a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed. *Civ. Code Cal.* 1903, § 1912; *Rev. Codes N. D.* 1899, § 4058; *Civ. Code S. D.* 1903, § 1411; *Civ. Code Mont.* 1895, § 2580.

LOATHSOME DISEASE

Gonorrhea is a loathsome disease, within the meaning of a statute entitling the wife

to a divorce on the ground that the husband has contracted a loathsome disease. *Boughner v. Boughner (Ky.)* 41 S. W. 26, 27.

LOBBY.

"Lobbying" signifies to address or solicit members of a legislative body, in the lobby or elsewhere, with the purpose of influencing their votes, and a contract for lobbying is void as against public policy. *Colusa County v. Welch*, 55 Pac. 243, 245, 122 Cal. 428. "To lobby is for a person not belonging to the Legislature to address or solicit members of the legislative body, in the lobby or elsewhere, away from the house, with a view to influencing their votes." *Chippewa Valley & S. R. Co. v. Chicago, St. P., M. & O. R. Co.*, 44 N. W. 17, 24, 75 Wis. 224, 6 L. R. A. 601 (quoting *Webst. Dict.*).

LOBBY MEMBER.

"A lobby member is a person who frequents the lobby of a house of legislation for the purpose of influencing measures therein pending." *Webst. Dict.* The term does not include an attorney openly appearing in the Legislative Assembly as a representative of parties interested in certain legislation. *Chippewa Valley & S. R. Co. v. Chicago, St. P., M. & O. R. Co.*, 44 N. W. 17, 24, 75 Wis. 224, 6 L. R. A. 601.

LOBBY SERVICES.

Lobby services are personal solicitations by persons supposed to have personal influence with members of Congress to procure the passage of a bill. *Trist v. Child*, 88 U. S. (21 Wall.) 441, 448, 22 L. Ed. 623.

"Lobby services" are generally defined to mean the use of personal solicitation, the exercise of personal influence, and improper or corrupt methods, whereby legislative or official action is to be the product. It is not, however, the doing of the improper act which is the sole test. A contract for such services is void, and cannot be enforced. *Dunham v. Hastings Pavement Co.*, 67 N. Y. Supp. 632, 634, 56 App. Div. 244.

LOBBYING CONTRACT.

Plaintiff, a person of large experience in regard to public lands, being satisfied that a certain class of lands that had been kept out of the market on account of a supposed claim under certain railroad grants could be legally thrown open to settlement, entered into an agreement with defendant, who was desirous of acquiring such lands, to instruct the latter in regard to the manner of procuring the same, and to do all that was necessary to have such lands thrown open to settlement, in consideration of a certain pro-

portion of the value of the land acquired by defendant. Held, that the contract was not per se invalid, as against public policy, as a lobbying contract. *Houlton v. Nichol*, 93 Wis. 393, 67 N. W. 715, 33 L. R. A. 166, 57 Am. St. Rep. 928.

LOBSTERS.

St. 1887, c. 314, § 1, providing a penalty for selling, offering for sale, or having in possession lobsters less than a certain length, should be construed to include dead as well as live lobsters, so that the offense would be committed by having in possession dead lobsters. *Commonwealth v. Hodgkins*, 49 N. E. 97, 170 Mass. 197.

LOCAL.

Burrill, in his Law Dictionary, defines the word "local" as "relating to place; belonging or confined to a particular place; distinguished from general, personal, or transitory." *People v. Hills*, 35 N. Y. 449, 451.

An appropriation of money to pay a debt of the state is not within the constitutional restriction as to appropriations for local and private purposes, though the debt was incurred for improvements of a local character. *People v. Denmore* (N. Y.) 1 Thomp. & C. 280, 282.

LOCAL ACT.

See "Local Law."

LOCAL ACTION.

A local cause of action is one which could only have arisen in a particular place. *Pegram v. Owens*, 64 Tex. 475, 477 (citing 1 Chit. Pl. 269).

"Local action" means that the cause of action could have arisen only in a particular place, and that the suit must be brought in the county or place in which it arose, and, according to all the authorities, includes an action for damages to real property, and actions on the case for nuisances or for the obstruction of one's right of way. *Crook v. Pitcher*, 61 Md. 510, 513.

Where the action of covenant is founded on privity of estate, the action is local, and must be sued in the county where the land lies. *Lienow v. Ellis*, 6 Mass. 331, 332.

All actions are either local or transitory. Real and mixed actions are local, and personal actions are transitory. An action for the recovery of damages for a breach of a contract is a personal action, and therefore transitory. *Beirne v. Rosser* (Va.) 26 Grat. 537, 541.

In the early ages of the common law all actions were local, and all issues of fact

were required to be tried and determined by a jury of the vicinage; but, in the course of time, guided and influenced by the dictates of reason, the principles of justice, and other considerations, motives, and purposes, so well expressed by Chief Justice Marshall in the case of *Livingston v. Jefferson* (U. S.) 15 Fed. Cas. 660, the courts established a distinction between local and transitory actions. The distinction taken is that actions are deemed transitory when the transactions on which they are founded might have taken place anywhere, but are local where their cause is in its nature necessarily local. This distinction has been recognized in the courts of England and this country in many decisions. *Nonce v. Richmond & D. R. Co.*, 33 Fed. 429, 432.

Local actions are such as require the venue to be laid in the county in which the cause of action arose, for the reason that the cause of action could only have arisen in a particular county. This generally included all actions in which the subject or thing in controversy, or thing sought to be recovered, is, in its nature, local—such as actions of ejectment, and other actions brought to recover the seisin or possession of lands and tenements; also actions which do not directly seek the recovery of lands and tenements, but which arise out of a local subject or the violation of a local right, such as trespass, *quare clausum fregit*, trespass on the case for nuisances to real property, disturbance of right of way; obstruction or diversion of water courses, etc. The action is also usually held to be local because of the necessity of giving a local description of the thing taken. The test as to whether an action is transitory or local is not, in general, the subject causing the injury, but the object suffering the injury. *McLeod v. Connecticut & P. R. Co.*, 6 Atl. 648, 649, 58 Vt. 727.

An action is local when its cause is, in its nature, necessarily local. Local actions embrace actions for the possession of land, or damages for actual trespass or waste, for nuisance to a house, for the disturbance of rights of way, for the diversion of water courses, and the like. Such causes of action must arise where the property is, and in the county in which it is situated. *Condon v. Lelpsiger*, 55 Pac. 82, 17 Utah, 498.

"Local actions are such as require the venue to be laid in the county in which the cause of action arose. These embrace all actions in which the subject or thing sought to be recovered is in its nature local, such as real actions of waste, when brought to recover the place wasted as well as the damages, and actions of ejectment. They are local because brought to recover the seisin or possession of lands, which are local subjects. Some other actions which do not seek the direct recovery of lands or tenements are also local, because they arise out of a local

subject, or the violation of some local right or interest. Of this class are waste for damages only; trespass quare clausum fregit; trespass on the case for injuries to things real, as nuisances to houses or lands; disturbance of right of way; obstruction or diversion of ancient water courses. The action of replevin is local, although it is for damages only, and does not arise out of any local subject, because of the necessity of giving a local description to the thing taken." An action for personal injuries is not local, but transitory. *Ackerson v. Erie R. Co.*, 31 N. J. Law (2 Vroom) 309, 811; *McLeod v. Connecticut & P. R. Co.*, 6 Atl. 648, 649, 58 Vt. 727; *Hall v. Decker*, 48 Me. 255, 256, 257.

Local actions embrace actions for the possession of land, or damages for actual trespass or waste, for nuisance to a house, for disturbance of right of way, for the diversion of water courses, and the like. Such causes of action must arise where the property is, and in the county in which it is situated. They are necessarily local actions, and remain so under a constitutional provision that an action must be brought in the county in which the cause of action arises. *Mosby v. Gisborn*, 54 Pac. 121, 127, 17 Utah, 257.

An action founded on and growing out of an obstruction of a highway, and raising distinctly and specifically the plaintiff's right to use the way, is essentially a local action, because it involves an interest in the local, fixed subject itself; but an injury happening to an individual on the same highway by reason of any tort or wrongful act of another is not necessarily an injury to the bare right of the user, even though an obstruction of the highway may be incidentally concerned as a mere instrumentality immediately producing the injury complained of. If the pending action involved the right of the plaintiff to use the highway, and the defendant obstructed the way, and by that means denied its existence, the cause of action would indisputably be local. The right of the plaintiff in or to the use of the highway would then be the subject of inquiry, but, where a suit was brought to recover a personal injury sustained on the highway by defendant's negligence in obstructing it, the subject of the injury is the person, and not the highway, and the action is transitory. *Gunter v. Dranbauer*, 38 Atl. 33, 34, 86 Md. 1.

The line between actions termed "local and transitory" in some of the decided cases is shadowy, but in no case can a suit, the purpose of which is to subject certain property, whether real or personal, to the payment of a debt, or to have it placed in possession of and under the control of a court for any purpose of administration, be termed a local action. The difference between local

and transitory actions was thus stated in the case of *Mostyn v. Fabrigas*, 1 Cowp. 161, by Lord Mansfield: "There is a formal and a substantial distinction as to locality of trial. I state them as different things. The substantial distinction is where the proceeding is in rem, and where the effect of a judgment cannot be had if it be laid in the wrong place. That is the case of all ejectments, where the possession is to be delivered by the sheriff of the county; and, as trials in England are in particular counties, the sheriffs are county officers, and therefore the judgment could not have effect if the action was not laid in the proper county." It has sometimes been said that the principles thus announced furnish simply a technical rule in relation to venue, and that they had no bearing on the more substantial question of jurisdiction. But the language of the great judge is not susceptible of such a construction. The principle stated met with the approval of Chief Justice Marshall in *Livingstone v. Jefferson*, 1 Brock. 209, Fed. Cas. No. 8,411; and, in deference to what he understood to be the difference between such actions at common law, he felt constrained to hold that an action of trespass quare clausum fregit was a local action. *Texas & P. R. Co. v. Gay*, 28 S. W. 599, 607, 86 Tex. 571, 25 L. R. A. 52.

"Actions, though merely for damages occasioned by injuries to real property, are local, as trespass, or case for nuisance, or waste, etc., to houses, lands, water courses, rights of common, ways, or other real property, unless there were some contract between the parties on which to ground the action. And, if the land, etc., be out of this kingdom, the plaintiff has no remedy in the English courts." 1 Chit. Pl. 298. So the superior court of the city of New York has no jurisdiction of an action for diverting a water course in the state of New Jersey. *Watts' Adm'rs v. Kinney* (N. Y.) 6 Hill, 82, 91.

LOCAL ADMINISTRATION.

"Local," as used in Laws 1882, c. 410, § 27, citing that for all purposes the local administration and government of the city of New York shall continue to be in and to be performed by the mayor and aldermen, applies to the extinguishment of fires; and such work, though assigned to the fire department of the corporation by section 34 of such act, is a duty of the corporation, to be performed by that department as its agent. *Workman v. City of New York* (U. S.) 63 Fed. 298, 304.

LOCAL AGENT.

A local agent is a representative of a corporation to transact its business and

represent it in a particular locality. It does not embrace the idea of an agent who casually happens to be in the particular territory, or one who is temporarily sent to such territory to perform some particular purpose or specific act. This is the sense of the term in Rev. St. art. 1223, providing that service of citation on a foreign corporation may be on any general local agent within the state. *Frick Co. v. Wright*, 55 S. W. 608, 610, 23 Tex. Civ. App. 340.

The term "local agent," in Acts 1895, p. 80, authorizing the taxation of local agents of insurance companies, means any person or firm soliciting, contracting for, or receiving premiums for any insurance company, or who delivers policies, and includes a railroad agent or employé who solicits or receives premiums for accident insurance. *Eichlitz v. State*, 46 S. W. 643, 39 Tex. Cr. R. 486.

Certain railroad companies, including defendant, a foreign corporation, erected and maintained a joint warehouse in Texas, on the Mexican frontier, for the storage of imported goods and goods for export, until the customs laws were complied with. One-half the expense of erecting and maintaining the warehouse was paid by defendant, and the balance by the other companies, one of which owned the land on which it was built. The agent in charge of this warehouse was appointed without any action or approval by defendant. He was on the pay roll of one of the other companies, and under bond to it for the faithful discharge of his duties. He had no authority to contract for defendant and received and disbursed no money on its account, and it had no control over or power to discharge him. Held, that he was not a "local agent" of defendant, on whom service of process could be made, under *Sayles' Rev. Civ. St. Tex. art. 1223a.—Mexican Cent. R. Co. v. Pinkney*, 13 Sup. Ct. 859, 862, 149 U. S. 194, 37 L. Ed. 699.

Code, § 217, providing that in an action against a corporation the summons shall be served by delivering a copy to the president or other head of the corporation, secretary, cashier, treasurer, director, manager, or local agent thereof, with reference to a local agent to receive and collect money, *ex vi termini* means an agent residing either permanently or temporarily for the purpose of his agency, and does not embrace a mere transient agent. The term "local" pertains to place. *Moore v. Freeman's Nat. Bank*, 92 N. C. 590, 594.

Of the two classes of agents, special and general, Mr. May observes: "A general agent, in the strict, legal sense, is one who has all the powers of his principal as to the business in which he is engaged—an extent of authority not often conferred in insurance. In that business an agent is termed a 'general agent' rather with reference to the geographical extent of his authority, in

contradistinction to a local agent, who may have original powers, though exercising them within more restricted limits. A general agent may appoint local and subagents, which a local agent cannot; but there seems to be no very well defined distinction between the powers of general agents, local agents, and subagents, and therefore they may become in any case a question of fact for the jury." 1 May, *Ins.* § 126. If the authority of the agent and its extent are not evidenced by a written instrument, but rest in parol, and are matters of disputed fact, then it becomes a question of fact for the jury, and not of law for the court. *Syndicate Ins. Co. v. Catchings*, 16 South. 46, 50, 104 Ala. 176.

LOCAL ASSESSMENTS.

Local assessments are a species of taxes on supposed benefits. *City of Shreveport v. Prescott*, 28 South. 664, 672, 51 La. Ann. 1895, 46 L. R. A. 193.

The essential characteristic of a local assessment is that it is levied on particularized property, and not on property generally. This feature is the corollary of what in theory, if not in actual practice, is the fundamental principle of the law of local assessment—that the tax should be levied on each particular piece of property in proportion to the benefit that is to be derived, not supposedly, but actually, from the expenditure of the avails of the tax. The mere localness of the tax is not necessarily a distinguishing feature, nor is the fact that the tax was imposed only after a consultation of the taxpayers, for local assessments may be, and often they are, levied without consultation with the contributors; hence a bridge tax levied under authority of the Constitution, on all the property generally in a ward, is not a local assessment, even though for the imposition of it a vote of the taxpayers is required. *Griggsby Const. Co. v. Freeman*, 32 South. 399, 400, 108 La. 435, 58 L. R. A. 849.

"Local assessments" are not ordinary taxes levied for the purposes of sustaining the government, but they are charges on individual property because the property on which the burden is imposed receives a special benefit, which is different from the general one which the owner enjoys, in common with others, as a citizen of the commonwealth. *Seanor v. Whatcom County Com'rs*, 42 Pac. 552, 555, 13 Wash. 48.

A local assessment is not a tax, but a consideration for the enhancement of the value of the property of the community. It not being a tax *eo nomine*, it is not governed by the provisions of the Constitution on the general subject of taxation. *Vicksburg, S. & P. R. Co. v. Goodenough*, 32 South. 404, 410, 108 La. 442.

A local assessment is a tax levied occasionally, as may be required, on a limited class of persons interested in local improvements, and who are presumed to be benefited by the improvement over and above the ordinary benefit which the community in general derives from the expenditure of the money. *Gould v. City of Baltimore*, 59 Md. 378, 380.

Local or private taxes and assessments are those charges and impositions which are laid directly on property in a circumscribed locality to effect some work of local convenience, beneficial to the property especially assessed for the expense of it. *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506, 509.

The terms "local" and "vicinity," used in connection with assessments for improvements, are not to be taken as indicating any definite limits, but are usually understood to extend to the real property reported by the assessors to be actually benefited to a certain amount. *State v. District Court of Ramsey County*, 23 N. W. 222, 229, 33 Minn. 236.

LOCAL AUTHORITIES.

The term "local authorities," within the meaning of Laws 1892, c. 676, § 33, which provides that the court may, on application of the local authorities, compel a railroad company to station a flagman or place gates at any point where a highway passes a railroad at grade, includes the commissioners of highways of a town. *In re Town of Niagara Highway Com'rs*, 25 N. Y. Supp. 231, 232, 72 Hun, 575.

LOCAL BILL.

See "Local Law."

LOCAL BOARDS.

The phrase "local boards of education" applies to the territory over which the board exercises its jurisdiction as a board, which board, whether of a city, township, or county, is local as to the territory of its jurisdiction. The board in a city is local as to the city, the board of a township is local as to the township, and the board of a county is local as to the county; and, where portions of a county are subject to local boards, the county board is local as to the balance of the county. *People v. Board of Education of Oakland*, 55 Cal. 331, 336.

LOCAL COMMERCIAL BROKER.

The term "local commercial broker," in a municipal ordinance requiring local commercial brokers to take out licenses, includes a person engaged in selling on com-

mission, in a city, merchandise from samples for his several principals, having an office where his samples are exhibited; but this is true though he makes special arrangements in advance with those by whom he is employed, and is their sole representative in his city. *Stratford v. City Council of Montgomery*, 20 South. 127, 128, 110 Ala. 619.

LOCAL COURT.

Const. art. 6, § 19, provides for the establishment by the Legislature of "inferior local courts of civil and criminal jurisdiction." "The meaning of the term 'local courts' is well established by the authorities. It means courts having a jurisdiction localized within the territorial limits of the city or village for which each is created, and by the electors of which its incumbent is chosen." *People v. Upson*, 29 N. Y. Supp. 615, 618, 79 Hun, 87.

"Local court," as used in Const. art. 6, § 19, providing that inferior local courts of civil and criminal jurisdiction may be established by the Legislature, "must be construed to refer to local courts as historically known—that is, courts established for and within one of the recognized territorial divisions of the state, and as a part of the system of local government—and that it cannot be so construed to authorize the Legislature to carve out from the territory of the state a district for judicial purposes not bounded by town or county, city or village, lines, and erect therein a local court." *People v. Porter*, 90 N. Y. 68, 75; *Rockwell v. Raymond*, 5 N. Y. Supp. 642, 645.

Local court, as used in a constitution conferring authority to establish a "local court" is one, the jurisdiction of which must be exercised within the locality, and its process cannot be executed outside of it. *Geraty v. Reid*, 78 N. Y. 64, 67.

A justice of the peace in the city of Brooklyn is a justice of a local inferior court, within Const. § 18, art. 6, providing that inferior local courts may be established by the Legislature. *In re Schultes*, 54 N. Y. Supp. 34, 38, 33 App. Div. 524.

A statute creating a justice's court in a village, and providing that within that village the justice shall have the same jurisdiction of crimes and misdemeanors as justices of the peace have in towns, confines the jurisdiction of the justice to the village, and makes the court a local one, and is authorized under Const. 1846, art. 6, § 14, which gives the Legislature power to create inferior local courts. *People v. Terry*, 14 N. E. 815, 817, 118 N. Y. 1.

Within the meaning of Const. art. 6, § 19, authorizing the Legislature to establish any inferior local courts of civil and criminal jurisdiction, such local and inferior courts

take their place with defined, limited jurisdiction. None of these local courts are intended to intrench upon or overthrow the jurisdiction of any of the superior courts, and an attempt to give a local city court the prerogative of the justice of the peace of the town, without complying with the constitutional requisites by which a town justice of the peace may be created, is unconstitutional. *Ziegler v. Corwin*, 12 App. Div. 60, 64, 42 N. Y. Supp. 855-863.

LOCAL CUSTOMS.

"Local customs," as used in Act Cong. March 26, 1866, providing that when rights to the use of water have vested, and are recognized and acknowledged by the local customs, the owner shall be protected in the same, the local custom is not a mere usage or custom, requiring proofs of undisputed, continuous possession beyond the memory of man, but the courts take knowledge of them as of the public laws. *Clough v. Wing* (Ariz.) 17 Pac. 453, 457.

LOCAL DISEASE.

The term "local disease," as used in a representation made by an applicant for life insurance that he has not had any local disease, includes tubercular affection of the lungs and of the brain. *Scoles v. Universal Life Ins. Co.*, 42 Cal. 523, 528.

LOCAL DRAINAGE.

Rev. St. § 2380, providing that no lots or lands shall be assessed to pay for the construction of a sewer that do not need "local drainage," or which are provided therewith, must be construed to mean present sufficient surface drainage for the necessary and usual purposes of sewerage. *Ford v. City of Toledo*, 59 N. E. 779, 781, 64 Ohio St. 92.

LOCAL ELECTION.

The term "local election," as used in the title relating to elections, shall mean any election of city, town, or village officers in cities, towns, or villages of more than four thousand inhabitants. V. S. 1894, 58.

LOCAL FREIGHT.

Act April 19, 1873, providing that railroads may for the transportation of local freight demand and receive not exceeding fifty per cent. more than the rate charged for the transportation of the same description of freight over the whole line of its road, should be construed to mean freight shipped from either terminus to a way station, or vice versa, or from one way station to another. It means freight shipped only over a part of the road between the termini. *Mobile & M. Ry. Co. v. Steiner*, 61 Ala. 559, 579.

"Local freight" is freight shipped from either terminus to a way station, or vice versa, or from one station to another that is over a part of the road only. *Mobile & M. Ry. Co. v. Steiner*, 61 Ala. 559, 579.

LOCAL IMPROVEMENT.

A "local improvement" is a public improvement, which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it through the municipality. *Illinois Cent. R. Co. v. City of Decatur*, 38 N. E. 626, 627, 154 Ill. 173.

Const. art. 9, § 1, as amended in 1869, allowing municipal corporations to levy assessments for local improvements, means improvements made in a particular locality, by which the real property adjoining or near such locality is especially benefited. *Rogers v. City of St. Paul*, 22 Minn. 494, 507.

The technical and legal meaning of the phrase "local improvement" is a public improvement, which, although it may incidentally benefit the public at large, is made primarily for the accommodation and convenience of the inhabitants of a particular locality, and which is of such a nature as to confer a special benefit upon the real property adjoining or near the locality of the improvement. Thus, if the word is used in such sense in Const. art. 10, § 17, authorizing assessments on real property for local improvements in cities and towns, the clause does not by implication forbid such assessment for improvements affecting the whole city. *Crane v. City of Siloam Springs*, 55 S. W. 955, 957, 67 Ark. 80.

Const. 1870, § 9, art. 5, authorizing the General Assembly to vest the corporate authority of cities, towns, and villages with power to make local improvements by special assessments, only means such local improvements as can be made by special assessments. *Wilson v. Board of Trustees of Sanitary Dist. of Chicago*, 27 N. E. 203, 208, 133 Ill. 443.

Electric light system.

Local improvements, within the meaning of the law which authorizes special assessments for local improvements, would not include a system of electric light towers, which were authorized to be erected by a city for the purpose of lighting the same. *Putnam v. City of Grand Rapids*, 25 N. W. 330, 333, 58 Mich. 416.

So much of an electric lighting improvement as relates to the placing, erection, and construction of poles, electric conductors, street lamps, and all appurtenances belonging thereto not included in the power house or generator plant is a "local improvement," the cost of which may be assessed against the property benefited under the laws of Il-

Illinois. Ewart v. Village of Western Springs, 54 N. E. 478, 479, 180 Ill. 318.

Filling up lots.

Local improvement, within the meaning of the laws relating to special assessments for "local improvements," does not include the filling up of a lot which had been declared to be a public nuisance under Act 1830, which authorized the city to fill up low lots which had been declared to be a public nuisance by the board of health, etc. *Charleston City Council v. Werner*, 17 S. E. 33, 38 S. C. 488, 37 Am. St. Rep. 776.

Rural highway.

Local improvements signify improvements made in a particular locality, by which the real property adjoining or near such locality is specially benefited, and is commonly applied to the grading, curbing, and paving of streets, rather than to any other class of improvements, and is employed in reference to improvements by municipal corporations proper, rather than to counties and towns, which are only quasi municipal corporations; and hence a rural highway is not a local improvement. *Sperry v. Flygare*, 83 N. W. 177, 178, 80 Minn. 325, 49 L. R. A. 757, 81 Am. St. Rep. 261.

Sewer.

"Local improvement," as used in Rev. St. c. 24, art. 9, § 1, authorizing local improvements to be constructed and paid for by special tax on contiguous property, includes a sewer. *Payne v. Village of South Springfield*, 44 N. E. 105, 107, 161 Ill. 285.

A sewer is a local improvement within the laws authorizing ordinances for local improvements. *Ryder's Estate v. City of Alton*, 51 N. E. 821, 823, 175 Ill. 94.

Street improvement.

"Local improvements," as applied to a street, mean the improvement of a street, as such, within the design of its creation, by reason of which the real property abutting or adjacent is especially benefited in its market value. *New York Life Ins. Co. v. Prest* (U. S.) 71 Fed. 815, 816 (citing *Cooley*, Tax'n, 100, 110; *Dill. Mun. Corp.* 596, 597).

"By common usage, especially as evidenced by the practice of courts and text writers, the term 'local improvements' is employed as signifying improvements made in a particular locality, by which real property adjoining or near such locality is specially benefited. 'Local improvements,' or terms synonymous, are more commonly applied to the grading, curbing, and paving of streets than to any other class of improvements. The term is used in such meaning in Const. art. 9, § 1, as amended in 1869, authorizing municipal corporations to levy assessments for local improvements on the property fronting

on such improvements, or to be benefited thereby." *Rogers v. City of St. Paul*, 22 Minn. 494, 507.

Street sprinkling.

Const. art. 9, § 1, authorizing a special assessment on property fronting on a street, in proportion to its lineal front footage, without regard to its cash valuation, for the purpose of paying for local improvements, includes sprinkling a street, as it renders the property fronting on it more desirable, and hence more valuable for occupancy. *State v. Reis*, 38 N. W. 97, 38 Minn. 371.

A local improvement is one which benefits the property on which the cost is assessed in a manner local in its nature, and not enjoyed by property generally in the city, and includes street sprinkling. *Smith v. City of Seattle*, 65 Pac. 612, 616, 25 Wash. 300 (citing *State v. Reis*, 38 Minn. 371, 38 N. W. 97).

"Local improvement," within the meaning of a statute authorizing cities and villages to make local improvements by special assessment, signifies the improvement of the street as such, and for the purposes for which it was designed, made in a particular locality, by reason of which the real property abutting or adjacent was specially benefited in its market value; but does not include street sprinkling. *City of Chicago v. Blair*, 36 N. E. 829, 831, 149 Ill. 310.

Waterworks system.

The construction of reservoirs, fire hydrants, and water mains is a "local improvement," which can be paid for by special assessment under the laws; but where an ordinance contemplates the erection of a city hall, pumping works, pumps and standpipes, such structures are improvements of a general character, and not local improvements within the meaning of the statutes. There is a distinction, so far as the construction of systems of waterworks are concerned, between the standpipe, pumping works, and buildings, which are of general utility, and must be paid for by general taxation, and the pipes which convey the water along particular streets, and which are local improvements. *Ewart v. Village of Western Springs*, 54 N. E. 478, 479, 180 Ill. 318 (citing *Harts v. People*, 171 Ill. 458, 49 N. E. 538).

The laying of water-main pipes in a municipality on particular streets for the distribution of water for the use of the inhabitants is a "local improvement" for which special assessment may be made under the laws. *Hewes v. Glos*, 48 N. E. 922, 923, 170 Ill. 436.

A standpipe, reservoir, and pumping apparatus in connection with a system of waterworks do not constitute a "local improvement" for which a special assessment by the city is proper under the laws. *Hughes v. City of Moline*, 45 N. E. 302, 164 Ill. 16.

Waterworks designed for the benefit of all the inhabitants of a municipality are not a "local improvement" within the meaning of Rev. St. 1893, c. 24, art. 9, § 1, authorizing special assessments for local improvements; the term "local improvements" signifying improvements made in a particular locality, by which the real property adjoining or near such locality is specially benefited. *Village of Morgan Park v. Wiswall*, 40 N. E. 611, 613, 155 Ill. 262.

Widening navigable river.

"Local improvement," as used in Act 1872, art. 9, § 1, providing that the corporate authorities of cities and villages shall have power to make local improvements by special assessments, cannot be construed to include the widening of a river in the city, which is a navigable stream, for the benefit of commerce. The term "local improvement" applies in cities and in incorporated towns to the opening, grading, paving, and otherwise improving streets and alleys, making sidewalks, the construction of drains and sewers, and other improvements of this character; improvements designed to be of benefit to the locality where they are made. The improvement of the navigable river is of a different character, it not being ordered to benefit specially the locality, and thus local, but ordered to be made to benefit the public at large, making it thus a national, rather than a local, improvement. *City of Chicago v. Law*, 33 N. E. 855, 857, 144 Ill. 569.

LOCAL INFLUENCE.

Within the meaning of the law authorizing removal of causes on account of local influence, the local judge's fitness, and his uprightness, firmness, or ability, or the reverse, do not constitute an element of local influence. *Montgomery County v. Cochran* (U. S.) 116 Fed. 985, 993.

"Local influence," within Rev. St. § 639, subd. 8, authorizing a removal because of prejudice and local influence, does not mean merely an influence primarily existing against the party seeking the removal. It includes as well that element in a controversy between a stranger and resident parties having the power through wealth, business, social relations, or personal popularity, or all combined, to direct or materially aid in the direction of political parties and control the selection of public officers and the distribution of public emoluments, so that a stranger may be at great disadvantage, if not powerless to assert his right. *Neale v. Foster* (U. S.) 31 Fed. 53, 55.

LOCAL LAW.

A statute which relates to a particular person or particular thing of a class is a local

law. *Clark v. Finley*, 54 S. W. 843, 345, 93 Tex. 171.

A local act is one operating over a particular locality, instead of over the whole territory of the state. *State v. Irwin*, 5 Nev. 111, 120.

"Local law," as used in Const. art. 3, § 57, providing for and prescribing the rules to be observed and the forms necessary to be followed in all cases where local or special laws are enacted, is defined by Mr. Bouvier as those which operate only upon particular persons and private concerns. *Cox v. State*, 8 Tex. App. 254, 287, 34 Am. Rep. 746.

The word "local," as a word of constitutional or statutory prohibition, signifies belonging to or confined to a particular place, and relates only to a portion of the people of a state or their property. When applied to legislation, it signifies such legislation as relates to only a portion of the territory of a state, or a part of its people, or a fraction of the property of its citizens. *Territory v. School Dist. No. 83 of Oklahoma County*, 64 Pac. 241, 10 Okl. 556.

"Local or special law," as used in Const. art. 4, § 7, which forbids the Legislature to pass private, local, or special laws regulating the internal affairs of towns, counties, etc., means those laws which create preferences and establish inequality; those which apply to persons, things, or places possessed of certain qualities or situations, and exclude from their effect other persons, things, or places that are not dissimilar in these respects. *Central R. Co. v. State Board of Assessors*, 2 Atl. 789, 798, 48 N. J. Law (19 Vroom) 1, 57 Am. Rep. 516 (citing *Van Riper v. Parsens*, 40 N. J. Law [11 Vroom] 1).

A law is special or local, as contradistinguished from general, which embraces less than the entire class of persons or places to whose condition such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed. A law which so particularizes, and by such means is restricted in its operation to persons or places which do not comprise all the objects which naturally belong to the class, is special or local. *State v. Borough of Somers Point*, 18 Atl. 694, 52 N. J. Law (23 Vroom) 32, 6 L. R. A. 57.

Local or special laws are all those that rest on a false or deficient classification. Their vice is that they do not embrace all the class that they naturally embrace. They create preference and establish inequality. They apply to persons, things, and places possessed of certain qualities or situations, and exclude from their effect other persons, things, or places which are not dissimilar in this respect. *State v. Yard*, 42 N. J. Law (13 Vroom) 357, 363.

"A local law is confined in its operation to the property and persons of a limited portion of the state. *People v. O'Brien*, 88 N. Y. 183. A local act, says Earl, J., in *People v. Newburgh & S. P. R. Co.*, 86 N. Y. 1, is one operating only within a limited territory or specified locality. In *Maxwell v. Tillamook County*, 26 Pac. 803, 20 Or. 495, Mr. Justice Lord, in defining the term, says: 'Statutes are sometimes distinguished as general or local, according to whether they are intended to operate throughout the entire jurisdiction, or only within a single county or other division or place. A law which applies only to a limited part of the state and the inhabitants of that part is local.' Thus, *Laws 1889*, p. 152, authorizing a tax on bicycles within certain counties only, is a local act." *Ellis v. Frazier*, 63 Pac. 642, 644, 38 Or. 462, 53 L. R. A. 454.

Local is defined by Burrill in his *Law Dictionary* as follows: "Relating to place, expressive of place, belonging to or confined to a particular place; distinguished from general, personal, or transitory." An act is local when the subject relates to a portion only of the people or their property, and may not, either in its subject, operation, or immediate necessary results affect the people of the state, or their property in general. *Earle v. Board of Education*, 55 Cal. 489, 491; *People v. Acton* (N. Y.) 48 Barb. 524, 530.

A local act is one operating only within a limited or specified locality. It could not be said with propriety that a territory comprising nearly a whole state was merely a place or locality. An act operating upon persons or property in a single city or county or in two or three counties would be local, but how far must this be extended before it ceases to be local? To determine this no definite rule can be laid down, but each case must be determined upon its own circumstances. In *re Hennerberger*, 49 N. Y. Supp. 230, 232, 25 App. Div. 164.

Local laws are applicable to all persons, and are distinguished from public general laws only in that they are confined to certain prescribed or defined territorial limits, and the violation of them must, in the nature of things, be local. *Herbert v. Baltimore County Com'rs*, 55 Atl. 376, 379, 97 Md. 639.

Law applying to cities only.

"Local statute," as defined by Bouvier, is a statute whose operation is intended to be restricted within certain limits, and Act Dec. 2, 1871, known as the "Sunday Law," making it a misdemeanor for any dealer in a lawful business to sell or barter on Sunday between 9 o'clock a. m. and 4 o'clock p. m. within the limits of any city, is not a local law. *Bohl v. State*, 3 Tex. App. 683, 685.

Law applying to class.

"Local or special legislation," according to the well-known meaning of the words, applies exclusively to special or particular places, or special and particular persons, and is distinguished from a statute intended to be general in its operation and that relating to classes of persons or subjects. *Stone v. Wilson* (Ky.) 39 S. W. 49, 50.

It is not easy to define with accuracy the difference between a "general law" and a "local law." A law relating to particular persons or things as a class is said to be general, while one relating to particular persons or things of a class is deemed local and private. *Laws 1881*, c. 554, giving to the board of supervisors of any county containing an incorporated city of over 100,000 inhabitants, where contiguous territory in the county has been mapped out into streets and avenues, power to lay out, open, grade, and construct the same, and to provide for the assessment of damages on the property benefited, is not a local or private act, but a general law. It applies to a class, and not to the selected or particular elements of which it is composed. The class consists of every county in the state having within its boundaries a city of 100,000 inhabitants, and territory beyond the city limits mapped into streets and avenues. How many such counties there are now or may be in the future we do not know, and it is not material that we should. Whether many or few, the law operates upon them all alike, and reaches them, not by a separate selection of one or more, but through the general class of which they are individual elements. In *re Church*, 92 N. Y. 1, 4, 5.

Classification of buildings by height.

The term "local or special legislation" cannot be applied to *Laws 1897*, p. 222, requiring fire escapes on buildings four or more stories in height, except such as are used for private residence, and on buildings more than two stories in height used for manufacturing purposes, as the statute applies to all buildings falling within the designated class, and is therefore general and uniform. *Arms v. Ayer*, 61 N. E. 851, 855, 192 Ill. 601.

Classification as to population.

"A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special, and comes within the prohibition of the Constitution of 1873, art. 5, § 7, prohibiting local or special legislation." The constitutional provision does not prevent the classification of municipal corporations with reference to taxation, and hence the act of May 23, 1874, classifying cities according to their population, is

constitutional. *Wheeler v. City of Philadelphia*, 77 Pa. (27 P. F. Smith) 338, 348.

A statute which, by its terms, can have application to but one county in the state, although purporting to be a general law applicable to all counties having a certain population, there being but one county in the state of such population, is a local or special law, within the meaning of the provision of the Constitution "that the General Assembly shall not pass local or special laws" in certain enumerated cases. Giving to the words "local or special laws," as used in the Constitution, their ordinary meaning, as contradistinguished from "general laws," the act comes within the definition of a special or private law. *Devine v. Cook County Com'rs*, 84 Ill. 590, 594.

A special or local act applies only to a limited part of the state. It touches but a portion of its territory, a part of its people, or a fraction of the property of its citizens. A law may be general, however, and have but a local application, and it is none the less general and uniform because it may apply to a designated class, if it operates equally upon all the subjects within the class for which the rule is adopted. In determining whether a law is general or special, the court will look to its substance and necessary operation as well as its form and phraseology. *Sess. Laws 1901*, p. 317, providing a method of holding primary elections in cities having a population of 10,000 or more for the selection of delegates to nominating conventions, though applicable to but one city at the time of its enactment, extends to all cities as they subsequently acquire the prescribed population, and operates equally upon all of a designated class founded upon a reasonable and proper classification, and hence is not a local or special, but a general, law. *Ladd v. Holmes*, 66 Pac. 714, 716, 40 Or. 167, 91 Am. St. Rep. 457.

Act March 8, 1879, § 7 (act restricting gaming), providing that certain games shall not be carried on in any room on the first floor or story of any building, nor a license issued therefor in any county where more than 1,500 votes were cast at the general election last preceding the application, is not in violation of Const. art. 4, § 20, prohibiting local and special legislation, although at the time the application was made there was only one county in the state to which the law could apply. *State v. Donovan*, 15 Pac. 783, 784, 20 Nev. 75.

The local option law (Act 1887, p. 179), providing that any county or town or city having a population of 2,500 or more inhabitants may, by a majority vote, put such county, town, or city under its operation, is not a local or special law within Const. art. 4, § 53, prohibiting the passage of a local or special law, when a general law can be made

applicable. *State ex rel. Maggard v. Pond*, 93 Mo. 608, 640, 6 S. W. 469, 472.

Law relative to county officer.

A county office not being a local office, a law regulating the compensation attached to a county office is not local in its nature, and hence must be uniform throughout the state. *State v. Yates*, 64 N. E. 570, 571, 66 Ohio St. 546.

An act applying to an officer in a single county and to the property and sales made therein is a "local law" within the meaning of a constitutional provision that no local law shall contain more than one subject. *Kerrigan v. Force*, 68 N. Y. 381, 383.

The term "local act" or "private act" in the constitutional provision providing that no private or local bill shall embrace more than one subject, and that shall be expressed in the title, does not apply to an act regulating the amount and manner of paying the officers, or any given number of the officers, of a county of the state for their official services, when such services are rendered in, and form a part of, the administration and execution of the laws of the state, and affect equally the whole citizens thereof, who come within their range. Thus Act March 10, 1847, entitled "An act in relation to the fees and the compensation of certain officers in the city and county of New York," and which gives salaries to four officers of that city in place of fees, is not a local or private act. *Conner v. City of New York*, 5 N. Y. (1 Seld.) 285, 297.

Act excluding one county.

The act of June 28, 1879 (Pub. Laws 1879, p. 182), providing for liens for labor and material on oil wells, and that the act does not apply to counties having a population of over 200,000 inhabitants, is a local or special law within the meaning of the Constitution prohibiting the passage of any local or special law authorizing the creation, extension, or impairing of liens. There is no dividing line between a local and a general statute. It must be either the one or the other. If it apply to the whole state, it is general; if to a part only, it is local. As a legal principle it is as effectually local when it applies to sixty-five counties out of the sixty-seven as if it applied to one county only. The exclusion of a single county from the operation of the act makes it local. A general statute must be applicable to every part of the commonwealth. *Davis v. Clark*, 106 Pa. 377, 384; *City of Philadelphia v. Pepper*, 8 Atl. 241, 242, 115 Pa. 291.

"Local act," as used in Const. art. 3, §§ 16, 18, prohibiting the passage of a local act by the Legislature, should be construed to mean an act operating only within a limited territory or specified locality. An act operat-

ing upon persons or property in a single city or county, or any two or three counties, would be local. In Burrill's Law Dictionary the word "local" is defined as "relating to place, belonging or confined to a particular place"; and a "local act" has been defined as one "confined in its operation to the particular persons of a specified locality." But it cannot be said that a territory comprising nearly the whole state is merely a place or locality, and hence an act which applies to 58 out of the 60 counties in the state is not a local act within the meaning of the Constitution. *People v. Newburgh & S. Plank Road Co.*, 86 N. Y. 1, 6.

The phrase "local bill," as used in the Constitution providing that no private or local bill shall embrace more than one subject, which shall be expressed in the title, means, according to Folger, J. (*Remsen v. People*, 43 N. Y. 10), "a bill, act, or law such as touches but a portion of the territory of the state or part of its people, a fraction of the property of its citizens"; and hence an act which applies to an officer of a single county and to the property and judicial sales made therein is a local bill. An act may be public, and yet local, although the words "private" and "local" are often, and perhaps generally, used as synonymous. *Kerrigan v. Force*, 68 N. Y. 381, 383.

Law relating to general subject.

The act of the Legislature providing for five terms of the district court of Bexar county is not a local or special law in the sense in which these terms are used in the Constitution providing that "no local or special law shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated at least thirty days prior to the introduction into the Legislature of such bill." Such act is on a general subject—the regulation of the courts—which cannot be said to affect the welfare and interests of that district alone. *Cordova v. State*, 6 Tex. App. 207, 221 (cited and approved in *Bejarano v. State*, Id. 265, 283, and *Handline v. State*, Id. 347, 357).

Laws 1897, pp. 186, 187, providing that in a certain section of the state the school lands which have been leased shall not be subject to sale during the existence of the lease, is not a local law, prohibited by the Constitution, for the sale of school lands is a matter of public interest. It is local in the sense that it applies to the lands of the state situate in a particular locality, but it is not local within the meaning of the term as used in the Constitution. *Reed v. Rogan*, 59 S. W. 255, 257, 94 Tex. 177.

Law having local application.

A statute is not special or local merely because it authorizes or prohibits the doing

of a thing in a certain locality. It is, notwithstanding this fact, a general law, if it applies to all the citizens of the state, and deals with a matter of general concern. Thus Act March 24, 1899, regulating the cultivation of oysters in certain tidal water lying wholly within the counties of the state, is not special or local within the prohibition of Const. art. 4, § 7, par. 11, the matter regulated being of general concern, and applying to all citizens. *State v. Corson*, 50 Atl. 780, 785, 67 N. J. Law, 178.

A statute regulating the fisheries throughout the state, and containing a provision that in the waters of certain counties named no nets shall be used during certain periods of the year, is not a local law within the meaning of the provision of the Constitution that no general law shall embrace any provision of a private, special, or local character. A law is not necessarily of a special or local character because it prohibits the doing of a thing in a certain locality. If this were so, a law regulating the use of the public roads of the state, and imposing penalties for the infringement of such rules, would be illegitimate, as such a law would be local in the sense that it prohibited the doing of certain things within certain localities, to wit, within the bounds of the public highways. A law cannot be said to have a special or local character that does not confer either a particular benefit or does not impose a particular burden upon the inhabitants of a designated place or district. *Doughty v. Conover*, 42 N. J. Law (13 Vroom) 193, 195.

The terms "local law" and "special law" in Const. art. 3, § 57, prohibiting the passage of special or local laws unless notice of the application therefor is given to the locality affected thereby, are synonymous, and mean a law which only applies to a particular locality. *Smith v. Greyson County*, 44 S. W. 921, 922, 18 Tex. Civ. App. 153.

Within the meaning of Const. art. 3, § 18, providing that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title" if the bill is local in its operation and effect, although public in its character, it is within the constitutional enactment. *Huber v. People*, 49 N. Y. 132, 135.

The term "local act," in Const. art. 3, § 18, declaring that no local or private act which may be passed by the Legislature shall embrace more than one subject, and that shall be embraced in its title, does not include a section of a statute relating to police justices and courts and their clerks in the city of New York, which section provides for an increased punishment for petit larceny when committed by stealing from the person in the city of New York. "It has, no doubt, features which savor of locality, for

it punishes a well-known common-law offense more severely if committed under peculiar circumstances within the limits of that city than if committed elsewhere; but it prescribes the rule of conduct for all persons, whether residents of the city or of any other part of the state, and its increased penalties are intended to protect residents of other localities equally with residents of the city." *Williams v. People*, 24 N. Y. 406, 407.

Law having optional application.

A bill that embraces all the villages of the state which may elect to take advantage of its provisions is a general, and not a local, act. *Arthur v. Village of Glens Falls*, 21 N. Y. Supp. 81, 83, 66 Hun, 136.

Police regulation.

The constitutional provision prohibiting the passage of any local or special law granting any special or exclusive right, privilege, or immunity is not violated by a city ordinance passed as a sanitary police regulation, granting the exclusive right to remove the carcasses of dead animals from the streets, though it be conceded that the restriction would apply to municipal legislatures as well as to the general assembly of the state. *River Rendering Co. v. Behr*, 7 Mo. App. 345, 351.

As public act.

See "Public Act or Statute."

Law required by Constitution.

The term "local or special law" in the clauses of the Constitution prohibiting the passage of such laws, except, etc., cannot include any law which results directly or indirectly from a specific constitutional requirement. It would be a manifest absurdity to assume that the Constitution, when directing the Legislature to pass a certain law, at the same time requires a notification to the people of the locality for the purpose of enabling them to defeat the law. Act April 27, 1877, dividing the city of St. Louis into election districts, and providing that at every general election thereafter held justices of the peace shall be elected in each of them, when construed in connection with Const. art. 6, § 39, declaring that in each county there shall be appointed or elected as many justices of the peace as the public good may require, whose powers, duties, and duration of office shall be prescribed by law, is not a local or special law within the meaning of the clause of the Constitution prohibiting the passage of such laws unless notice of the intention to apply therefor be published in the locality where the matter or thing to be effected may be situated. *State ex rel. Monahan v. Walton*, 69 Mo. 556, 557.

The term "local law," in Const. art. 4, § 54, prohibiting the passage of any local or

special laws without publication of notice of intention to apply therefor, does not include a law which results directly from a specific constitutional requirement, and therefor a statute creating the office of reporter for the St. Louis Court of Appeals is neither a local nor a special act as the Court of Appeals was created by the Constitution, which grant carried with it the power necessary to the exercise of its jurisdiction. A law creating an office and prescribing the duties of the officer whose services are to be rendered in and form a part of the administration of the laws of the state, and affect equally all who come within their range, is neither local nor special within the meaning of the Constitution. Nor is the source from which the expenses of the office are to be paid a test by which to determine whether the act creating the office is local or special. *State ex rel. Berry v. Shields*, 4 Mo. App. 259, 265.

Law applying to single city.

The term "local act (or statute)" is one of modern origin, and has, therefore, no definite meaning in the common law; and yet there is no room for reasonable doubt as to its proper signification. Local, according to Webster, means pertaining to a place, or to a fixed and limited portion of space. According to Bouvier it means fixedness in a place; as local courts, or courts fixed in a particular place. An act establishing a court in a particular town, and confining its jurisdiction to the corporate limits of the town, and extending only to suits brought for violation of its ordinances, and in other cases to persons served and property found therein, is a local act within the prohibition of the laws and the Constitution prohibiting local and special acts, except, etc. *Town of McGregor v. Baylies*, 19 Iowa, 43, 47.

The term "local act" in the constitutional provision that a private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in its title, includes an act entitled "To amend and consolidate the several acts relating to the city of Rochester." In so holding the court says that "Burrill, in his Law Dictionary, defines the word 'local' as relating to place; belonging or confined to a particular place, distinct from a general, personal, or transitory." *People v. Hills*, 35 N. Y. 449, 451.

As special law.

Const. 1876, § 23, art. 16, authorizes the Legislature to "pass laws for the regulation of live stock and the protection of stock raisers in the stock raising portion of the state and exempt from the operation of such laws other portions, sections, or counties, and shall have power to pass general and special laws for the inspection of cattle, stocks, and hides, and for the regulation of

brands: provided that any local law thus passed shall be submitted to the freeholders of the section to be affected thereby and approved by them before it shall go into effect." Held, that the words "special" and "local" are synonymous, and only require local laws of the county mentioned in the section to be submitted to the freeholders to be affected by them. *Lastro v. State*, 3 Tex. App. 363, 374.

"Local law" and "special law" are synonymous terms. *Smith v. Grayson County*, 44 S. W. 921, 922, 18 Tex. Civ. App. 153.

The terms "special" and "local" are not always convertible, though the former may include the latter. A special act is one that comes short of being general. The latter comprehends the genus, while the former is confined to the species. In the course of the discussion of the case at bar the court said: "An act providing for the assessment of mortgages generally is so far a general act which comprehends the genus, but an act providing for the assessment of all mortgages for sums exceeding \$500 which are not payable within one year from the date of their execution is special. It comprehends only a species of mortgages, so an act providing for the assessment of mortgages on wood lands, plow lands, or river lands, is special." *Dundee Mortgage Trust Inv. Co. v. School Dist. No. 1* (U. S.) 19 Fed. 359, 371.

Universal application required.

A statute relating to mechanics' liens, and applicable to building contracts for an amount of \$1,000 and any amount exceeding that sum, and applicable to cities of not less than 10,000 inhabitants, is not a local or special act. With the exception of the lower limit in amount and the lower limit in the number of inhabitants in cities in which the statute is operative, it is general. If a law is limited in some minor details, deemed proper by the Legislature in carrying out a public policy, but otherwise general in its application, it is neither local nor special. A law may be general without being universal. *McKeon v. Sumner Bldg. & Supply Co.*, 26 South. 430, 431, 51 La. Ann. 1961.

LOCAL LEGISLATION.

"Legislation" to be "local," within the meaning of Const. art. 8, § 7, providing that the Legislature may confer on the boards of supervisors of the several counties of the state such further powers of "local legislation" and administration as they should from time to time prescribe, must apply to and operate exclusively upon a portion of the territory of the state and upon the people living therein. If it applies to or operates upon persons or property beyond such locality, it is not local. It is not meant to say that the law, to be local, must be restricted

in its operation to the persons, property, or rights which belong within the locality within which the law is intended to operate. Such a construction would make all laws relating to municipal corporations general, as they affect all persons within its limits, without regard to their permanent place of residence; but the law is not local that operates upon a subject in which the people at large are interested. *Healey v. Dudley* (N. Y.) 5 Lans. 115, 120.

LOCAL MATTERS.

Mr. Stephens (Steph. Pl. 288) says that: "Local matters consist of such facts as carried with them the idea of some certain place comprising all matters relating to realty, and hardly any others." Mr. Chitty says: "When a cause of action could only have arisen in a particular place or county, it is local." *Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co.*, 16 Atl. 12, 13, 51 N. J. Law (22 Vroom) 58.

LOCAL MINISTER.

A "local or located minister" in the Methodist Church is one who does not travel. *Guardians of the Poor v. Greene* (Pa.) 5 Bin. 554, 560.

LOCAL NATURE.

"Suit of a local nature," as used in Rev. St. §§ 740-742 [U. S. Comp. St. 1901, pp. 587, 588], relating to the districts in which a "suit of a local nature" may be brought, should be construed to include a suit by creditors for the appointment of a receiver for a railroad, a large part of the railroad being actually located within the district, and, in so far as the assets were personal, they were likewise largely located there; and the local character of the suit is not affected by the fact that a portion of the railroad was located in another district. *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.* (U. S.) 49 Fed. 608, 614, 15 L. R. A. 109.

LOCAL OFFICE OR OFFICER.

The term "local office" in the statute providing that every office shall become vacant on the incumbent's ceasing to be an inhabitant of the city, county, or town in which he shall have been elected, if such office shall be local, does not include a supervisor's, when considered in connection with his relation to the district in which he is elected; and therefore such supervisor does not lose his office by removing into another district. *State v. Milwaukee County Sup'rs*, 21 Wis. 443, 450.

A county office is not a local office, but a part of the permanent organization of the

government of the state. *State v. Yates*, 64 N. E. 570, 571, 66 Ohio St. 546.

"To say that an office was a local one has always meant that it was not a state office, but an office of one of the political subdivisions of the municipal corporations of the state; and such is the statutory definition. Public Officer's Law, § 2." It has heretofore been used only in its generic sense to designate all excepting state offices. It cannot be said that a jury commissioner of a county, appointed by justices of the Supreme Court, as authorized by Laws 1901, c. 602, is a local and not a county officer, and therefore the statute is within Const. art. 10, § 2, prohibiting the appointing of county officers by other than the board of supervisors or other county authorities. In *re Brenner*, 71 N. Y. Supp. 44, 46, 35 Misc. Rep. 306.

The term "local officer" is defined in Laws 1892, c. 681, which first defines "state officers," and excludes congressmen, United States senators, and presidential electors, "as including every other officer who is elected by the electors of a portion only of the state, every officer of a political subdivision or municipal corporation of the state, and every officer limited in the execution of his official functions to a portion only of the state." The term includes a commission appointed by the mayor of New York and Brooklyn, in reference to a bridge between the cities, as authorized by Laws 1895, c. 789, as amended by Laws 1896, c. 612. *People v. Nixon*, 52 N. E. 1117, 1118, 158 N. Y. 221.

Laws 1892, c. 681, § 2, known as the "Public Officer's Law," divides public officers into two classes—state officers and local officers—and, after defining state officers, defines the term "local officers" as including every other officer who is elected by the electors of a portion only of the state, every officer of the political subdivisions of municipal corporations of the state, and every officer limited in the execution of his official functions to a portion only of the state. In *re Board of Health of Village of Lansingburg*, 60 N. Y. Supp. 27, 29, 43 App. Div. 236.

The term "local officers," in Const. art. 4, § 20, providing that no person holding any lucrative office under the United States or any other power shall be eligible to any civil office of profit under this state, provided that officers in the militia, who receive no annual salary, local officers or postmasters whose compensation does not exceed \$500 per annum, shall not be deemed to hold local offices, means local federal officers. *People v. Leonard*, 14 Pac. 853, 855, 73 Cal. 230.

LOCAL OPTION LAW.

The term "local option law" includes a law prohibiting the sale of intoxicating liq-

uors, which is not to operate until the majority of the adult residents in certain local districts shall, by petition, procure an order of the county court prohibiting the sale of such liquors. *Wilson v. State*, 35 Ark. 414, 416.

The term "local option law" is an apt term to designate a law prohibiting the sale of intoxicating liquors which is left to take effect or operate in school districts at the option of a majority of the adult residents thereof. *Boyd v. Bryant*, 35 Ark. 69, 73, 37 Am. Rep. 6.

A "local option law" is a law to take or not to take effect in a given locality upon the consent or dissent of the voters of the locality, or upon other contingencies, while it may have effect in other localities. An act which simply provides that a license for the sale of intoxicating liquors shall not be granted to a particular individual unless his application is freely signed by a certain number of voters requesting that he be granted a license to sell in a designated place on payment of a certain sum of money for the privilege is not a local option law. The act is uniform in its operation throughout the state, and uniform in its operation upon every person who wishes to engage in the occupation of a liquor dealer. No person is prohibited by it from obtaining the requisite number of petitioners, or paying his money or receiving a license, nor is there any locality in the state where he is forbidden to sell liquors upon complying with the law. The law is uniform because it operates alike upon all persons in all parts of the state who may desire to engage in the particular occupation. *State v. Brown*, 19 Fla. 563, 598.

The words "local option" imply the grant of the right to one locality to adopt and another to decline to avail itself of the law. Moreover, it is no objection to a law that it does not operate upon every citizen alike. It is sufficient if it operates equally upon all who, in all parts of the state, come under the same circumstances and conditions. *Ex parte Handler*, 75 S. W. 920, 922, 176 Mo. 383.

LOCAL POSTS.

"Local posts" are special arrangements for the carriage of letters and packets to and from subordinate stations within the limits of a mail station. *United States v. Kochersperger* (U. S.) 28 Fed. Cas. 803, 809.

LOCAL PURPOSE.

The term "local purpose" in the clause of the Constitution prohibiting the appropriation of public money or property for a public purpose except for compensation means a purpose the benefit of which is confined to a particular locality or limited district. A

local purpose has reference to the citizens or interest of a particular locality, and not to a large or extensive district, or the community in general. An act appropriating money for removing obstructions from and improving the navigation of the navigable portion of the Boquet river, a river flowing into Lake Champlain, and navigable therefrom for three miles for boats of light burden, was held not an appropriation for a local purpose. "The improvement cannot be said to be for local purposes simply because it is made, as it necessarily must be made, in a particular or limited locality. It is not the place where the improvement is made that is to confer upon it a local character or otherwise, but the purpose for which it is made. There is, it must be admitted, considerable difficulty in defining the word 'local' by a synonymous word, or by a phrase expressing its precise meaning. I agree that it was designed to express an idea somewhat different from that of 'private,' and yet for some purposes the words are nearly synonymous. The words 'general' or 'common' will, it seems to me, express the opposite or converse idea to both those words. Both words are used for greater caution, and are doubtless somewhat different in meaning; a private purpose referring more particularly to a purpose for the benefit of an individual or a limited number of men, and a local purpose to a purpose for the benefit of a particular place or limited locality." *People v. Allen* (N. Y.) 1 Lans. 248, 251.

Under Const. art. 9, §§ 9, 10, authorizing municipal corporations to "levy taxes for strictly local purposes," the raising of money by taxation in towns or counties for the purpose of building bridges, maintaining public highways, and for other objects of a similar character, in which the people of the state at large are directly interested, is not included. *Will County Sup'rs v. People*, 110 Ill. 511, 518.

Under Const. art. 1, § 9, providing that public money or property shall not be appropriated for local or private purposes without the consent of two-thirds of each branch of the Legislature, a law authorizing the commissioners of highways of a town to lay out a highway, and vesting in a town, for road purposes, the right, title, and interest of the state, in so much of the lands as may be necessary for the purpose of such highway, is an appropriation of public property for local purposes. *People v. Commissioners of Highways of Marlborough*, 54 N. Y. 276, 278, 13 Am. Rep. 581.

Const. 1821, art. 1, § 9, requiring the assent of two-thirds of the members elected to each branch of the legislature to every appropriation of public moneys for private or "local purposes," means an appropriation to be expended in a particular locality, which is directly and mainly for the benefit of the

people of that locality, notwithstanding the public are incidentally and remotely benefited, and an appropriation for the improvement of the navigation of a river is for a local purpose. *People v. Allen*, 42 N. Y. 378, 383.

An indebtedness for local or corporate purposes is not imposed on a municipality against its consent by a Legislature in violation of Const. art. 9, §§ 9, 10, by Laws 1887, p. 237, making a municipality liable for property destroyed within its limits by a mob. *City of Chicago v. Manhattan Cement Co.*, 53 N. E. 68, 71, 178 Ill. 372, 45 L. R. A. 848, 69 Am. St. Rep. 321.

LOCAL SELF-GOVERNMENT.

"The principle of local self-government is regarded as fundamental in American political institutions. It means that local affairs shall be decided upon and regulated by local authorities, and that the citizens of particular districts have the right to determine upon their own public concerns and select their own local officials without being controlled by the general public or the state at large. For this purpose municipal corporations are established, and are invested with rights and powers of government subordinate to the general authority of the state, but exclusive within their sphere. It is axiomatic that the management of purely local affairs belongs to the people concerned, not only because of being their own affairs, but because they will best understand and be most competent to manage them. The continued and permanent existence of local government is therefore assumed in all the state constitutions, and is a matter of constitutional right, even when not in terms expressly provided for. It would not be competent to dispense with it by statute. The institution of local self-government is not an American invention, but is traditional in England, and is justly regarded as one of the most valuable safeguards against tyranny and oppression. It is but an extension of this idea that the government of the United States should be intrusted with only such powers and rights as concern the welfare of the whole country, while the individual states are left to the uncontrolled regulation of their internal affairs." *Rathbone v. Wirth*, 40 N. Y. Supp. 535, 542, 6 App. Div. 277 (quoting *Black*, Const. Law, 373, 374. See, also, 1 Dill. Mun. Corp. p. 48).

LOCAL STATUTE.

See "Local Law."

LOCAL SUPERINTENDENT.

"Local superintendent of repairs," as the term is used when applied to an officer of a railroad company, means a superintendent

of repairs whose duties are confined or limited to a particular county, city, town, place, district, or section, and as used in Comp. Laws 1885, p. 613, § 68a, which makes service of summons on a local superintendent of repairs a valid service on the railway company, includes a section foreman, where it appears that the company has not designated any person or officer on whom service can be made as provided by statute. *St. Louis & S. F. Ry. Co. v. Deford*, 16 Pac. 442, 443, 38 Kan. 299.

LOCAL TAXATION.

In a law "exempting from local taxation or other purposes" all the real and personal property of a charitable corporation "so long as it or its income is used for the purposes for which it was incorporated," the "other purposes" referred to are evidently local purposes, such as assessments, etc., and could never have been intended to extend to taxation by the state. In *re Vanderbilt*, 2 Con. Sur. 319, 326, 10 N. Y. Supp. 239.

"Local taxation," as used in Laws 1887, providing that certain property shall not be subject to local taxation, will be construed to distinguish it from that taxation which is general, and for the whole state, and hence to exempt such property from all taxation except for state purposes. *People v. Board of Assessors of City of Brooklyn*, 36 N. E. 508, 141 N. Y. 476.

"Local taxation," as used in Const. art. 11, § 5, providing that any county or township organization shall have such power of local taxation as may be prescribed by law, means the taxing of property which may be properly subjected to taxation in the place where such local organizations exist; that is, within the geographical limits of the county or township, as the case may be. *Davidson v. Ramsey County Com'rs*, 18 Minn. 482, 494 (Gil. 432, 442).

LOCAL TICKET.

Local railroad tickets are mere tokens to the passenger and vouchers to the conductor, adopted for convenience to show that the passenger has paid his fare from one place to another, and are much in the nature of baggage checks. No contract is contained in such a ticket, the contract being made when the ticket is purchased, and is simply that which the law implies by the transaction. *Louisville & N. R. Co. v. Turner*, 47 S. W. 223, 226, 100 Tenn. 213, 43 L. R. A. 140 (citing *Rawson v. Pennsylvania R. Co.* 48 N. Y. 212, 8 Am. Rep. 543, 545; *Cole v. Goodwin* [N. Y.] 19 Wend. 251, 32 Am. Dec. 470, 505).

LOCALITY.

In Comp. St. 1887, pp. 563, 570, relating to the state board of transportation, and

providing that it shall be the duty of said board to carefully investigate any complaint in writing and under oath concerning any injustice or discrimination against either any person, firm, or corporation, or locality either in rates, facilities furnished, or otherwise, "locality" means the territory unjustly discriminated against, and it may refer either to a village, city, county, or portion of the state. *State v. Fremont, E. & M. V. R. Co.*, 35 N. W. 118, 124, 22 Neb. 313.

The word "locality" signifies a particular district; confined to a limited region; opposed to "general"; limited by boundaries, large or small—as a country, a state, a county, a town, or a portion thereof. *Anderson's Law Dictionary*. In human laws neither the world, nor the greater portion of it, is spoken of as a locality. Laws 1885, § 1, relating to the suppression and prevention of the spread of contagious and infectious diseases among domestic animals, and providing (section 5) that whenever the board of commissioners shall report to the Governor that such diseases have become epidemic in certain localities in other states, or that their condition would render such domestic animals liable to convey such diseases, he may, by proclamation, schedule such localities, and prohibit the importation of any live stock of the kind into the state except under such regulations as may be prescribed by the said board and approved by the Governor, does not confer the power to select certain kinds of cattle and prescribe that such cattle cannot be brought into the state of Illinois from any quarter of the globe except under such conditions as the board might prescribe. The Legislature contemplated that contagious or infectious diseases of domestic cattle might become epidemic in certain localities; that is to say, in prescribed, defined, limited portions of other states. *Pierce v. Dillingham*, 96 Ill. App. 300, 313.

As political subdivision.

"Localities," as used in Laws 1899, c. 370, §§ 10, 17, giving the civil service commission power to prescribe rules for the classification of the offices, places, and employments in the classified service, and section 17, providing that, where the labor service of any department or institution extends to separate localities, the commission must provide separate registration lists for each district or locality, means some political subdivision of the state created and existing by legislative act at the time the registration lists are furnished. For a district or locality thus created, and not otherwise, the commission may provide separate registration lists; but it cannot of its own volition, independent of the statute, first create a district and then furnish the list. *People v. Shea*, 76 N. Y. Supp. 679, 681, 73 App. Div. 232.

LOCALIZED PROPERTY.

"Localized property" is defined in Acts Tenn. 1897, c. 5, relating to taxation of railroads, to consist of depot buildings, and other property, real, personal, and mixed, having an actual situs. *Kansas City, Ft. S. & M. R. Co. v. King* (U. S.) 120 Fed. 614, 621, 57 C. C. A. 278.

LOCALLY.

"Locally inapplicable," within Act Cong. March 3, 1893, and the President's proclamation providing that all laws of the United States not locally inapplicable should go into effect in the territory of Oklahoma, is not limited to the district within the boundaries of the territory at that time, but such laws became applicable to the territory added to the domain from time to time under the subsequent laws of Congress; and a contention that "locally inapplicable" refers to place, and not to time, is unsound. *Hoffman v. County Com'rs*, 3 Okl. 325, 349, 41 Pac. 568.

LOCATE.

See "Definitely Locate"; "Permanently Located."

In an act of Congress to provide a national currency, known as the "National Bank Act," it is provided that the usual business of a bank organized thereunder shall be prosecuted at an office or banking house located at the place specified in its organization certificate, and that its affairs shall be managed by a board of directors, at least three-fourths of whom shall have resided in the state, territory, or district in which such association is located one year next preceding their election as directors, and be residents of same during their continuance in office; and in other places speaks of the place where the association is located and established. "It is quite apparent from all these statutory provisions," says Judge Blatchford, "that Congress regards a national banking association as being located at the place specified in its organization certificate. If such place is a place in a state, the association is located in the state. It is, indeed, located at but one place in the state, but when it is so located it is regarded as located in the state." *Davis v. Cook*, 9 Nev. 134, 145.

As appropriation or occupation.

"Located," as used in a deed of land made on the express condition that a railroad company should have its road constructed and a depot located on such land within six months from that date, does not mean "erected." The depot was located thereon, though the depot building was not erected, where the ground had been staked out, a

platform built, and the premises actually occupied and used for depot purposes, so far as might be, without having a depot building erected. *Waldron v. Marcler*, 82 Ill. 550, 552.

"Locate" means to place; to set in a particular spot or position; to select, survey, and settle the boundaries of a particular tract of land, or to designate a particular portion of land by limits; to designate and determine the place of. The same acts which amount to an "appropriation" of premises for a specified purpose also amount to a "location." Cases may arise in which it is evident that the parties have used the word "locate" to express the completion of the enterprise or structure located, but such is not the usual force of the word. *Murdock v. City of Memphis*, 47 Tenn. (7 Cold.) 483, 501.

As brought in.

"Located" means placed, situated, fixed in place, and "locate" means to place, to set in a particular spot or position, and, as used in Sess. Laws 1895, p. 229, providing that any personal property that shall be located in any county of the territory after the 1st day of March, etc., shall be taxed, means placed or brought into the territory after the 1st day of March, so that cattle brought in before the 1st day of March will not be taxed according to the provisions of the statute. *Godfrey v. Wright*, 56 Pac. 1051, 1052, 8 Okl. 151.

As build and construct.

Act April 9, 1851, § 2, provides that it shall not be lawful for any plank road company or any turnpike company to put up or erect any tollgate, gatehouse, or other building within a less distance than ten rods from the front of any dwelling house, barn, or other outhouse without the written consent of the owner thereof, and if any tollgate or other such building shall hereafter be located by any such company within said distance without such consent, the county judge of the county in which such building shall be located shall, on application, order the same to be removed. It was held that "located" is employed in reference to and synonymous with the antecedent words "erect" or "put up." Where ground was staked out, a cellar dug, and materials gotten together for building a tollgate and gatehouse within the limits prohibited by the act without the written consent of the owner before the passage of the statute, the buildings were not thereby located, though in common parlance the word "located" would describe the acts done in reference to the structures. "Locate" and "located" are words whose meaning depends on the connection in which they are used and the subjects to which they are applied. "Located,"

as defined by lexicographers, means placed, situated, fixed in place. *Moule v. Macedon & B. Plank Road Co.* (N. Y.) 6 How. Prac. 37, 38.

In a subscription agreement providing that the subscription should be void unless a railroad company should locate its road on or near a certain place, "locate" did not mean merely a resolution of the board of directors of the company that the road should be located at that place, but that the road should be actually built and constructed there. *Nashville & N. W. R. Co. v. Jones*, 42 Tenn. (2 Cold.) 574, 588.

"Locate," as used with reference to railroads, means to put in place. Thus, a city council may locate the route of the railroad, and may direct where the location must be, if at all, but it is for the company to make the location, and put its track in the place designated, and, if it does not choose to so locate its tracks, it is no function of the city to locate the tracks. *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 110, 141.

Strictly speaking, to "locate a road" is to build it, because until it is completed it is not a road. When a subscription book speaks of locating a road, everybody understands it to mean less than a finished road—a mere line surveyed and established as the locus where the road is to be built. It must be supposed and held that it was the location of the road, and not its structure, that was intended to be specified. *Warner v. Callender*, 20 Ohio St. 190, 197.

"Located," as used in Pub. Laws, p. 245, § 2, providing that "from and after the passage of this act it shall be the duty of the commissioners of those townships in which a county bridge is or hereafter may be located," etc., does not mean the mere selection and approval and entering of record of the place selected for the purpose of constructing a bridge, but it is practically synonymous with "built." *Everett v. Bailey*, 24 Atl. 700, 701, 150 Pa. 152.

The word "located" in an agreement by a landowner granting to the railroad company undertaking to construct a road or right of way of lawful width through his land, the damages to be assessed when the road was located, was not used in the technical sense, as a final line duly adopted by the board of directors of the railroad, but as a railroad located and constructed upon the land. *Hoffman v. Bloomsburg & S. R. Co.*, 27 Atl. 564, 567, 157 Pa. 174.

As lead or direct to.

A contract whereby one party agreed to "locate" another on government land meant that the party was to lead or direct the other to and point out to him public land of the

United States, which was open and subject to be settled upon and entered as a homestead by any person having the qualifications required by law to settle upon and enter such land, and hence the allegation in the pleadings that defendant agreed to locate plaintiff does not show that title to real estate has become in issue to take the matter out of the jurisdiction of the justice of the peace. *Hart v. Carnall-Hopkins Co.*, 37 Pac. 196, 197, 103 Cal. 182.

As purchase.

When applied to the acquisition of lands from the government, "locate" means the purchasing of lands from the government by means of scrip or other instruments issued by the government calling for specified quantities of land. *Goodnow v. Wells*, 25 N. W. 864, 866, 67 Iowa, 654.

As selection of place.

"Locating," as the word is used in speaking of the locating of lands, means the act of selecting and designating lands which the person making the location is authorized by law to select. *City of Richmond v. Henrico County Sup'rs*, 2 S. E. 26, 30, 83 Va. 204 (citing 2 Bouv. Law Dict. 124).

"Locate and lay out," as used in St. 1875, c. 185, establishing a board of park commissioners, and section 3, providing that said board shall have power to "locate" within the limits of the city of Boston one or more public parks and to "lay out," improve, govern, and regulate any such park or parks and the use thereof, is to be construed as meaning to determine the place of one or more public parks; and formally and distinctly designate the boundaries of the land and the place determined upon, and the dedication of the land so bounded as a public park. The ordinary meaning of the words "to locate" is to ascertain and determine the place of, and in this sense they were used in connection with the technical words "to lay out," and are not to be construed in the sense in which the words "to lay out" are used in statutes relating to highways, that "to lay out" should be construed to mean something analogous to the words "to improve." Hence, where the commissioners had taken land and called it a park, they had located and laid it out within the meaning of the statute, whether it had been constructed so as to be fit for public use as a park or not. *Foster v. Park Com'rs of City of Boston*, 133 Mass. 321, 322.

To locate is defined as to place, to set in a particular spot or position, or to determine the situation or limits, and Act Cong. Feb. 13, 1889, authorizing a railroad company to locate a railway line gave it power to set its railway line in a particular spot or position, to fix the place of its railway line, of surveying the place where it was to

go, and fixing its boundary. *United States v. Choctaw, O. & G. R. Co.*, 41 Pac. 729, 757, 8 Okl. 404.

"Locating," as used in St. 1865, c. 171, providing that the time for "locating and constructing a certain railroad is hereby extended," etc., means estimating the line of the railroad. The effect of a location is to bind the land described to that servitude. *Abbott v. New York & N. E. R. Co.*, 15 N. E. 91, 100, 145 Mass. 450.

The word "located," as used in an act providing for a petition to the commissioners of a county through which a proposed road is located, means the selecting and defining the line upon which the road is to be constructed. *Turner v. Thorntown & M. Gravel Road Co.*, 83 Ind. 317, 319.

The preliminary survey of a line of road made by the engineer, but never reported to the company or acted on by it, does not constitute a location of the line. *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, 141 Pa. 416, 21 Atl. 645, 12 L. R. A. 220.

LOCATE ANEW.

"Locate anew," as used in Gen. St. c. 43, § 12, authorizing the selectmen of a town, either for the purpose of establishing the boundary lines of a road or making alterations in the course or width thereof, to locate anew such road, means the same as to relocate the same, the words "locate anew" and "relocate" being practically synonymous; and therefore a petition using the word "relocate" was sufficient to confer jurisdiction on the commissioners under the statute. *Inhabitants of Hyde Park v. Norfolk County Com'rs*, 117 Mass. 416, 422.

LOCATED MINISTER.

A "local or located minister" in the Methodist Church is one who does not travel. *Guardians of the Poor v. Greene* (Pa.) 5 Bin. 553, 557.

LOCATIO CONDUCTIO.

"Locatio conductio" is the bailment which is created "when goods are left with the bailee to be used by him for hire." *Coggs v. Bernard*, 2 Ld. Raym. 909, 918.

LOCATIO OPERIS.

A contract between parties for the performance of mechanical labor and the supply of necessary materials therefor in the repair of an article is described by text-writers as "locatio operis." The subject of the contract is labor, to be expended by the workman on the property of the hirer, for

an agreed price or upon a quantum meruit. The possession of the article on which the labor is to be expended passes to the workman for the purposes of the contract. Its storage from the time the article is received until the work upon it is completed is a necessary incident of the undertaking of the workman. The obligations imposed by the locatio operis, and capable of enforcement by an action on the contract, are as follows: (a) To do the work which is the subject of the undertaking; (b) to do it within the time agreed on, or within what may be, in view of all the circumstances, a proper time; (c) to do it in a proper manner; (d) to surrender the property on which the labor has been expended on payment for the work done. *Zell v. Dunkle*, 27 Atl. 88, 156 Pa. 353.

LOCATION.

See "Definite Location"; "Mining Location"; "Original Location"; "Placer Location"; "Practical Location"; "Valid Location."

Where the owner of land gave a real estate agent a writing in which he agreed either to lease a certain building at a stated rent, with the privilege to the lessee of buying it at a certain price, or to donate to the company whom he desired as a tenant a tract of land to build on, and the writing concluded: "Will allow you as commission for said location one third interest in five acres located near said works," the word "location," as used in such instrument, should be construed to apply to either one of the results which the parties contemplated producing, and that a location was secured when an accepted lessee of the factory was produced by the agent for the owner. *Harvey v. Hamilton*, 40 N. E. 592, 593, 155 Ill. 377.

"Location," as used in the chapters relating to railroads and street railways, as applied to a street railway, means the grant to a street railway company of the right to construct, maintain, and operate a street railway in a public way or place. *Rev. Laws 1902, Mass. p. 978, c. 111, § 1.*

Where a school district in possession of a schoolhouse voted to repair it, and to buy land enough to straighten the line west of the schoolhouse, this was a sufficient location to give the county commissioners jurisdiction of a petition to change the location. *Holbrook v. Faulkner*, 55 N. H. 311, 315.

As situation.

"Location," as used in a verdict in an action by a railroad employé against the company that he did not know and had no means of knowing the existence and location

of the cattle chute by which he was injured, with reference to the side tracks, does not necessarily imply the exact relation of the cattle chute to the track. If the question put to the jury had been confined to the location of the structure with reference to the track, there would have been no difficulty in holding that the question called only for his knowledge of the general relation of the cattle chute to the track. The question would then have been substantially the same in meaning as if it had inquired only of existence of the cattle chute. In reference to the track, location by itself would have imported substantially the same as existence by itself. Both words being used in the question answered by the jury, each must be construed in a different sense from the other, both words implying a greater question of knowledge than either alone. General location is implied in the question by the word "existence," and the word "location," used with it, must signify more than mere existence, more than general location, in reference to the track; it must mean the exact location or distance from the track. *Dorsey v. Phillips & Colby Const. Co.*, 42 Wis. 583-604.

The word "location," in Const. art. 8, § 5, providing that the "location of the State University, the Agricultural College, and the School of Mines, as well as all grants, gifts, and appropriation of money and property heretofore made to the said several institutions, are hereby conferred to the use and benefit of the same," is used in its ordinary sense, which is the sense of situation with respect to place. In re Senate Resolutions, 21 Pac. 472, 473, 9 Colo. 626.

Corporation.

"Location," as used in Rev. St. § 1772, providing that a corporation in its articles of incorporation shall state the name and location of such corporation, is not equivalent in language or meaning to the words "principal office or place of business." It means that the name of the corporation shall be localized; that is, a steamship company, not located in Milwaukee, should not be called the "Milwaukee Steamship Company," it being located in the town of Lake. *Milwaukee Steamship Co. v. City of Milwaukee*, 53 N. W. 839, 841, 83 Wis. 590, 18 L. R. A. 353.

Highway.

The "location of a highway" is a definite judicial act. The opening and building adds nothing to the legal effect of the location. The time of location is certain. The rights of the public and the duties of the town become fixed from that time. The precise time of opening and building the way is, within certain limits, a matter of municipal convenience and discretion. In re Railroad Crossing, 39 Atl. 478, 479, 91 Me. 135.

Land as application and survey.

"Locations," as used in a deed of all locations made by the grantor on Galveston Island, Tex., either individually or in connection with others, has no such well-defined meaning as would enable the court to construe the instrument without the aid of evidence. The primary signification of the word "location," as applied to land, is the land designated by a person when he files a valid certificate with the proper surveyor, and makes an application for the survey of land subject to location by virtue of the certificate. Such person acquires a vested right in the land, and to have same appropriated to his certificate, and finally patented on proper return of the field notes and otherwise complying with the law. But when the term is used by a person in speaking of locations made by himself it would ordinarily apply to the land surveyed for him on his application, without any restricted meaning as to whether it was land filed on survey or patent; yet it might be used in an appropriate sense by a grantor in conveying lands to designate the same as to locations made by him, though a part had been conveyed away to others and reconveyed to him, as contradistinguished from lands not located by him, but conveyed to him by others. *Robinson v. Jones*, 22 S. W. 15, 2 Tex. Civ. App. 316.

"Location," as used in Act Cong. April 26, 1822, entitled, "An act to perfect certain locations and sales of public lands in Missouri," by which it was enacted that the locations theretofore made of warrants issued under the act of February 15, 1815, which was an act for the relief of the New Madrid sufferers, if made in pursuance of the provisions of that act in other respects, should be perfected into grants in like manner as if they had conformed to the sectional or quarter-sectional lines of the public surveys, means a completed location, which does not take place on the mere application to the Surveyor General to survey the tract which the party desired to appropriate, nor when the surveyor had planted his last stake or heap of stones on the ground, nor when he had returned home with his notes in his pocket, nor when he had made out his survey and plat, but only when the surveyor had returned the survey and plat and the notice as to the party for whom the survey was made to the office of the recorder of land titles, to be by him filed and recorded. *Hot Springs Cases*, 92 U. S. 698, 711, 23 L. Ed. 690.

"Location," as used with reference to public lands in Pennsylvania, is "one where the lands are sufficiently described." It is distinguished from a mere application for vacant lands, which does not describe the particular lands. *Biddle's Lessee v. Dougal*, (Pa.) 5 Bin. 142, 151.

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"Location," as used in Act April 5, 1871, authorizing a railroad company to construct its road from one city to another on such route and location and through such counties as the board of directors should deem

of the cattle chute by which he was injured, with reference to the side tracks, does not necessarily imply the exact relation of the cattle chute to the track. If the question put to the jury had been confined to the location of the structure with reference to the track, there would have been no difficulty in holding that the question called only for his knowledge of the general relation of the cattle chute to the track. The question would then have been substantially the same in meaning as if it had inquired only of existence of the cattle chute. In reference to the track, location by itself would have imported substantially the same as existence by itself. Both words being used in the question answered by the jury, each must be construed in a different sense from the other, both words implying a greater question of knowledge than either alone. General location is implied in the question by the word "existence," and the word "location," used with it, must signify more than mere existence, more than general location, in reference to the track; it must mean the exact location or distance from the track. *Dorsey v. Phillips & Colby Const. Co.*, 42 Wis. 583-604.

The word "location," in Const. art. 8, § 5, providing that the "location of the State University, the Agricultural College, and the School of Mines, as well as all grants, gifts, and appropriation of money and property heretofore made to the said several institutions, are hereby conferred to the use and benefit of the same," is used in its ordinary sense, which is the sense of situation with respect to place. In re Senate Resolutions, 21 Pac. 472, 473, 9 Colo. 626.

Corporation.

"Location," as used in Rev. St. § 1772, providing that a corporation in its articles of incorporation shall state the name and location of such corporation, is not equivalent in language or meaning to the words "principal office or place of business." It means that the name of the corporation shall be localized; that is, a steamship company, not located in Milwaukee, should not be called the "Milwaukee Steamship Company," it being located in the town of Lake. *Milwaukee Steamship Co. v. City of Milwaukee*, 53 N. W. 839, 841, 83 Wis. 590, 18 L. R. A. 353.

Highway.

The "location of a highway" is a definite judicial act. The opening and building adds nothing to the legal effect of the location. The time of location is certain. The rights of the public and the duties of the town become fixed from that time. The precise time of opening and building the way is, within certain limits, a matter of municipal convenience and discretion. In re Railroad Crossing, 39 Atl. 478, 479, 91 Me. 135.

Land as application and survey.

"Locations," as used in a deed of all locations made by the grantor on Galveston Island, Tex., either individually or in connection with others, has no such well-defined meaning as would enable the court to construe the instrument without the aid of evidence. The primary signification of the word "location," as applied to land, is the land designated by a person when he files a valid certificate with the proper surveyor, and makes an application for the survey of land subject to location by virtue of the certificate. Such person acquires a vested right in the land, and to have same appropriated to his certificate, and finally patented on proper return of the field notes and otherwise complying with the law. But when the term is used by a person in speaking of locations made by himself it would ordinarily apply to the land surveyed for him on his application, without any restricted meaning as to whether it was land filed on survey or patent; yet it might be used in an appropriate sense by a grantor in conveying lands to designate the same as to locations made by him, though a part had been conveyed away to others and reconveyed to him, as contradistinguished from lands not located by him, but conveyed to him by others. *Robinson v. Jones*, 22 S. W. 15, 2 Tex. Civ. App. 316.

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"Location," as used in Act April 5, 1871, authorizing a railroad company to construct its road from one city to another on such route and location and through such counties as the board of directors should deem

most feasible, necessarily involve a starting point and a terminus, and there cannot be a complete route and a complete location which does not comprehend the entire structure throughout its length. *Mellen v. Town of Lansing* (U. S.) 11 Fed. 820, 825.

Under a statute authorizing towns through or near which an extension of a railroad passes from a fixed point in the state to any point on Lake Erie to aid the same, there is no location of the road sufficient to authorize such an issue by an establishment of one terminus to a further terminus through the town issuing the bonds without the establishment of the further terminus of the road. *Oswego County Sav. Bank v. Town of Genoa*, 59 N. Y. Supp. 829, 835, 840, 28 Misc. Rep. 71.

Under 18 St. 482, § 1, granting a right of way through public lands to any railroad which shall have filed a copy of its articles of incorporation and due proofs of its organization, and section 4, providing that such railroads shall within 12 months after the location of any section file a profile thereof, and proofs of its organization, as required, its right of way became definitely located by the construction of its road, though the profile map had not been accepted because the land was unsurveyed. *Pennsylvania Min. & Imp. Co. v. Everett & M. C. Ry. Co.*, 69 Pac. 628, 629, 29 Wash. 102.

Warrant.

A location of a land warrant is an actual appropriation of so much of the land of the commonwealth to the use of that warrant. It is not a mere mental purpose to appropriate, but an actual appropriation by such acts performed on the ground or return into the land office as shall give the world notice that the designated land has been withdrawn from the common mass of public lands, and has become private property. *McBarron v. Gilbert*, 42 Pa. (6 Wright) 268, 278.

LOCATION CERTIFICATE.

A location certificate is purely a creature of statute. Its purposes and functions are twofold. When duly recorded, it becomes notice to the world of the facts therein set forth, namely, a description of the premises claimed, and by whom and when located, in order to secure the discoverer or claimants against others seeking to locate the same ground; and it is thus constructive notice of the claimant's possession. By statute it is made one of the steps requisite to constitute a perfected mining location. It differs from ordinary documentary muniments of title in that it is not a title, nor proof of title, nor does it constitute or of itself establish the possessory right which is necessary in order to maintain an action of ejectment. *Strepey v. Stark*, 5 Pac. 111, 113, 7 Colo. 614.

LOCATOR.

The name of the lender in a bailment in which the goods are left with the bailee to be used by him for hire. *Coggs v. Bernard*, 2 Ld. Raym. 909, 913.

LOCKED HARBOR.

A locked harbor is where a vessel cannot go to sea being landlocked by shoals or reefs. *United States v. Morel* (U. S.) 26 Fed. Cas. 1310.

LOCKOUT.

A lockout has been defined to be the closing of a factory or workshop by an employer, usually to bring the workmen to satisfactory terms by a suspension of wages. *Mathews v. People*, 67 N. E. 28, 31, 202 Ill. 389, 63 L. R. A. 73, 95 Am. St. Rep. 241.

LOCO PARENTIS.

See "In Loco Parentis."

LOCMEN.

"The term 'locmen' was used in the early maritime law to designate a local pilot whose business was to assist the pilot of the vessel in guiding the course of the vessel into the harbor, or through a river or channel, so as to avoid shoals, rocks," etc. "If a vessel was lost by the false direction or ignorance of the local pilot, he was liable to lose his head at the hands of the master or one of the mariners, who were authorized to cut it off as a penalty for his false pretensions of knowledge or skill." *Martin v. Farnsworth*, 33 N. Y. Super. Ct. (1 Jones & S.) 246, 260 (quoting Laws of Oleron, arts. 13, 14).

LOCOMOTIVE.

Laws 1871, c. 609, declaring that "no railroad on which locomotive steam shall be used" shall be constructed across certain avenues, refers to railroads moving cars in the ordinary way, by means of locomotive engines, and does not include railroads moving their cars in any other way, as by horses or by a propelling rope or cable attached to stationary power. A stationary engine is not a locomotive engine, and does not, according to general understanding, use locomotive steam. Locomotive steam is such as is used in a locomotive engine, and a locomotive engine is one which moves cars by its own backward and forward motion. *Stranahan v. Sea View Ry. Co.*, 84 N. Y. 308, 314.

The term "locomotive power," in an act giving the right to construct a street railway and convey passengers by any power

other than by locomotive, means locomotion by the power of steam. "Electricity is certainly a locomotive power, and therefore, by a strict definition of the word, could not be used. Horses and mules are locomotive powers, but the act, I suppose, did not intend to exclude them. There is some authority for the use of the word 'locomotive' as meaning a steam engine, or an engine propelled by steam as its motive power. I suppose the court may safely construe the words as including every present known power of locomotion except steam." *Gillert v. Chester & M. Ry. Co.*, 2 Pa. Dist. R. 450, 451.

A machine which moves backward and forward along the track of a railroad, by its own steam power, and which, while it had not the weight, size, speed, nor power of an ordinary locomotive, was capable of and did the same work to a certain extent, and was also used for the purpose of driving piles, was a locomotive, within *Burns' Rev. St. 1901, § 7083*, providing that every corporation shall be liable for injuries to an employé caused by negligence of any person in the service of the corporation who has charge of any locomotive. *Jarvis v. Hitch (Ind.)* 65 N. E. 608, 610.

Laws 1887, c. 270, § 1, cl. 3, making the employer liable for injuries to an employé resulting from negligence of a fellow employé in charge of a "locomotive engine or train upon a railroad," relates to those operated or originally intended to be operated to some extent by steam, and does not include electrically propelled cars on street railways. *Fallon v. West End St. Ry. Co.*, 30 N. E. 536, 537, 171 Mass. 249.

"Locomotive engine" generally means a propelling engine on a railroad, and does not include a traction engine, with a crane used for lifting stone, but propelled by steam. *Murphy v. Wilson*, 27 Alb. Law J. 505.

A locomotive engine is one which moves cars by its own backward and forward motion. *Stranahan v. Sea View Ry. Co.*, 84 N. Y. 308, 314.

In construing the statute in reference to the liability of a railroad for injuries resulting by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine, or train, the court says the statute in referring to a signal, switch, locomotive engine, or train seems to contemplate the danger from a locomotive engine or train as a moving body, and to provide against the negligence of those who wholly or in part control its movements. The charge and control is of that whose characteristic is rapid and forceful motion. It relates to locomotive engines as a whole, and not to the individual parts which make up the train or engine. *Thyng v. Fitchburg R. Co.*, 30 N. E. 169, 170, 156 Mass. 13, 32 Am. St. Rep. 425.

LOCUS IN QUO.

The term "locus in quo," when used with reference to trespass on realty, does not mean the identical place where the trespass was committed, but merely the premises described in the writ. *Moor v. Campbell*, 15 N. H. 208, 211.

LODE.

See "Known Lode or Vein"; "Quartz Lode."

Lodes in place, see "In Place."

"A lode consists of aggregations of peculiar matter, and its form can only be found and its limits determined, by discerning and identifying the qualities and appearances of its composition." In some cases the apex of a lode crops out on the surface, and in others it is found 100 or more feet beneath the surface. *Bullion Beck & Champion Min. Co. v. Eureka Hill Min. Co.*, 11 Pac. 515, 516, 5 Utah, 3.

The words "vein or lode," in the United States statutes relative to mining locations and claims, were intended to apply to such veins or lodes as are described in the first portion of the statute, namely, a vein or lode of quartz or other rock in place bearing gold, silver, etc. The statute, it is said, was intended to be liberal and broad enough to apply to any kind of lode or vein of quartz or other rock bearing mineral, in whatever character, kind, or formation the mineral might be found. *Shoshone Min. Co. v. Rutter (U. S.)* 87 Fed. 801, 807, 31 C. C. A. 223.

To constitute a "lode," within the meaning of a statute providing that, if a lode is known to exist within the boundaries of a placer claim, the applicant for a patent must state that fact and pay a specified price per acre for that portion of the ground, or he acquires no right to the loan, it is not enough that there may have been some indications by outcropping on the surface of the existence of lodes or veins of rock in place, bearing gold, silver, or other precious metals, to justify their designation as "known veins or lodes." In order to meet that designation, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account and justify their exploration. *Migeon v. Montana Cent. Ry. Co. (U. S.)* 77 Fed. 249, 256, 23 C. C. A. 156.

As any mineralized matter.

The definition of a "lode" given by geologists is that of a fissure in the earth's crust filled with mineral matter, or, more accurately, as aggregations of mineral matter containing ores in fissures. As used by miners, before being defined by any authority, the term "lode" simply meant that formation by which the miner could be led or

guided. It is an alteration of the verb "lead" and whatever the miner could follow, expecting to find ore, was his lode. Some formation within which he could find ore and out of which he could not expect to find ore was his lode. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within other well-defined boundaries of the earth's surface and under it would equally constitute in his eyes a lode. The term "lode" as used in the acts of Congress is applicable to any zone or belt or mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same process. *Eureka Consol. Min. Co. v. Richmond Min. Co.* (U. S.) 8 Fed. Cas. 819, 823 (approved and followed in *Iron Silver Min. Co. v. Cheesman*, 6 Sup. Ct. 481, 483, 116 U. S. 529, 29 L. Ed. 712); *Waterloo Min. Co. v. Doe* (U. S.) 82 Fed. 45, 51, 54, 27 C. O. A. 50; *Meydenbauer v. Stevens* (U. S.) 78 Fed. 787, 790; *King v. Amy & Silversmith Consol. Min. Co.*, 24 Pac. 200, 202, 9 Mont. 543.

Justice Hallett's definition of the term "lodes," as used in mining law, "is a body of mineral or mineral-bearing rock within defined boundaries in the mass of the mountain." Judge Goddard gives this definition: "Any mineralized belt or zone of rock lying within boundaries clearly distinguishing it from the neighboring rock coming from the same source, impressed with the same forms, and appearing to be created by the same process." Justice Field gives the same definition, and also the following: "A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it." And Justice Miller quotes approvingly all the definitions above given. Dr. Raymond has somewhere defined a "lode" as "that which the miner can follow, expecting to find ore." *Duggan v. Davey*, 26 N. W. 887, 896, 4 Dak. 110.

A "lode," as used in the mining acts 1866 and 1872, is whatever indication of ore or mineral a miner would follow and find ore. *Harrington v. Chambers*, 1 Pac. 362, 375, 8 Utah, 94.

"Lodes," as used in the mining land laws of the United States, means "lines or aggregations of metal imbedded in quartz or other

rock in place. It is intended to indicate the presence of metal in rock." *Wheeler v. Smith*, 32 Pac. 784, 786, 5 Wash. 704; *United States v. Iron Silver Min. Co.*, 9 Sup. Ct. 195, 198, 128 U. S. 673, 32 L. Ed. 571.

A "lode," as the term is used in the mining law, means "ore in mass and position in the body of a mountain, whatever its former structure or boundaries may be." *Hyman v. Wheeler* (U. S.) 29 Fed. 347, 353.

A lode is a connected deposit of mineral-bearing ore and concomitant vein matter. *Phillipotts v. Blasdel*, 8 Nev. 61, 68.

"Lode" is the term used in the mining law to designate any description of deposit of mineral-bearing rock "situated in the general mass of the country; that is to say, whether, in the language of the geologist, we say that it is a bed or a segregated vein, or a gash vein, or a true fissure vein, or merely a deposit. In other words, whenever a miner finds a valuable mineral deposit in the body of the earth he calls that a 'lode,' whatever its form may be, and however it may be situated, and whatever its extent in the body of the earth." *Stevens v. Williams* (U. S.) 23 Fed. Cas. 40, 42.

As a fissure.

In defining "lodes," the text-books and several of the decisions speak of them as fissures in the earth filled with quartz in place, carrying gold and silver or other minerals. But true fissure lodes often exist and are continuous without having any filling in certain points or places of mineral matter. A majority of such lodes have, in addition to the clean fissure filling of mineral, a considerable amount of decomposed wall rock, clay, etc. *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* (U. S.) 63 Fed. 540, 544.

"A vein or lode authorized to be located is a seam or fissure in the earth's crust, filled with quartz, or with some other kind of rock in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It is not enough to discover detached pieces of quartz, or mere bunches of quartz not in place. The vein, however, may be thin, and it may be many feet thick, or thin in places—almost or quite 'pinched out,' in miner's phrase—and in other places widening out into extensive bodies of ore. So, also, in places it may be quite or nearly barren, and at other places immensely rich." *Jupiter Mining Co. v. Bodie Consol. Min. Co.* (U. S.) 11 Fed. 666, 675 (quoted in *Stinchfield v. Gillis*, 30 Pac. 839, 840, 96 Cal. 33).

Defined boundaries required.

A "lode," within the meaning of the act of Congress, is a mineral body of rock within defined boundaries in the general mass of the mountain. *Stevens v. Williams* (U. S.) 23

Fed. Cas. 40, 42; *Iron Silver Min. Co. v. Chessman* (U. S.) 8 Fed. 297, 307; *Iron Silver Min. Co. v. Chessman*, 116 U. S. 529, 6 Sup. Ct. 481, 484, 29 L. Ed. 712 (cited in *Raisbeck v. Anthony*, 41 N. W. 72, 77, 73 Wis. 572); *Synnott v. Shaughnessy*, 7 Pac. 82, 84, 2 Idaho (Hasb.) 122.

Justice Field, in *Eureka Consol. Min. Co. v. Richmond Min. Co.* (U. S.) 8 Fed. Cas. 819, 823, defines a "lode" to be a zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. In the case of *North Noonday Min. Co. v. Orient Min. Co.* (U. S.) 1 Fed. 522, it was said that a lode is a seam or fissure in the earth's crust filled with quartz, carrying gold, silver, or other valuable mineral deposits named in the statute. In the case of *Iron Silver Min. Co. v. Chessman*, 116 U. S. 535, 536, 6 Sup. Ct. 481, 29 L. Ed. 712, it was said a lode or vein is a body of mineral or mineral-bearing rock within well-defined boundaries in the general mass of the mountains. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountains, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. *Montana Cent. Ry. Co. v. Migeon* (U. S.) 68 Fed. 811, 813.

While metalliferous rock in place not in a fissure may be found under such conditions, within clearly defined boundaries, as to require recognition as a "vein" or "lode," a broad metalliferous zone having within its limits true fissure veins, plainly bounded, cannot be regarded as a single vein or lode, although such zone may itself have boundaries which can be traced. *Mount Diablo Milling & Mining Co. v. Callison* (U. S.) 17 Fed. Cas. 918, 924.

A philologist would define a "lode" to be a seam or layer of any substance, more or less wide, intersecting the rock or stratum, and not corresponding with the stratification, but in mining parlance it means a body of mineral or mineralized rock in place, within defined boundaries, in the general mass of the mountains. *Cheesman v. Shreeve* (U. S.) 40 Fed. 787, 792.

The word "lode," as used in the United States statutes, and as understood by miners, is applicable to any body or belt of mineralized rock lying within clearly defined boundaries separating it from the country or non-mineral rock. *Book v. Justice Min. Co.* (U. S.) 58 Fed. 106, 125.

A body of mineral or mineral-bearing rock in the general mass of the mountain, so

far as it may continue unbroken and without interruption, may be regarded as a "lode." With well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a "lode." *Meydenbauer v. Stevens* (U. S.) 78 Fed. 787, 790.

"Lode," as the term is used in mining law, means "a fissure between well-defined boundaries, containing ore, even though the ore is found at considerable intervals and in small quantities." *United States v. King*, 22 Pac. 498, 499, 9 Mont. 75.

In the *Eureka Case* (U. S.) 8 Fed. Cas. 819, 823, it was said: "It is difficult to give any definition of the term ['lode'], as understood and used in the acts of Congress, which will not be subject to criticism. A fissure in the earth's crust, made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a 'lode' in the judgment of geologists, but to the practical miner the fissure and its walls are only of importance to indicate the boundaries of it within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface or under it would equally constitute in his eyes a 'lode.' We are of the opinion, therefore, that the term, as used in the acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rocks." *Iron Silver Min. Co. v. Chessman*, 116 U. S. 529, 534, 6 Sup. Ct. 481, 483, 29 L. Ed. 712. The courts say in general that a lode or vein is a bed of mineral body, or mineral body of rock, within well-defined boundaries, in the general mass of the mountain. The lode or vein must be continuous in the sense that it can be traced through the surrounding rocks, though slight interruptions of the mineral-bearing rock would not be alone sufficient to destroy the identity of the vein, nor would a short partial closure of the fissure have that effect, if a little later on it recurred again with mineral-bearing rock within it. *Buffalo Zinc & Copper Co. v. Crump*, 69 S. W. 572, 575, 70 Ark. 525, 91 Am. St. Rep. 87.

Length, width, and depth required.

A lead or lode is not an imaginary line without dimensions; it is not a thing without shape or form; but before it can legally and rightfully be denominated a "lead" or "lode," it must have length and width and depth. It must be capable of measurement, and must occupy definite space, and be capable of identification; and, before a lode can be called a "discovery," at least one well-defined wall or side of the lode must be found. *Foot v. National Min. Co.*, 2 Mont. 402, 404.

Placer claim.

The term "lode," in the language of miners, means a vein containing ore. The term, in a statute providing for the location and recording of mining claims on veins or lodes, or lands bearing valuable deposits, does not include a placer mining claim. *Moxon v. Wilkinson*, 2 Mont. 421, 424.

As used in acts of Congress relating to mines, the term "lode" is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same process. This definition would not include a bed of gravel from which particles of gold may be washed. *Gregory v. Pershbaker*, 14 Pac. 401, 402, 38 Cal. 109.

Vein synonymous.

The word "lode," in mining law, is a Cornish word nearly synonymous with "vein." It is used to designate ore contained between defined walls or boundaries of rock, etc. *Bullion Min. Co. v. Croesus Gold & Silver Min. Co.*, 2 Nev. 168, 176, 90 Am. Dec. 528; *Synnott v. Shaughnessy*, 7 Pac. 82, 84, 2 Idaho (Hasb.) 122.

A "lode" is an aggregation of mineral matter containing ore in fissures, and, as used by miners, is synonymous with "vein," and applies to all deposits of mineralized matter within any zone or belt of mineralized rock separated from the neighboring rock by well-defined boundaries. *Hayes v. Lavagnino*, 53 Pac. 1029, 1032, 17 Utah, 185.

The term "vein or lode" meant lines or aggregations of metal imbedded in quartz or other rock "in place"; that is, fixed in rock. The terms are found together in the statutes, and both are intended to indicate the presence of metal in rock, yet a lode may be and often does contain more than one vein. *United States v. Iron Silver Min. Co.*, 9 Sup. Ct. 195, 198, 128 U. S. 673, 32 L. Ed. 571.

LODE MINING CLAIM.

A "lode mining claim" is a definite, distinct, and certain tract or parcel of land, the same as is a farm or town lot, and a location according to law and the record thereof is the title by which it is held and owned. It is a claim on the surface and exposed to view, designated by stakes and monuments so that its boundaries may be readily traced. *Mantle v. Noyes*, 5 Pac. 856, 861, 5 Mont. 274.

LODGE.

Within the meaning of a statute which makes it the duty of the clerk of common

pleas of a county to record all deeds lodged with him for that purpose, a deed is "lodged" with the clerk for record when it is sent to him with a request to record the same and inform the sender of the necessary charges therefor. *Dickerson v. Bowers*, 11 Atl. 142, 42 N. J. Eq. (15 Stew.) 295.

In a statute providing for calling elections upon the question of local option, providing that, after receiving the petition of a requisite number of voters in the territory to be affected, the county judge shall make an order directing an election to be held on some day not earlier than 60 days after said application is lodged with him, the word "lodged" imports that the writing is to be made a matter of record in some way, and is not to be construed differently from the word "received," as used in the act. It was intended that the petition should be received in court and there made a matter of record by the proper order entered on the order book, showing that it has been received and filed, and the purpose of it, and that the order for the election should be made at the next regular term of the court thereafter. *Wilson v. Hines*, 99 Ky. 229, 35 S. W. 627, 629.

As used in Kentucky statutes authorizing the county court to fix the day for a local option election not earlier than 60 days after a petition for such election is "lodged" with the judge of such court, the word "lodged" refers to the act of receiving the petition, or of making the application by petition for the whole of the election, as the starting point from which to compute the time within which the election might be held. *Wilson v. Hines*, 37 S. W. 148, 149, 99 Ky. 221.

As dwell.

In Act 1838, providing that the place where any person having no family shall generally lodge shall be held and considered his place of abode, etc., "lodge" means dwells, rests. Wherever a person rests or dwells for a time, whether he does so rightfully or wrongfully, voluntarily or involuntarily, he "lodges," within the meaning of the statute. *Darden v. Wyatt*, 15 Ga. 414, 416.

LODGER.

A lodger is one who inhabits a portion of a house of which another has the general possession and custody. *Metzger v. Schnabel*, 52 N. Y. Supp. 105, 106, 23 Misc. Rep. 698 (citing 13 Am. & Eng. Enc. Law, 1003); *McDowell v. Hyman*, 48 Pac. 984, 986, 117 Cal. 67.

"A lodger is one who lives at board, or in a hired room, or who has a bed in another's house for a night." *Pollock v. Landis*, 38 Iowa, 651, 652 (quoting *Webst. Dict.*).

A "lodger" is defined by Burrill as "one who occupies hired apartments in another's house; a tenant of part of another house. Volume 2, p. 166." *Ullman v. State*, 1 Tex. App. 220, 222, 28 Am. Rep. 405.

Where the landlord lets a person into possession of the second floor, the landlord himself retaining the possession of the rest of the house, such person is merely a "lodger" or inmate. *Wansey v. Perkins*, 7 Man. & G. 151, 155.

Where the owner of a house takes in a person to reside in a part of it, though such person has the exclusive possession of the rooms appropriated to him, and the uncontrolled right of ingress and egress, yet if the owner retains his character of master of the house, the individual so occupying it occupies it as a lodger only, and not as a tenant, within the meaning of 2 Wm. IV, c. 45, § 27, providing that every male person of full age occupying any house as owner or tenant, of the clear yearly value of a certain sum, should be entitled to vote. *Toms v. Luckett*, 5 Man., G. & S. 22, 37.

Guest distinguished.

A lodger is one who inhabits a portion of a house, of which another has the general possession and capacity. As distinguished from a "guest," a "lodger" is one who for the time being has his home at his lodging place. *Pullman Palace Car Co. v. Lowe*, 44 N. W. 226, 227, 28 Neb. 239, 6 L. R. A. 809, 26 Am. St. Rep. 325.

Tenant distinguished.

A lodger is one who has the right to inhabit another man's house; one who lives in a hired room or rooms in the house of another. The distinction between "lodgers" and "tenants" may in some cases be fairly drawn, and may depend upon the character of the hiring, with reference sometimes to the business of the lessor and the presumed intention of the parties, as gathered from all the other surrounding circumstances of the particular case. The tenant is put into the exclusive possession of his rooms, while the boarder or lodger has merely the use of them, without the actual or exclusive possession, which is in the lessor, subject to such use. *Linwood Park Co. v. Van Dusen*, 58 N. E. 576, 580, 63 Ohio St. 183 (citing 1 McAdam, Landl. & Ten. 619, 621; Cent. Dict.).

LODGING HOUSE.

See "Public Lodging House."

A lodging house is a house where lodgings are let. *Linwood Park Co. v. Van Dusen*, 58 N. E. 576, 581, 63 Ohio St. 183.

"Lodging houses" is the term applied to houses containing furnished apartments

which are let out by the week or by the month, without meals, or with breakfast simply. They are called by the French "hotels," but not so by us. *Cromwell v. Stephens* (N. Y.) 2 Daly, 15, 25, 3 Abb. Prac. 26, 35.

Inn, hotel, and tavern distinguished.

See, also, "Inn"; "Tavern."

The term "lodging house" and the words "inn," "hotel," or "boarding house" are not convertible terms or words, and a distinction exists between these several institutions and a lodging house. *Bailey v. People*, 60 N. E. 98, 100, 190 Ill. 28, 54 L. R. A. 838, 83 Am. St. Rep. 116.

LODGING HOUSE KEEPER.

The "keeper of a lodging house" is not in a legal sense an innkeeper, a hotel keeper, or a boarding house keeper; so that a statute regulating the number of people a lodging house keeper may permit to sleep in one room is discriminatory against lodging house keepers as a class, and exempts keepers of other houses of public entertainment, such as inns, hotels, and boarding houses. *Bailey v. People*, 60 N. E. 98, 99, 190 Ill. 28, 54 L. R. A. 838, 83 Am. St. Rep. 116.

A "lodging house keeper," as distinguished from an "innkeeper," makes a contract with every man that comes to his lodging house, whereas an innkeeper is bound, without making any special contract, to provide lodging and entertainment for all at a reasonable price. *Thompson v. Lacy*, 3 Barn. & Ald. 283.

LODGE.

See "Supreme Lodge."

A lodge is the meeting room of an association. *Laycock v. State*, 36 N. E. 137, 140, 136 Ind. 217.

"Lodge," as used in reference to associations by that name, "is defined by Webster to be a secret association, as the free Masons, Odd Fellows, and the like." *State v. National Ass'n of Farmers' & Mechanics' Mut. Aid Ass'n*, 9 Pac. 956, 960, 35 Kan. 51.

LOG.

The term "log" has a definite significance, and means the trunk of a tree cut down and stripped of its branches. *State v. Ad-dington*, 27 S. E. 988, 990, 121 N. C. 538.

The words "logs or timber," as used in the act relating to booms and dams, shall be taken to mean logs and timber of every kind and description, manufactured or unmanufactured. Code W. Va. 1899, p. 1071, § 27.

Manufactured timber.

"Logs," as used in Rev. St. § 830, as amended by Laws 1879, c. 167, § 1, in that part of the section which applies to the county of Marathon, and provides for a lien in favor of persons furnishing supplies to men engaged in getting out logs and timber in that county, means the stems or trunks of trees cut into convenient length for the purpose of afterwards being manufactured into timber of various kinds to supply the manifold wants of a civilized community, and does not include manufactured lumber of any kind, nor timber which is square or otherwise shaped for use, without further change in form. *Kolloch v. Parcher*, 9 N. W. 67, 69, 52 Wis. 393.

Masts and spars.

"Log" is a word of large signification, and might under some circumstances include within its meaning masts and spars, where there was something in the context to indicate an intent to use it in that manner, but as used in the following contract: "Said H. agrees to sell and does hereby sell to said H. & Co., all the logs, cut and hauled into the J. M. waters the present lumbering season," etc.—it would not include masts or spars. *Haynes v. Hayward*, 40 Me. 145, 148.

Shingle rift.

"Logs and timber," in Rev. St. c. 91, § 34, giving a labor lien on logs and timber for cutting the same, includes cedar shingle rift cut four feet in length. Cutting up the logs does not defeat the lien. *Sands v. Sands*, 74 Me. 239, 240.

LOG MAN.

In construing an order given to a captain of a tug employed for rafting purposes, which recited that the bearer was defendant's "log man," and any orders from him would be the same as from the employer's office, the court said: "The term 'log man' is a technical term, and may have a signification limiting the range of the duties of the person to whom applied. It may be that in the performance of his duties, such as the booming of the logs and the care of the raft, the co-operation of the tug captain was essential, and that the authority conferred related only to such as was necessary to secure that co-operation. In the absence of such explanation, it cannot be said that by these letters the defendant, a log-towing company, engaged in the navigation of logs, and expert in all matters pertaining to such navigation, intended to restrict the authority of the bearer of the letter to matters respecting the booming of the raft, and the placing of lights thereon while in transit." *Stevenson v. Michigan Log-Towing Co.*, 61 N. W. 536, 538, 103 Mich. 412.

LOG MEASURE.

"Log measure" is the measurement of the logs before sawing them, then by calculation ascertaining what quantity of lumber they would produce when sawed into pieces the required size. *Smith v. Aikin*, 75 Ala. 209, 210.

LOGGING RAILROAD.

A "logging railroad" is a private road constructed for the convenience and accommodation of lumbermen. *Tompkins v. Gardner & Spry Co.*, 37 N. W. 43, 44, 69 Mich. 58.

LOGROLLING.

Logrolling is a union of interest to secure legislation. *Attorney General v. Amos*, 27 N. W. 571, 572, 60 Mich. 372 (citing *People v. Briggs*, 50 N. Y. 553).

"Logrolling" is the public name, universally understood, designating the practice of corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits. *Commonwealth v. Barnet*, 48 Atl. 976, 977, 199 Pa. 161, 55 L. R. A. 882.

Sandford, J., in the case of *Conner v. City of New York*, 4 N. Y. Super. Ct. (2 Sandf.) 261, in reference to a provision of the Constitution that "no private or local law shall embrace more than one subject, and that shall be expressed in the title," said that the provision was aimed at "logrolling," a well-known process by which bills to promote individual interests and mere neighborhood projects often, at the expense of the people of the county at large, were combined together in order to aggregate a sufficient number of votes to carry them all through the Legislature—the learned judge might have added, "and in one bill." *O'Leary v. Cook County*, 28 Ill. (18 Peck) 534, 542.

The vicious and corruptive system familiarly known as "logrolling" is the practice of comprising in one bill subjects of a diverse and antagonistic nature, in order to combine in its support members who were in favor of particular measures, but neither of which measures could command the requisite majority on its own merits; and it was to prevent this practice that Const. art. 4, § 32, provides that no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title. *City of St. Louis v. Tiefel*, 42 Mo. 578, 590.

The term "logrolling" is used to designate the legislative practice "of embracing in one bill several distinct matters, none of which perhaps would singly obtain the assent of the Legislature, and then procuring

its passage by a combination of the minorities in favor of each of the measures into a majority that will adopt them all." *Walker v. Griffith*, 60 Ala. 361, 369.

LOGICAL RELEVANCY.

Stephen defines "logical relevancy," as follows: "Two facts are said to be 'relevant' to each other when so related that according to the common course of events only, either, taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or nonexistence of the other." *Cole v. Boardman*, 4 Atl. 572, 575, 63 N. H. 580 (quoting from *Steph. Dig. Ev. art. 1*).

LOITER.

"To loiter," according to the lexicographers, means to be slow in moving; to delay; to hinder; to be dilatory; to spend time idly; to saunter; to lag behind. Under an ordinance providing that vehicles for hire seeking employment shall not stop or loiter upon any street, etc., it is held that the mere fact that a person drove his vehicle slowly along the streets, and turned and returned upon the same street, does not necessarily constitute "loitering" in the sense of the law. *Stephens v. District of Columbia*, 16 App. D. C. 279, 281.

LONDON.

The word "London" is a nomen collectivum when used in stating the termini and declaring against the carrier, and includes all that is commonly so called, and not the city merely. *Beckford v. Crutwell*, 5 Car. & P. 242.

An agreement wherein it was stipulated that a certain party should not carry on a certain business "in London" or any of the towns in England, etc., meant the city of London, in its strict and proper meaning. *Mallan v. May*, 13 Mees. & W. 510, 517.

LONG.

See "As Long As"; "So Long As."

In construing the provisions of a towing contract providing that "a long line" shall be furnished, the words "a long line" will not be construed to mean the longest line in use, but will be a matter for the jury to determine. *Stevenson v. Michigan Log-Towing Co.*, 61 N. W. 536, 537, 103 Mich. 412.

"Long," within the meaning of the rule that, to constitute title by adverse possession, the possession must be long, continuous, and peaceable, according to the doctrine of

the law of England as cited by Lord Coke in *Bracton*, means during the time required by law. *Ingraham v. Hough*, 46 N. C. 89, 43.

LONG ACCOUNT.

Five items in an account do not constitute a "long account," within Code Civ. Proc. § 271, authorizing a compulsory reference where the examination of a long account is declared. *Dickinson v. Mitchell* (N. Y.) 19 Abb. Prac. 286.

Code Civ. Proc. § 271, declares that no compulsory reference can be ordered unless the examination of a "long account" be declared. Held, that a long account, within such section, does not include a bill of particulars in an action for work, labor, and services. *Dickinson v. Mitchell* (N. Y.) 19 Abb. Prac. 286.

Under a statute authorizing a compulsory reference only in cases involving the examination of a "long account" the word "account" must be taken according to its ordinary acceptation, and therefore does not include an action to recover damages for the destruction of property by rioters, though the trial will require an examination of a large number of items of property injured or destroyed, for which plaintiff seeks to recover damages; since the fact that an action involves a large number of items does not necessarily make it an action of account within the meaning of such act. *Ross v. City of New York* (N. Y.) 2 Abb. Prac. (N. S.) 268.

"Long accounts," as used in Rev. St. § 3064, providing that a reference may be had in all cases requiring the examination of a long account, "is construed to mean a series of charges made at various times as the transactions occurred." *Druze v. Horter*, 16 N. W. 14, 16, 57 Wis. 644.

"Long account," as used in Code Civ. Proc. § 1013, providing that an involuntary reference of issues in an action at law may be made when the trial will require the examination of a "long account," and will not require the decision of difficult questions at law, cannot be construed to apply to an action involving the value of the fee and the amount of the rental loss in land taken by a railroad company. *Doyle v. Metropolitan El. R. Co.*, 20 N. Y. Supp. 865, 868, 1 Misc. Rep. 376.

LONG PRICE.

"Long price," as used in a sale of imported goods by the importer at the "long price," is the price which includes the amount of duties paid, and carries to the purchaser the right to the drawback. *Moore v. Des Arts*, 1 N. Y. 359, 363.

LONG SWINGS.

The term "long swings" is used in the postal service to designate intervals of time of considerable length between the time of the closing of one mail delivery and the commencing of the next subsequent delivery, such interval being the carrier's own time, for which he is entitled to receive no compensation. *King v. United States*, 32 Ct. Cl. 234, 238.

LONG TIME.

In an answer in an action against a railroad company to recover damages for personal injury caused by a defect in the track, an allegation in the answer being that the person injured had full knowledge and had had such knowledge for a "long time," the term "long time" does not denote any specific length of time. It means that the person injured had the knowledge long enough to have afforded him an opportunity to make objections to the company. *Worden v. Humeston & S. Ry. Co.*, 33 N. W. 629, 632, 72 Iowa, 201.

LONG TRANSACTIONS.

"Long transactions," in relation to stocks, mean those where an order is given to a broker to buy, where the broker receives an order to credit the account with certain stocks. *Baldwin v. Flagg*, 36 N. J. Eq. (9 Stew.) 48, 56.

LONG WALL WORK.

The term "long wall work" is used to designate a manner of operating a coal mine in which the coal is all taken out as the work progresses. *Chicago, W. & V. Coal Co. v. Peterson*, 39 Ill. App. 114, 115.

LONG WEIGHT.

A sale of one hundred tons iron "long weight," being a phrase perfectly well known to mean tons of twenty hundred weight of one hundred twenty pounds each, was not illegal and void under Act 5 & 6 Wm. IV, c. 63, for the establishment of weights and measures. *Jones v. Giles*, 10 Exch. 119, 127.

LONGER PERIOD.

The words "longer period," as used in section 3310, Rev. Codes, which declares invalid all leases of agricultural lands which are made for a longer period than ten years, in which rent or service is reserved, should be construed as meaning a definite period, and not as applicable to estates whose duration is wholly indefinite and uncertain in its duration. *Wegner v. Lubenow* (N. D.) 95 N. W. 442, 444.

LONG YEARLINGS.

After cattle enter the second year, and before completing it, they are called "long yearlings." *Sparks v. Deposit Bank* (Ky.) 74 S. W. 185.

LONGER TIME.

"Longer time," as used in a promise to pay a debt if longer time is given, in common parlance is as indefinite as the word "time" without an adjunct, and are equivalent to it in strict meaning, the adjunct being redundant. *Downing v. Funk* (Pa.) 5 Rawle, 69, 73.

LONGEST PERIOD.

The term "longest period," as used in the bankruptcy act, declaring that the petition in bankruptcy shall be addressed to the judge of the district in which the debtor has resided for the longest period during the six months next immediately preceding the time of filing the petition, means the longest period during or within such six months that he has resided or carried on business in any district. Thus, during such six months the debtor may have resided or carried on business in one district for two months, in another for one month and three-quarters, in another for one month and one-quarter, and in another for one month. In such case the proper district in which to file the petition is the one in which the debtor has resided or carried on business for the two months. *In re Foster* (U. S.) 9 Fed. Cas. 521, 522.

LONGS.

The term "longs" is used in the language of boards of trade, stock exchanges, etc., to designate the buyers of commodities for future delivery, who, by reason of the fact that there is a greater quantity of such commodities sold for such future delivery than can be purchased in the markets, are said to have procured a corner on the market, and by insisting on delivery of the commodity run up prices to a fictitious point. *Kent v. Miltenberger*, 13 Mo. App. 503, 506.

LOOK.

In speaking of the meaning of the word "look" in the rule that a person of ordinary care is required to look and listen before attempting to cross a railway track, the court says that it cannot be that "look" simply means that a person with his eyes open shall turn his head in a particular direction, but that the word, as understood in the decisions, must mean that he looked intelligently, and in such manner that what his vision disclosed might influence his action or

conduct. *McAuliffe v. New York Cent. & H. R. R. Co.*, 84 N. Y. Supp. 607, 609, 88 App. Div. 356; *Swart v. New York Cent. & H. R. R. Co.*, 80 N. Y. Supp. 906, 909, 81 App. Div. 402.

LOOK AFTER.

To "look after" means to watch after, and to watch; to tend; to guard; to have in keeping; so that a person who employs another "to look after" a gambling device, to keep the same from being broken, which device was in a saloon where the public came and went, was within a statute making it a penal offense to be directly or indirectly interested in a gambling device. *Jeffries v. State*, 32 S. W. 1080, 1081, 61 Ark. 308.

LOOKING GLASS.

The term "looking-glass," within the meaning of a statute exempting a looking-glass, includes a barber's mirror. *Cherry v. McDaniel*, 53 S. W. 732-733.

LOOKING-GLASS PLATES.

"Looking-glass plates," as used in Act Oct. 1, 1890, par. 116, relating to the duties on looking-glass plates, does not include cast polished plate glass, silvered and beveled, from which looking glasses are made, but such glass comes within paragraphs 116, 118, relating to the duties on cast polished plate glass, silvered and beveled. *Herrman v. United States* (U. S.) 62 Fed. 149, 150.

LOOKOUT.

The word "lookout," as used in reference to a lookout on a vessel, does not mean merely persons on deck, "but some one in a favorable position to see, stationed near enough to the helmsman to communicate with him and to receive communications from him, and exclusively employed in watching the movements of vessels which they are meeting or about to pass." *The Genesee Chief v. Fitzhugh*, 53 U. S. (12 How.) 443, 462, 13 L. Ed. 1058.

Where at the time of a collision between a steamboat and a sloop in the North river the only persons on the forward part of the boat were the pilot, the captain, and a hand in the pilot house (neither the captain nor hand being stationed there to act as a lookout), and a man not connected with the boat or in its employ, there was no lookout within the meaning of the rule which requires a steamboat traversing waters where sailing vessels are often met to have a trustworthy lookout besides a helmsman. *Reed v. The New Haven* (N. Y.) 18 How. Prac. 482, 485, 20 Fed. Cas. 447.

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LOOSE.

The terms "fast" and "loose" are relative terms, and might mean one thing in one place, and quite another thing in another place. *Sandwich Enterprise Co. v. Joliet Mfg. Co.* (U. S.) 91 Fed. 254, 255, 33 C. C. A. 491.

LOOSE PROPERTY.

The term "loose property," in a clause of a will bequeathing all of testator's loose property, includes all of testator's personalty, including money on deposit and choses in action. The term "loose property" corresponds with the term "movables." *Fry v. Shipley*, 29 S. W. 6, 8, 94 Tenn. (10 Pickle) 252.

LOOSE WOMEN.

A "loose woman" is a woman of unchaste character. Exceptions showing that plaintiff in an action for breach of marriage promise was of loose and immodest character means that plaintiff was an unchaste woman, and not merely loose and immodest in conduct; and thus defendant was not bound by the contract. *Foster v. Hanchett*, 35 Atl. 316, 68 Vt. 319, 54 Am. St. Rep. 886.

LOPPINGS.

The fruit of trees, together with the usual trimmings. *Elliot v. Smith*, 2 N. H. 430, 431.

LORD PARAMOUNT.

The King of England is styled the "lord paramount," as under the feudal system all lands are holden mediately or immediately of the King. *De Peyster v. Michael*, 6 N. Y. (2 Seld.) 467, 495, 57 Am. Dec. 470.

The term "lord paramount" was used in the English feudal law to designate the king, and in him, according to the theory of that law, was the absolute right of the property. As a return or compensation for the possession and enjoyment of the land, the owners, or, as they were then called, "vassals," were obliged to render the king certain services, the failure to perform which defeated the estate and caused it to revert to the lord paramount. In re Opinion of the Justices, 33 Atl. 1076, 1080, 66 N. H. 629.

LORD'S DAY.

"Lord's day," as used in a statute providing that, if any civil process shall be issued and served on the "Lord's day," it shall be void and of no effect, comprises the solar

day only, and does not include Saturday and Sunday nights. *Fox v. Able*, 2 Conn. 541, 549.

In a statute prohibiting the keeping of shops open on the Lord's day or evening, it is held that the expression "Lord's day or evening" meant Sunday and the evening immediately following Sunday on that day, and not the evening immediately preceding Sunday. *Commonwealth v. Newton*, 25 Mass. (8 Pick.) 234.

LOSE.

A note promising to pay a certain sum of money six months after the date when such person loses his situation as a teacher at a certain place, provided that he loses such situation at any time after the date of the note and previous to the date of the maker's second marriage, means that the situation is lost involuntarily, and not voluntarily by abandonment or resignation. As found in Webster's Dictionary, the use of the word "lose" implies an inability to retain or to recover, or an involuntary deprivation of the thing which is said to be lost. In the ordinary and common sense of the word no man can be said to have lost a situation which he of his own motion and without any reasonably compelling cause resigns, and the duties of which, of his own free will, he refuses longer to discharge. The situation might be lost from sickness or personal injury, by the failure of the person to reappoint him, or by his discharge to make way for another, or by the insolvency of his employer, or the destruction of the buildings by fire; but he certainly does not lose his situation when he voluntarily resigns and abandons it to take another, which, under the circumstances, he preferred. *Shafer v. Senseman*, 17 Atl. 350, 125 Pa. 310.

Forgetting place of deposit.

"To lose is not to place or put anything carefully or voluntarily in the place you intend, and then forget it. It is to casually and involuntarily part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there, and where money has been concealed it cannot be said to have been lost." *Sovern v. Yoran*, 20 Pac. 100, 102, 16 Or. 269, 8 Am. St. Rep. 293.

"To lose is not to place or put anything carelessly and voluntarily in the place you intend, and then forget it. It is casually and involuntarily to part from possession, and the thing is then usually found in a place or under circumstances to prove to the finder the owner's will was not employed in placing it there. To place a pocketbook, therefore, upon a table, and to omit or forget to take

it away, is not to lose it." *Lawrence v. State*, 20 Tenn. (1 Humph.) 228, 232, 34 Am. Dec. 644.

LOSS.

See "Direct Loss"; "Net Loss"; "Partial Loss"; "Pecuniary Loss"; "Salvage Loss"; "Total Loss"; "Unnecessary Loss"; "Utterly Lost."

All other losses, see "All other."

In the case of injury or destruction of the property insured, or injury by accident, or liability for death, the liability is called a "loss." *State v. Pittsburgh, C., C. & St. L. Ry. Co.*, 67 N. E. 93, 96, 68 Ohio St. 9, 64 L. R. A. 405, 96 Am. St. Rep. 635.

"In its most general sense the word 'loss' means any deprivation. In some instances it may mean that which can never be recovered, and in others that which is simply withheld, or that of which a party is dispossessed." *Queenan v. Palmer*, 7 N. E. 613, 618, 117 Ill. 619.

"Loss," as used in Code, §§ 2064, 2066, relating to the liability of carriers for "loss" of goods, includes injury or damage to the goods. *Central Railroad & Banking Co. v. Hasselkus*, 17 S. E. 838, 839, 91 Ga. 382, 44 Am. St. Rep. 37 (citing *Richmond & D. R. Co. v. White*, 15 S. E. 802, 88 Ga. 805).

The county treasurer having defaulted, action was commenced upon his bond to recover the amount, and pending such action the state applied for mandamus to compel the supervisors of the county to assemble and cause to be raised the amount of taxes due the state included in such default; the application being under the statute which provides "that all losses which may be sustained by the default of the treasurer of any county in the discharge of his duties shall be chargeable upon such county, and the several boards of supervisors shall add such losses to the next year's taxes of such county." The court said: "We are of opinion that the money cannot be said to be lost while the means provided by law for securing its payment are being enforced in the ordinary course of justice, and it cannot properly be said to be lost where a creditor is prosecuting a surety for its recovery. The statute does not authorize the money to be collected a second time from the taxpayers unless a loss has actually resulted from the delinquency of the treasurer." *People v. Livingston County Sup'rs*, 17 N. Y. 486, 487.

"Loss," as used in Code, § 2064, declaring that in all cases of bailments after proof of loss, the burden of proof is on the bailee to show proper diligence, means injury or damage to goods, as well as for the destruction or disappearance. *Hawkins v. Haynes*, 71 Ga.

40, 43; *Richmond & D. R. R. Co. v. White*, 15 S. E. 802, 804, 88 Ga. 805.

"Loss," as used in a policy of credit insurance insuring the holder against loss sustained by reason of the insolvency of debtors owing the insured for merchandise, means not the whole amount due from an insolvent debtor at the time of his suspension, but the amount remaining due after deducting from such indebtedness any payments made by the debtor. *Mercantile Credit Guarantee Co. v. Wood* (U. S.) 68 Fed. 529, 533, 15 C. C. A. 563.

A contract of hiring between a party who owned a plantation and the person who was to act as his manager, in which the manager agreed to "share one-third of all losses which may occur on the said plantation for the present year, etc.," would not include the loss of working animals by death from natural causes. *Gomez v. Levy*, 38 La. Ann. 420, 423.

The preamble of 11 Geo. IV, and 1 Wm. IV, c. 681, recites that "loss" has been sustained by the frequent omissions of the senders of parcels to notify the carriers of the value and nature of the contents so as to enable the carriers to protect themselves against loss, and the enacting portion declares that no carrier shall be liable for "the loss of or injury to" any of the enumerated articles unless notified of their value. Held, that the word "loss" in the enacting clause did not mean the loss of money or profit to the railroad company, as in the preamble, but would include cases where the chattel was either abstracted altogether or taken from the place where it ought to be, and incapable of being delivered at the time it ought to be by reason of that sort of loss. *Hearn v. London Southwest Ry. Co.*, 29 Eng. Law & Eq. 494, 499, 10 Exch. 793, 801.

Whenever the word "loss" occurs in a standard fire insurance policy it shall be deemed the equivalent of "loss or damage." *Rev. St. Wis.* 1898, §§ 1941-1960.

As amount due.

Ordinarily the loss for which a credit insurance company is liable is the amount remaining due upon a debt at the time of rendition of proofs of loss, rather than the amount due at the time of the insolvency of the debtor. Money which a creditor is able to obtain is not lost within the ordinary meaning of the term, whether the payment be made before or after an act of insolvency. Nevertheless, where a credit insurance policy provides that "when only a part of the loss is covered by this contract the proportionate part of everything realized or secured by the indemnified shall be credited to so much of the loss as is covered by this contract," it is evident that the loss there meant is not the final unpaid balance of the debt, since the phrase itself looks to other pay-

ments on such loss, but is rather the amount due at the time of the insolvency of the debtor. *Goodman v. Mercantile Credit Guarantee Co.*, 45 N. Y. Supp. 508, 513, 17 App. Div. 474.

Damage synonymous.

"Loss" is a generic term, of which "damage" is a species. They are synonymous. "Loss signifies the act of losing, or the thing lost. Damage—in French, 'dommage'; Latin 'damnum,' from 'demo,' take away—signifies a thing taken away; a loss which a party is entitled to have restored to him so that he may be made whole again. Loss or damage sustained—the thing taken away—may be supplied by compensation; but the loss, damage, or thing taken away cannot be supplied or restored by the vindictive punishment of him who has occasioned the loss or damage." *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270.

The words "loss" and "damage," as used in a provision in a fire insurance policy that in case of loss the amount of loss or damage shall be ascertained by arbitration, are synonymous, and hence the provision applies, though there is a total loss of the property insured. *Chippewa Lumber Co. v. Phenix Ins. Co.*, 44 N. W. 1055, 1057, 80 Mich. 116.

In a mortgage given by a guardian as indemnity to his surety, providing that, if the guardian failed to comply with the terms of the law in the guardianship and caused loss by the surety, the surety was authorized to take possession of the land mortgaged and sell the same, the word "loss" does not mean an actual loss by the surety incurred by his payment of the debt. The failure of the guardian to pay over to those entitled the balance which he owed on final settlement was a loss to the surety, who was personally bound for the payment of the debt. The word "loss," as used in the mortgage, means nothing more than legal damage, detriment, or forfeiture. *Daniel v. Hunt*, 77 Ala. 567, 570.

Delivery to wrong person.

A bill of lading stipulating that in the event of the loss of any property, etc., the value or cost of the same at the point in time of the shipment is to govern, does not include a delivery of the goods at the point of destination to a wrong person. *Baltimore & O. R. Co. v. McWhinney*, 36 Ind. 436, 441.

As deposits.

"Make good all losses," as used in the charter of a bank requiring its stockholders to make good all losses to depositors or others, is equivalent to the phrase "make good all deposits." It requires the stockholders on the default of the bank to repay deposits to the parties entitled to receive them. *Queenan v. Palmer*, 7 N. E. 613, 618, 117 Ill. 619.

Destruction by fire.

The word "loss," when applied to property, includes the destruction of the property by fire, and hence an allegation that the note has been lost is supported by evidence that it has been destroyed by fire. *McGregory v. McGregor*, 107 Mass. 543, 548.

As diminution of profits.

Where several parties enter into an agreement to prosecute a common enterprise and to share the profits, it being a part of the agreement that there should be reserved monthly, to meet any losses that might occur, 25 per cent. of the profits falling to either party, this clearly shows the intention of the parties that losses were to be shared as well as profits. In addition to this, it is generally an accepted rule that a community of profits implies a community of losses, and this seems to follow naturally from the consideration that losses are in a certain sense nothing more than a diminution of profits. *Priest v. Chouteau*, 12 Mo. App. 252, 256.

Indemnity distinguished.

"Loss," as used in a bond to indemnify plaintiffs against losses by sales in their business, etc., means the loss which the plaintiffs sustained in their dealings with their customers, and not the amount for which the obligor may be liable under the bond; the latter being spoken of as "indemnity." *Rice v. National Credit Ins. Co.*, 41 N. E. 276, 277, 164 Mass. 285.

Injury distinguished.

To say that the phrases "loss of property" and "injury to property" in connection with damages to freight shipped have the same signification is to declare them synonymous, when in fact they are not. One means a total destruction or loss of property; the other means a partial loss or destruction; and in case of injury a value may yet remain in the property equal to or exceeding the stipulated value. *Nelson v. Great Northern Ry. Co.*, 72 Pac. 642, 648, 28 Mont. 297.

Time of destruction related to.

"Loss," as used in Gen. Laws 1895, c. 175, p. 421, providing that no action shall be brought to recover claim on an insurance policy unless commenced within two years from the time the loss occurred, refers to the destruction of the property, and not to the time when the right of action against the insurance company accrued. *Rottler v. German Ins. Co.*, 86 N. W. 888, 889, 84 Minn. 116 (citing *Chandler v. St. Paul Fire & Marine Ins. Co.*, 21 Minn. 85, 18 Am. Rep. 385).

LOSS ARISING FROM PETROLEUM.

A fire policy insuring goods and merchandise while in process of transportation,

which provides that no loss is to be paid in case of collision unless fire ensues, and then only for a loss and damage by fire, and that no loss is to be paid "arising from petroleum," construed to exempt the insurer from liability for loss of a car load of freight caused by the explosion of petroleum in other cars belonging to the insured. *Imperial Fire Ins. Co. v. Fargo*, 95 U. S. 227, 231, 24 L. Ed. 428.

LOSS BY CAUSE BEYOND CONTROL.

A bill of lading providing that the carrier shall not be liable for "loss or damage occasioned by causes beyond his control" does not include a loss occasioned by a jettison of sound cattle from unfounded apprehensions during rough weather. *Compania De Navigacion La Flecha v. Brauer*, 18 Sup. Ct. 12, 168 U. S. 104, 42 L. Ed. 398.

LOSS BY EXPLOSION.

"Loss by explosion," as used in a fire policy exempting the insurer from any loss by explosion of steam boilers, construed to include a loss by fire caused by the explosion of a boiler. *St. John v. American Mut. Fire & Marine Ins. Co.*, 11 N. Y. 516, 518.

A fire policy providing that the company shall not be liable for any loss or damage by fire caused by means of an invasion, insurrection, riot, etc., nor for any loss occasioned by the explosion of gunpowder, etc., is to be construed to mean the loss actually caused by the explosion, and not the loss caused by a fire resulting therefrom. *Commercial Ins. Co. v. Robinson*, 64 Ill. 265, 267, 16 Am. Rep. 557.

"Loss by bursting of boilers," as used in a marine policy exempting the insurer from liability from any loss by the bursting of boilers is construed to include the total loss of a vessel caused by the bursting of a boiler, which inflicted injury causing it to take fire and to be ultimately scuttled to prevent the entire loss of the cargo. *Roe v. Columbus Ins. Co.*, 17 Mo. 301, 303.

LOSS BY FIRE.

The phrase "loss by fire" in a fire policy embraces property destroyed by being blown up under the authority of a city to prevent the spreading of the fire. *Pentz v. Receivers of Aetna Fire Ins. Co. (N. Y.)* 9 Paige, 563, 572.

"Loss by fire," as used in an insurance policy covering loss by fire, includes loss by water thrown upon the property to prevent its destruction by fire. *John Davis & Co. v. Insurance Co. of North America*, 73 N. W. 393, 394, 115 Mich. 382.

A bill of lading exempting the carrier from liability for "loss by fire" does not exempt the carrier from liability for loss by fire occasioned by ordinary negligence of the carrier. *New Orleans Ins. Co. v. New Orleans J. & G. N. R. Co.*, 20 La. Ann. 302, 304.

A bill of lading issued by an express company containing the condition that the company is not to be liable in any manner or to any extent for any "loss or damage or detention of the package or its contents or of any portion thereof occasioned by fire," does not excuse the express company from liability for the loss of such package by fire if the loss was caused by the negligence of a railroad company to which the former had confided a part of the duty it had assumed. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872.

A clause exempting a carrier from liability for "loss of goods by fire" does not apply where the goods were stolen, and the car was then burned to conceal the crime. *Merchants' Dispatch Transp. Co. v. Hoskins*, 41 S. W. 31, 19 Ky. Law Rep. 799.

A policy of insurance insuring against "loss or damage by fire" would include every loss of which combustion is the cause, and hence would cover a loss occasioned by an explosion of gunpowder. It would not cover any losses occasioned by explosions which were not the result of combustion, such as an explosion caused by steam, etc. *Scripture v. Lowell Mut. Fire Ins. Co.*, 64 Mass. (10 Cush.) 356, 363, 57 Am. Dec. 111.

A fire policy covering "all loss or injury by fire" is not to be construed to cover an injury to boilers produced by fire kept therein. "In *Wood, Ins.* § 103, it is laid down that where fire is employed as an agent either for the ordinary purpose of heating the building, or for the purpose of manufacture, or as an instrument of art, the insurer is not liable for the consequences thereof so long as the fire itself is confined within the limits of the agencies employed; as from the effects of smoke or heat evolved thereby or escaping therefrom from any cause, whether intentional or accidental. In order to bring such consequences within the risk, there must be actual ignition outside of the agencies employed, not purposely caused by the assured," and the damage caused as a consequence of such ignition dehors the agencies. *American Towing Co. v. German Fire Ins. Co.*, 21 Atl. 553, 554, 74 Md. 25.

A fire insurance policy indemnifying the insured against "loss by fire" must be construed as meaning the whole loss of which the fire is the actual cause, whether it is the remote or proximate cause of the loss. That which is the actual cause of the loss, whether operating directly or by putting intervening agencies—the operation of which could not be reasonably avoided—in motion, by

which the loss is produced, is the cause to which such loss should be attributed. A fair and reasonable interpretation of a policy of insurance against loss by fire will include within the obligation of the insurer every loss which necessarily follows from the occurrence of the fire to the amount of the actual injury to the subject of the risk, whenever that injury arises directly and immediately from the peril, or necessarily from incidental and surrounding circumstances the operation and influence of which could not be avoided; and hence where the building was destroyed to such extent that its repair was prohibited by city ordinance, the insurer is liable for the entire loss since the fire was the cause thereof. *Brady v. Northwestern Ins. Co.*, 11 Mich. 425, 445.

An exception in a bill of lading exempting a carrier from liability for "loss or damage on any article or property whatever by fire or other casualty while in transit or while in depots or places of transshipment," is applicable to goods forcibly taken from the carrier while in transit and burned by a lawless mob, where such carrier was not guilty of any negligence by which the efficiency of the exception was in any way impaired. *Hall v. Pennsylvania R. Co.* (U. S.) 1 Fed. 226.

LOSS BY FIRE OR WETTING.

A bill of lading which exempts the ship and owner from "loss by fire or wetting" does not exempt from liability to contribute in general average for loss of cargo by water poured thereon to extinguish a fire. *The Roanoke* (U. S.) 53 Fed. 270, 272.

LOSS BY MOB.

See "Mob."

LOSS BY THEFT.

An insurance policy providing that the company should not be liable for any loss or injuries to goods contained in the show window when the loss or damage is caused by the light in the window, nor shall the company be liable for "loss by theft," means theft from the show windows, and not theft committed in the necessary removal of goods to save them from impending conflagration. When goods prudently removed to save them from an impending fire were stolen in consequence of such removal, it is not a loss by theft within the meaning of the policy. Loss by theft about large commercial towns and markets is a consequence as immediate and certain and direct as is the damage to the goods by water and defacement when goods are necessarily removed to prevent destruction by the peril. *Leiber v. Liverpool, L. & G. Ins. Co.*, 69 Ky. (6 Bush) 639, 641, 99 Am. Dec. 695.

LOSS OF EARNINGS.

"Loss of earnings for that time," as an element of damages in an action for personal injuries, is not distinguishable from loss of time. The damages to be awarded in either case is the pecuniary value of the time lost, and either expression sufficiently indicates the measure. In common acceptance they are one and the same thing. *Slaughter v. Metropolitan St. Ry. Co.*, 23 S. W. 760, 762, 116 Mo. 269.

LOSS OF LIMB.

An accident insurance policy insuring against the loss of a limb, does not necessarily mean loss by amputation. The word includes loss of the use of it by paralysis or otherwise resulting from an accident. *Sheanon v. Pacific Mut. Life Ins. Co.*, 46 N. W. 799, 800, 77 Wis. 618, 9 L. R. A. 685, 20 Am. St. Rep. 151.

"Loss of two feet," as used in an accident policy providing that, if assured should suffer the loss of two feet within a certain time after the accident causing the loss, the full amount of the policy should be payable, should be construed to include the loss of the use of the legs caused by paralysis, which was in turn caused by the wounds received, and is not limited only to a loss by amputation. *Sheanon v. Pacific Mut. Life Ins. Co.*, 53 N. W. 878, 882, 83 Wis. 507.

Amputation of the arm a little below the elbow is the "loss of an arm," within the meaning of that phrase as used in an accident policy. *Garcelon v. Commercial Travelers' Eastern Acc. Ass'n*, 67 N. E. 868, 869, 184 Mass. 8.

An insurance policy providing for the payment of a certain sum for the loss of feet or hands will be construed to mean the destruction of the usefulness of the member or of the entire member. *Fuller v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n*, 81 N. W. 326, 328, 122 Mich. 548, 48 L. R. A. 86, 80 Am. St. Rep. 598.

LOSS PAYABLE PRO RATA.

The Resolute Fire Insurance Company made its policy in which it contracted to re-insure the L. Insurance Company on property of G., B. & R. against loss or damage by fire to the amount of \$5,000, the property being the same described in the policy made by the L. Insurance Company to G., B. & R. After the description of the property was written, "Loss, if any, payable pro rata with the reassured." One of the printed conditions of the policy was reinsurance in case of loss to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company. Held,

that the phrase "loss, if any, payable," etc., should be construed as if it were as follows, to wit: "The loss in this policy is payable by the Resolute Insurance Company pro rata with the loss payable by the L. Company under the primitive policy." *Norwood v. Resolute Fire Ins. Co.*, 36 N. Y. Super. Ct. (4 Jones & S.) 552, 554.

LOSS OF SIGHT.

A policy of accident insurance providing that for the "total and permanent loss of the sight of both eyes" the whole of the principal sum named should be paid, should be construed to include the loss of one eye, the insured at the time of the insurance having lost the sight of the other eye. The loss of one eye to him was precisely the same as the loss of both eyes by an ordinary man. It is total blindness in either case. The loss of one eye does not produce a total and permanent loss of sight. For practical purposes, a man with one eye can still follow his occupation and gain his living. It was the loss of sight which was insured against, and this was just as complete in the case of the insured as though both eyes had been lost during the life of the policy. *Humphreys v. National Benefit Ass'n*, 20 Atl. 1047, 1048, 139 Pa. 214, 11 L. R. A. 564.

LOSS OF SOCIETY.

Greater New York Charter, § 1364, subd. 2, giving the municipal court jurisdiction of actions to recover damages for personal injuries or injuries to property, except actions for the "loss of society of a husband or wife," etc., applies only to actions founded upon an intentional injury to the consortium, and not upon an unintentional act, as of negligence which may result in the loss of service or society. I see no good reason why the court should have jurisdiction of actions based upon negligence, and yet be excluded from such an action because loss of services or of society constitutes an element of damage resulting from the negligence. An application of the principle of *nosctur a sociis* to the antecedent words "criminal conversation," "seduction," would also lead to this conclusion. The plaintiff does not complain of a loss of society, but that the accident prevented or will prevent his wife from performing her customary duties as a housewife. *McVeigh v. Gentry*, 76 N. Y. Supp. 535, 536, 72 App. Div. 598.

LOSS OF TIME.

Loss of time, as an element of damages in an action for personal injuries, is not distinguishable from loss of earnings for that time. The damages to be awarded in either case is the pecuniary value of the time lost, and either expression sufficiently indicates

the measure. In common acceptance they are one and the same thing. *Slaughter v. Metropolitan St. Ry. Co.*, 23 S. W. 760, 762, 116 Mo. 269.

LOSS OF VOYAGE.

The term "loss of voyage" in the law of marine insurance does not include the interruption of the voyage. *Wain v. Thompson* (Pa.) 9 Serg. & R. 115, 119, 11 Am. Dec. 675.

LOSSES OF BUSINESS.

"Losses," as used in a Code requiring, in order to constitute a partnership, "a joint interest in the partnership property, or a joint interest in the profits and losses of the business," means something more than the mere failure to realize profits, and means the actual deficits sustained by such partnership. *South Carolina & G. R. Co. v. Augusta Southern R. Co.*, 33 S. E. 36, 38, 107 Ga. 164.

The losses incurred in the prosecution of a business which are to be deducted in ascertaining the net profits of such business necessarily include such accounts as are to be treated as bad and uncollectible. *McCulsky v. Klosterman*, 25 Pac. 366, 367, 20 Or. 108, 10 L. R. A. 785.

LOST.

The word "lost," according to the various definitions of it as found in Webster's Dictionary, implies an inability to retain or to recover, or an involuntary deprivation of the thing which is said to be lost. In the ordinary and common sense of the word no man can be said to have lost a situation which he of his own motion and without any reasonable compelling cause resigns, and the duties of which of his own free will he refuses longer to discharge. A situation as teacher may be lost from sickness or personal injury, by the failure of the principal to reappoint, or by discharge to make way for another, or by the insolvency of the employer, or the destruction of the buildings by fire; but the situation is not lost when the person voluntarily resigns and abandons it to take another, which under the circumstances he refers. *Shafer v. Senseman*, 17 Atl. 350, 125 Pa. 310.

"In one sense a thing is lost when it cannot be found. When your spectacles are on top of your head, and you don't know where they are, in a sense they are lost. In another sense, they are not lost. That is to say, there is a very great difference between a thing being mislaid, which a vigilant search will discover, and a thing being gone where ordinary vigilance will not regain it." *State Sav. Bank v. Buhl*, 88 N. W. 471, 472, 129 Mich. 193, 56 L. R. A. 944.

It is held that the word "lost," as used in an instruction in a prosecution for larceny, that, if the evidence satisfied the jury, that the prosecuting witness lost bank bills, and they were afterwards found in defendant's possession, and there was no evidence proving how defendant came into possession of them, they should find him guilty, may be construed as including a loss by stealing or by any act of another, as well as by the act of the owner himself or by casualty. It is further said that the general term, as so used, should be construed with reference to the charge against the accused, and must be understood with reference to the loss established by the evidence. *Belote v. State*, 36 Miss. 96, 120, 72 Am. Dec. 163.

The term "lost" does not describe a purse accidentally left in a store, and therefore a person who takes it with felonious intent is guilty of larceny. *State v. McCann*, 19 Mo. 249.

"Lost or damaged," as used in a notice by a carrier that it would not be answerable for parcels above the value of five pounds if "lost or damaged," unless an insurance were paid, are not to be construed in their largest sense as comprehending any case where the goods were lost or damaged, but the true construction is that the carrier is not to be protected by the words "lost or damaged" if he divests himself willfully of the charge of the parcel intrusted to his care; but the words ought to be qualified thus: "The carrier himself doing nothing by his own voluntary act or the act of his servants to divest himself of the charge of carrying the goods to the ultimate place of destination." *Garnett v. Willan*, 5 Barn. & Ald. 53, 54.

Money left on a desk in a bank, provided for the use of the customers of the bank, is not "lost property," so as to entitle the finder to the same against the bank; the inference being that such money was voluntarily placed on the desk by the owner, and inadvertently left there by him. *Loucks v. Gallogly*, 23 N. Y. Supp. 126, 1 Misc. Rep. 22.

The authorities, as a general rule, hold that money or other property voluntarily laid down and forgotten is not, in legal contemplation, lost, and that the owner of a shop, bank, or other place where it is left is the proper custodian, rather than the person who happens to discover it, as well, also, as to all other persons except the owner. *Hoagland v. Forest Park Highlands Amusement Co.*, 70 S. W. 878, 880, 170 Mo. 335, 94 Am. St. Rep. 740 (citing *State v. McCann*, 19 Mo. 249; *Kincaid v. Eaton*, 98 Mass. 139; 93 Am. Dec. 142).

Where the owner of a tannery, when removing his hides, omitted to remove all, and the tannery was sold, and many years after the hides were discovered in the vat

by workmen assisting in the erection of a factory on the premises, the hides could not be regarded as having been lost. The fact of their being there being forgotten by the owner did not render them any the less his, and, though forgotten, they were not lost. *Livermore v. White*, 74 Me. 452, 456, 43 Am. Rep. 600.

Deposits.

Rev. St. 1894, § 2031, which makes it embezzlement for a banker to receive a deposit, when insolvent, from any one not indebted to the bank, whereby the deposit so made shall be lost to the depositor, will be construed so that a deposit is lost to the depositor when, by reason of such insolvency, he is deprived of the use of the same, or any part thereof; and hence the suspension of the bank by reason of such insolvency and the withholding of the deposits from the depositors is a loss within the meaning of the statute. *State v. Beach*, 46 N. E. 145, 150, 147 Ind. 74, 36 L. R. A. 179; *State v. Beach* (Ind.) 43 N. E. 949, 954.

Act June 4, 1879, providing that if any banker shall receive any deposit when insolvent, whereby the deposit so made shall be lost to the depositor, the banker so receiving said deposit shall be deemed guilty of embezzlement, should be construed so that the crime is consummated when the banker receives the deposit, and he is unable, by reason of his insolvency, to repay the entire sum deposited; and hence, when an insolvent bank is placed in the hands of a receiver, a deposit received while the bank was insolvent is lost within the meaning of that word as used in the statute, so as to warrant a conviction of the banker for receiving the same, though pending the prosecution therefor the full amount of the depositor's claim is tendered to him. *Meadowcroft v. People*, 45 N. E. 303, 309, 163 Ill. 56, 35 L. R. A. 176, 54 Am. St. Rep. 447.

Ships.

The word "lost," when applied to a ship, is understood to mean "lost at sea." This is the common acceptance of that word in that connection. It would be unusual, if not unheard of, to speak of a ship, under any circumstances, as lost at her wharf. *Portland Flouring Mills Co. v. Weir* (U. S.) 95 Fed. 997, 1000.

It has been held, in construing a bottomry bond, that "lost" means a loss by going to the bottom of the sea. *Delaware Mut. Safety Ins. Co. v. Gossler* (U. S.) 7 Fed. Cas. 404, 406.

A vessel which is lost is one that is totally gone from its owners against their will, so that they know nothing concerning it, either whether still existing or not. Or one which they do know is to them no longer

within their use or control, either by capture by an enemy or pirates, or by a known foundering, or by a sinking by a known storm, or collision, or by a total destruction by shipwreck. *Bennett v. Garlock* (N. Y.) 10 Hun, 328, 338.

"There is a difference in the words 'lost' and 'wrecked' in their marine signification. A vessel lost is one that has totally gone from the owners against their will, so that they know nothing concerning it, either whether still existing or not, or one which they do know is to them no longer within their use and control, either from capture by enemies or pirates, or by unknown foundering, or by a sinking by a known storm, or collision, or by a total destruction by shipwreck. But a vessel is wrecked by being stranded or cast upon the shores, snags, and rocks. The consequence may be a total loss, or a partial loss, or a temporary disability. A loss, then, is consistent with the fact that a vessel, raft, or other property, being still in existence, though its location be unknown to the owner, and therefore as to him is lost, and may be found and become the subject of salvage under our statute, providing that when any boat, vessel, raft, or other property shall be lost or wrecked and in a perishable condition upon any river, any person may take up and secure the same at or near the place where found. So a wreck, to be within the statute, its condition must be such as its owner is ignorant of at the time the person claiming salvage saves it; otherwise it could not be said to be found." A steamboat lying at the levee, having no person on board, which breaks loose from its moorings in broad daylight, and is not secured before it had drifted over sixty feet without injury, is not lost or wrecked within the meaning of the statute. *Collard v. Eddy*, 17 Mo. 354, 355.

LOST ART.

The term "lost art" is applicable peculiarly to certain monuments of antiquity still remaining in the world, the process of whose accomplishment has been lost for centuries, has been irretrievably swept from the earth, with every vestige of the archives or records of the nations with whom those arts existed, and the origin or even the identity of which process none can certainly establish. *Gayler v. Wilder*, 51 U. S. (10 How.) 477, 507, 13 L. Ed. 504.

LOST BOUNDARY.

A lost boundary "is a boundary which has lost its distinctive character as such by removal, displacement, decay, or change, so that it no longer answers the purpose of a bound in defining the true line between the tracts. And it is immaterial whether it be

a natural object or an artificial one. A tree that has been turned over with its roots by a gale, and is lying in the vicinity, but away from the corner or the line, has lost its place and distinctive character as a bound." So, also, if cut down, and the stump has decayed and become invisible. So of a stone which has been displaced, although remaining near the place. So of the mouth of a stream which has been filled by sudden avulsion, and has broken for itself a new mouth at a distance more or less remote from the line. It has lost, by sudden removal from its place, or a series of sudden removals from the line, its character as a bound. *Perry v. P* 21 Conn. 433, 442.

LOST GRANT.

The fiction of a "lost grant" is merely a presumption, from the long possession and exercise of right by user of an easement with the acquiescence of the owner, that there must have been originally a grant to the claimant, which had been lost. It was called a "lost grant" not to indicate the fact of the existence of the grant originally was of importance, but to avoid the rule of pleading requiring proof. *Boyce v. Missouri Pac. R. Co.*, 68 S. W. 920, 922, 168 Mo. 583, 58 L. R. A. 442.

LOST INSTRUMENT.

"Lost instrument," within the meaning of the statute which allows secondary proof of the contents of instruments which have been lost, includes a letter that is beyond the territory of the state. *Zellerbach v. Allenberg*, 33 Pac. 786, 791, 99 Cal. 57.

A deed which has been surrendered to be canceled is not a "lost deed," so as to make parol evidence of its contents admissible. *Thompson v. Thompson*, 9 Ind. 323, 328, 68 Am. Dec. 638.

LOST MOTION.

"Lost motion," as applied to a locomotive, means a jarring or swinging motion, caused by its worn-out condition. *Southern Pac. Co. v. Johnson* (U. S.) 69 Fed. 559, 567, 16 C. C. A. 317.

LOST OR NOT LOST.

The use of the words "lost or not lost" in a marine policy on cargo lost or not lost operates to make the policy cover the loss of the goods occurring either before or after the issuance of the policy. *Arkansas Ins. Co. v. Bostick*, 27 Ark. 539, 544.

The use of the words "lost or not lost" in a marine policy on a vessel lost or not lost operates to render the contract valid, although

the property insured may be lost when the contract is made. It is the stipulation for indemnity against past as well as future losses, and the law upholds it. *Hooper v. Robinson*, 98 U. S. 528, 537, 25 L. Ed. 219.

As used in a policy of insurance on property, "lost or not lost" gives the policy a retroactive effect. But such phrase is not necessary to make the policy retroactive. It is sufficient if it appear by the description of the risk and the subject-matter of the contract that the policy was intended to cover previous loss. *Mercantile Mut. Ins. Co. v. Folsom*, 85 U. S. (18 Wall.) 237, 251, 21 L. Ed. 827.

LOST PROPERTY.

The term includes only property which the owner has involuntarily parted with, and does not include property that he has intentionally concealed in the earth or elsewhere for safe-keeping. *Sovern v. Yoran*, 20 Pac. 100, 102, 16 Or. 269, 8 Am. St. Rep. 293 (citing *Lawrence v. State*, 20 Tenn. (1 Humph.) 228, 229, 34 Am. Dec. 644).

Lost property is property that the owner has casually or involuntarily parted with, and not property where the surroundings evidence that the owner deposited it intentionally in the place where found for safe-keeping. *Sovern v. Yoran*, 20 Pac. 100, 105, 16 Or. 269, 8 Am. St. Rep. 293.

Property is not lost if the owner knows where it is, so that he is able to recover the actual possession thereof when he desires; and therefore the taking thereof is constructively from the possession of the owner, and constitutes theft. *Pritchett v. State*, 34 Tenn. (2 Sneed) 285, 288, 62 Am. Dec. 468.

The term "lost" cannot be applied to characterize the act of the owner of a ring in leaving it by accident in the tub where she has been washing, if she knows where it is, and therefore a person taking the ring is guilty of taking it from the owner's possession. *State v. Cummings*, 33 Conn. 260, 264, 89 Am. Dec. 208.

LOST TIME.

"Lost time," as used in a contract hiring a slave, by which the hirer was to lose the slave's lost time, means lost time no matter by what means, whether by death or by sickness or running away. *Barlow v. Lambert*, 28 Ala. 704, 710, 65 Am. Dec. 374.

LOT.

As chance.

"Lot" is defined to be a contrivance to determine a question by chance, or without the action of man's choice or will. *Lynch*

v. Rosenthal, 42 N. E. 1103, 1105, 144 Ind. 86, 31 L. R. A. 835, 55 Am. St. Rep. 168 (citing *Chavannah v. State*, 49 Ala. 396); *Lol-seau v. State*, 22 South. 138, 139, 114 Ala. 34, 62 Am. St. Rep. 84; *Johnson v. State*, 84 South. 1018, 1019, 137 Ala. 101.

Webster defines "lot" as that which causes, falls, or happens; that which, in human speech, is called chance, fortune, hazard. *Wilkinson v. Gill*, 74 N. Y. 63, 65, 30 Am. Rep. 264; *People v. Noelke*, 1 N. Y. Cr. R. 252, 258.

Lot signifies chance, or that which happens without design or forethought, so that a record of an election of an umpire to serve on a committee of arbitration by lot authorized a conclusion that the umpire was selected in some irregular and unjustifiable manner. In *re Grening*, 26 N. Y. Supp. 117, 119, 74 Hun. 62.

As expressive of quantity.

A lot means a great quantity or number, a great deal, and an indictment charging simple larceny in the stealing of "a lot of cord wood" of a stated value is an insufficient description of the property alleged to have been stolen, and the indictment should be quashed. *Walthour v. State*, 39 S. E. 872, 114 Ga. 75.

"Lot," as the term is used when speaking of a lot of goods, a lot of logs, etc., means the separate portion belonging to one person; and hence a distinct parcel or a separate part. It was so used in the notice of a lien in which the property upon which the lien was claimed was described as follows: "A lot of saw logs marked 'F. & A.' now lying in Edey's Slough;" and this description is held to be equivalent to "A certain raft of logs marked 'F. & A.' now lying in Edey's Slough." *Wheeler v. Port Blakeley Mill Co.*, 3 Pac. 635, 2 Wash. 71.

LOT.

See "Cemetery Lot"; "Church Lots"; "Contiguous Lots"; "House and Lot"; "Public Lots"; "Single Lot"; "Town Lots."

Abutting lot, see "Abutting."

"Town lots, out lots, common field lots and commons were known and recognized parts of the Spanish town or commune of St. Louis. They existed by public authority, whether by concession, custom or permission." *Vasquez v. Ewing*, 42 Mo. 247, 256.

The term "lot" is sometimes used in a restricted sense, being limited at the time, as "wood lot," "house lot," or "store lot"; but where the term is used unqualifiedly, especially if said to be a lot in a certain range or right, it is almost uniformly used in a technical sense, and means a lot in a

township, and duly laid out by the original proprietors. *White v. Gay*, 9 N. E. 126, 131, 31 Am. Dec. 224.

The term "lot" means any contiguous quantity of land in the possession, owned by, or recorded as the property of, the same claimant, person, or company. Rev. Codes N. D. 1899, § 1176.

Act 1830, amending the charter of the city of Charleston, authorizing the city to fill up any "lots or grounds within the city of Charleston belonging to any person or persons," where the same are public nuisances, and to recover the cost from the landowner if it does not exceed one-half the value of the lot, does not refer to only a portion of any lot or ground which is not occupied by buildings, but includes the whole of any lot or grounds with the value of the buildings thereon. *City Council of Charleston v. Werner*, 24 S. E. 207, 208, 46 S. C. 323.

As city lot.

The word "lot," when applied to real estate, is indefinite in its dimensions, but is a portion of land that has been set off or allotted, whether great or small. There is no definite and fixed meaning attached to the word which is applicable to all cases, since what would be deemed a lot of land in the country would not be so considered a lot in a city or town. Its ordinarily accepted meaning, when applied to property within a corporate city or town, is not synonymous with the word "tract" or "parcel," but is used in the sense of a city lot as bounded and described on the recorded plats of the city, or as subdivided and bounded by conveyances of the owners, or by the city authorities in exercising the right of eminent domain in opening and establishing streets. When the word is used in a statute providing that a lien may be had on the lot for grading or otherwise improving the street in front of it, it means a city lot, as contradistinguished from a rural lot. *Pilz v. Killingsworth*, 26 Pac. 305, 306, 20 Or. 432.

The word "lot," as used in the chapter relating to special taxes in cities, shall be taken to mean any subdivided real estate. Rev. St. Utah 1898, § 261.

In Gen. St. 1878, c. 68, § 1, exempting an amount of land not exceeding one lot, if within the laid-out or platted portion of any incorporated town, city, or village having over 5,000 inhabitants, as a homestead of the owners thereof, "lot" is not synonymous with "tract" or "parcel," but means a city lot of the size or description of lots in the addition in which it is situated. *Lundberg v. Sharvey*, 49 N. W. 60, 46 Minn. 350.

"Lot," as used in the homestead law (Gen. St. 1894, § 3521), means a city, town, or

village lot, according to the plat thereof, and has no application to a rural homestead outside the limits of any incorporated city, town, or village. Hence, where an owner divided his farm into lots, the fact that his house was situated on one of the lots did not limit his homestead to such lot. *Phelps v. Northern Trust Co.*, 73 N. W. 842, 844, 70 Minn. 546.

The term "lot," as used in the homestead law, which limits the homestead in a city or town to a quantity of land not exceeding in amount one lot, means a city, town, or village lot, according to the survey and plat of the city, town, or village in which the property is situated, and is not synonymous with the words "tract" or "parcel." *Wilson v. Proctor*, 8 N. W. 830, 832, 28 Minn. 13; *Ford v. Clement*, 71 N. W. 672, 673, 68 Minn. 484.

Lot denotes a single piece or parcel of land lying in a solid body, and separated from contiguous land by such subdivisions as are used to denote different tracts of land, as in the subdivision of a tract of land into city lots. *North & South Lumber Co. v. Hegwer*, 42 Pac. 388, 390, 1 Kan. App. 623.

A statute providing that claims of mechanics and materialmen shall be a lien not only on the building, but on the "lot" or curtilage as well, means a town lot. *Edwards v. Derrickson*, 28 N. J. Law (4 Dutch.) 39, 72; *Coddington v. Drydock Co.*, 31 N. J. Law (2 Vroom) 477, 484.

The word "lots" must be construed with reference to the subject-matter, and when used in reference to city property means such "lots and blocks" as are appropriate to cities, and such as cities usually have for convenience and for arrangement into groups with streets and alleys between, which may be larger or smaller in different cities or in different parts of the same city, subject to the general convenience; and generally the words do not include rural subdivisions for agricultural purposes. *Webster v. City of Little Rock*, 44 Ark. 536, 551.

As distinct or separate portion of land.

"In the general acceptance of the words, a 'lot of land' is the separate portion belonging to one person. According to Webster, 'that portion of ground which is allotted or assigned to any one, and hence any distinct portion of land.'" As used in a statute limiting the powers of commissioners appointed to fix a compensation for land taken by a railroad for condemnation proceedings to a particular quarter-section or other "lot of land," the term is not restricted to a subdivision less than a quarter, but may include a section lying in one body, and owned by one person. *Kansas City, E. & S. R. Co. v. Merrill*, 25 Kan. 421, 423.

The expression "lot of land," as used in the rule of law which requires that in the

assessment of damages to land for injuries thereto by reason of the appropriation of a right of way by a railway company the damages shall be limited to the "lot of land" over and across which the right of way is condemned, is construed in Kansas to include any contiguous compact body of land used as a single farm. *Leavenworth, N. & S. Ry. Co. v. Wilkins*, 26 Pac. 16, 17, 45 Kan. 674.

Rev. St. § 1174, providing for the assessment of land for taxation, declares that the printer who shall publish the list and notice shall receive 30 cents for each "lot or tract of land." Section 1048 declares that, where parcels of land are contiguous, and owned by the same person, they may be assessed together in one tract. Section 1045 provides that when each parcel or tract of land are deemed by the assessor so improved or occupied with buildings as to be practically incapable of separate valuation, they may be assessed as one parcel. Held, that the term "lot or tract of land," as used in section 1174, included as a single "lot or tract" several parcels of land which are assessed together in one tract, they being contiguous, and owned by the same person; or being so improved, as provided by section 1045, that they could not be separately assessed. *Bohan v. Ozaukee Co.*, 60 N. W. 702, 703, 88 Wis. 498.

In a will by which the testator devised "my two lots of ground, lying on the east and west sides of Ledenhall street in Ridgley's Addition to Baltimore town, now city," the word "lot" was construed to mean the entire tract owned by testator, lying on the west side of Ledenhall street, and extending from said street to the next parallel street, and not to be confined to a single building lot as laid down upon the plat of the town and designated by a number. *Warner v. Miltenberger's Lessee*, 21 Md. 264, 270, 273, 83 Am. Dec. 573.

Within the meaning of the act of Congress approved May 23, 1844, for the relief of citizens of towns upon the lands of the United States, authorizing the judges of the county court to enter lands within incorporated towns in trust for the several use and benefit of the occupants thereof, and providing that the execution of the trust as to the disposal of the lots in such town, and the proceeds of the sale thereof, shall be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory in which same is situated, the word "lot" applied to the land actually occupied by the residents of the town site as well as to the unoccupied platted tracts. One of the ordinary meanings of the word given by lexicographers is "that portion of ground which is allotted or assigned to any one, and hence a distinct portion of land." *Diamond Machine Co. v. Vil-*

lage of Ontonagon, 40 N. W. 448, 453, 72 Mich. 249, 261.

A deed conveyed a lot of land containing 60 acres, lying in block 1111, according to the official map of the city. At the time of the conveyance there had been no survey or subdivision of the block. Held, that "the lot" referred to should be construed to mean an undivided 60 acres in the block. *Cullen v. Sprigg*, 23 Pac. 222, 224, 83 Cal. 56.

Divided lot.

A "lot," within the meaning of a statute exempting a lot occupied by a college building, includes all of such lot, though it is divided by a highway into two portions, one only of which is occupied by the college buildings, the other being occupied for the use and recreation of pupils and teachers. *People v. Commissioners of Taxes (N. Y.)* 10 Hun, 246, 247.

As field or land.

See "Land."

A "lot" is a piece of land, usually lying in cities or towns. It may consist of one acre, or more, or less, and, if inclosed and cultivated, is just as much a "field," according to the definition that a field is a cultivated tract of land, as if it lay in the country. "An acre lying in the country, fenced and cultivated, would certainly be called a 'field.' The fact of its lying on one or the other side of a corporate boundary of a town would make no difference." *State v. McMin*, 81 N. C. 585, 587.

Improvements.

The terms "real property," "real estate," "land," or "lot," whenever used in the chapter relating to the assessment and collection of the revenue, shall be held to mean and include not only the land itself, whether laid out in town or city lots or otherwise, with all things pertaining therein, but also all buildings, structures, and improvements and other permanent fixtures, of whatsoever kind, thereon, all shot towers and all machinery therewith connected, all smelting furnaces and all machinery therewith connected, all gristmills, sawmills (except portable mills of every description), oilmills, tobacco, hemp, and cotton factories, tobacco stemmeries, ropewalks, manufactories of iron, nails, glass, clocks, and all other property belonging to manufactories of whatever kind, all wool-carding machines, all distilleries, breweries, all tanneries, all iron, copper, brass, and other foundries, and all rights and privileges belonging or in any wise pertaining thereto, except where the same may be otherwise denominated by the chapter. Rev. St. Mo. 1890, § 9123.

The words "real property," "real estate," "land," "tract," or "lot," when used in the

revenue act, shall be construed to include not only the land itself, whether laid out in town or city lots or otherwise, with all things contained therein, but also all buildings, structures, and improvements, and other permanent fixtures, effects of every kind thereon, and all rights and privileges belonging or in any wise pertaining thereto, except where the same may be otherwise denominated by this act. *Hurd's Rev. St. Ill. 1901*, p. 1494, c. 120, § 292, subd. 12.

As smallest legal subdivision.

The term "single lot," in Rev. St. c. 138, § 7, subd. 4, providing that where a known farm or a single lot has been partially improved, etc., the portion of such farm or lot that may have been left not cleared, etc., shall be deemed to have been occupied for the same length of time as the part improved and cultivated, means the smallest legal subdivision of land. Its extent is certain of itself, without any recourse to any course or custom. *Pepper v. O'Dowd*, 39 Wis. 538, 547; *Wilson v. Henry*, 40 Wis. 594, 609.

The term "lot," in a statute exempting from levy and forced sale a lot of ground, and the building thereon occupied as a residence and owned by the debtor, to the value of \$1,000, only exempts the lot actually so occupied, and the court will take judicial notice of the subdivisions of land; and therefore, if one-fourth of 160 acres of land exceeds the value of \$1,000, the other three-fourths may be levied on and sold. *Gardner v. Eberhart*, 82 Ill. 316, 321.

Where a statute exempting a homestead from execution provided that "the lot of ground" and the buildings thereon occupied as a residence and owned by the debtor should be exempted, the term "lot" should be construed to mean a legal subdivision of land, and hence, where the debtor's dwelling house is situated on a quarter section of land, and the value of the entire tract does not exceed the value limited in the statute, the term included the entire tract. *Aldrich v. Thurston*, 71 Ill. 324, 325.

Narrow strip.

The term "lot" does not properly apply to a very narrow strip of land. *Coutt's Trustees v. Craig (Va.)* 2 Hen. & M. 618, 622.

As platted lots or blocks.

"Lot," as used in a conveyance, may mean the entire premises conveyed, whether such premises consists of a farm, or even a block in a city. But the ordinary meaning of the word, when used in reference to town or city property, is a subdivision of a block, according to the plat or survey of such town or city. As used in a mortgage of property, part of which only was platted into lots, the rest being merely platted in blocks, the mortgage providing that the mortgagor should

be entitled to a partial release of the mortgage on payment of a certain sum for each "lot" released, it only includes the lots which had been platted as such, and does not include those blocks which had not been subdivided into lots. *Ontario Land & Imp. Co. v. Bedford*, 27 Pac. 39, 90 Cal. 181.

The term "lots," as used in 1 Rev. St. 1852, p. 220, § 81, providing that whenever there shall be lots laid off and platted adjoining a city, etc., the common council may extend the boundary of such city so as to include such lots, means any subdivision platted for the purpose of embracing on them urban character, in contradistinction from rural use and character. *Collins v. City of New Albany*, 59 Ind. 396.

The words "lot of land," in a statute providing that in towns, villages, or cities a mechanic's lien shall be upon the building, erection, or improvement, and the "lot of land" on which the same are situated, plainly refer to the lots as bounded and described on the recorded plats of such towns, cities, or villages, or as subdivided and bounded by conveyances of the owners thereof, or other acts done by them for that purpose. The lien given by the statute is against each building or improvement and the lot on which it is situated, and thus, where a number of buildings are built on separate lots, the one lien cannot be filed on all the buildings and lots, although the lots are contiguous and in a compact body of land without division fences. *Fitzgerald v. Thomas*, 61 Mo. 499, 500.

The term "lots," in a statute authorizing the annexation of platted lots adjoining a city, means the subdivisions marked on the plat with an evident view to impress upon them the character of urban as contradistinguished from rural use; and the word is not used in contradistinction to the term "blocks," and therefore adjoining territory may be annexed though not platted into smaller subdivisions than blocks. *City of Evansville v. Page*, 23 Ind. 525, 528; *Lake Erie & W. R. Co. v. City of Alexandria*, 55 N. E. 435, 437, 153 Ind. 521.

The word "lot" means "any portion, piece, or division of land" (Webster's Dict.), and is just as applicable to a piece of land described as "commencing at 4th avenue, west side of 7th street, in Buell's Addition, and running south 480 feet, property not laid out, but corresponding to block 3, range 7, Buell's Addition," where such tract is clearly designated on the map of such addition, as if it had been duly platted and recorded as "lot 1 in block 1," or any other number, or as to any other lot in the city, and such description is a sufficient designation of the property in proceedings to assess the same for street improvements in front thereof. *Buell v. Ball*, 20 Iowa, 282, 290.

The term "lot," employed in a statute exempting homesteads, is used in its proper sense, and denotes a parcel of land within the limits of the state or village as surveyed and platted. *Norfolk State Bank v. Schwenk*, 51 Neb. 146, 70 N. W. 970.

The term "lot," in a constitutional provision providing that the homestead of a family shall not exceed 200 acres of land not included in a town or city, or any town or city lot or lots in value not to exceed \$2,000, "must be taken and construed in the popular sense of those terms, and, when so used, never would be considered as embracing land within the jurisdictional limits of the corporation, but not connected with the plan of the city." *Taylor v. Boulware*, 17 Tex. 74, 79, 67 Am. Dec. 642.

Public street.

According to the common ordinary use of the word "lot," it cannot be held to designate land in an open public street, and hence one who owns the fee of a street where it intersects a paved street is not a "lot" owner, within a corporate charter providing that the expense of paving in front of a lot may be recovered by a suit against the owner. *City of Schenectady v. Trustees of Union College*, 39 N. E. 67, 68, 144 N. Y. 241, 26 L. R. A. 614.

Quantity indicated.

The word "lot" contains no legal or other meaning as to quantity, except it is a distinct portion of land usually smaller than a field. *Kaufman v. Stein*, 37 N. E. 333, 336, 138 Ind. 49, 46 Am. St. Rep. 368.

In Gen. St. p. 3345, providing that all real estate shall be assessed in the township, ward, or taxing district in which the same may be situated, and where the line between two taxing districts divides a farm or "lot" owned or possessed by the person taxed, the same shall be taxed in the taxing district in which the occupant resides, "lot" is indefinite, and cannot be held to denote such a parcel as in a particular locality is commonly considered a lot, and that the local tax maps afford guide in that direction. *Potter v. City of Orange*, 40 Atl. 647, 648, 62 N. J. Law, 192.

In proper meaning, when applied to real estate, a "lot" is a portion of land that has been set off or lotted, whether great or small; but in common use it means simply a piece, parcel, or tract of land, without regard to size. It does not necessarily connect itself with buildings, but may be anywhere on the surface of the earth. It may be a small or a large one; it may be a town lot, a wood lot, or a mill lot. *Edwards v. Derrickson*, 28 N. J. Law (4 Dutch.) 39, 45.

The term "lot" is more generally used to describe a small parcel of land than a large

parcel. *Inhabitants of Phillipsburgh v. Bruch's Ex'r*, 37 N. J. Eq. (10 Stew.) 482, 486.

A power of attorney authorizing the sale of real estate in lots "as surveyed by B." will be construed to limit the right of the attorney to lots, it clearly conveying the idea that the land could only be conveyed in small parcels as designated on the plat; hence a sale by the acre was unauthorized. *Rice v. Tavernier*, 8 Minn. 248, 251 (Gil. 214), 83 Am. Dec. 778.

Where suburban property is platted into lots, and marked in such a way as to impress on it the character of urban property, as distinguished from rural use, the fact that the lots are larger than ordinary city lots will not exclude them from the operation of laws of Indiana authorizing a city to annex suburban property which has been platted into "lots." *Glover v. City of Terre Haute*, 129 Ind. 593, 594, 29 N. E. 412.

Railroad property.

"Lot," as used in *St. N. C. March 28, 1870*, giving a lien to mechanics and laborers for labor performed on any "building, lot, farm, and any kind of property not herein enumerated," does not include railroad property. *Buncombe County Com'rs v. Tommey*, 5 Sup. Ct. 626, 629, 115 U. S. 122, 29 L. Ed. 308.

A railroad right of way in a street cannot come within the term "lot." *Indianapolis & V. R. Co. v. Capitol Pav. & Const. Co.*, 54 N. E. 1076, 1077, 24 Ind. App. 114 (citing *Oshkosh City Ry. Co. v. Winnebago Co.*, 89 Wis. 435, 61 N. W. 1107).

A strip of land used by a railroad company as a right of way is a "lot" within the meaning of the statute governing street improvements. *Figg v. Louisville & N. R. Co.*, 75 S. W. 269, 270, 25 Ky. Law Rep. 350.

Within Laws 1883, c. 183, subc. 10, § 3, giving aldermen the right to charge the cost of certain improvements to any lot fronting on the street, even within the definition of the term "lot" as a strip of land, a right of way of a railroad, with its roadbed and tracks, lying wholly within the street and not outside of it, and of indefinite length, is not a lot which may be assessed for such improvement. *Oshkosh City Ry. Co. v. Winnebago Co.*, 61 N. W. 1107, 1108, 89 Wis. 435.

Tide land.

A division of land under tide water is not a "lot" or "curtilage," within the meaning of those words as used in a mechanic's lien law. *Coddington v. Beebe*, 31 N. J. Law (2 Vroom) 477, 484.

As tract or parcel.

In Sp. Laws 1885, c. 110, § 26, providing for the assessment of water-frontage tax on

each and every "lot," the word "lot" is synonymous with "tract" or "parcel," and an answer in an action to enforce assessment for water tax, which alleges that the land assessed is vacant, unoccupied pasture land, does not show that it was a lot. *State v. Robert P. Lewis Co.*, 75 N. W. 108, 110, 72 Minn. 87, 42 L. R. A. 639.

In an assessment assessing a "lot," counting a certain number of feet on the east side of the street bounded by premises owned by certain persons, the word "lot" will be held to be synonymous with "tract," "piece," or "parcel," and hence the description is not sufficiently definite, and the assessment is absolutely void. *Harvey v. Meyer*, 48 Pac. 1014, 1015, 117 Cal. 60.

In *Mechanic's Lien Law*, Gen. St. 1878, c. 90, § 1, which gives the laborer or materialman a lien upon a house and the lot of ground on which such house is erected, the word "lot" merely denotes one single parcel of land lying in a body, known and treated by usage or otherwise as one tract, and as being the tract, lot, or parcel which the parties naturally understood as that which will appertain to or be connected with a building or buildings after they should be erected. It does not confine the lien to a particular town or city lot as bounded and described on the town or city plat, and separated from adjacent property by real or imaginary lines. *Lax v. Peterson*, 44 N. W. 3, 4, 42 Minn. 214; *North Star Iron Works Co. v. Stronge*, 21 N. W. 740, 741, 33 Minn. 1.

The terms "tract" or "lot," and "piece or parcel of real property," and "piece or parcel of lands," whenever used in the chapter relating to the assessment and collection of taxes, shall be held to mean any contiguous quantity of land in the possession of, owned by, or recorded as the property of the same claimant, person, or company. *Ballinger's Ann. Codes & St. Wash.* 1897, § 1658.

Where a city by its charter is authorized to let, "lease or rent at public sale any lot or lots of land" belonging to such city, the Legislature did not intend to confine the term "lot or lots" to those portions of ground which had been admeasured off and set apart as lots in the plan of the town designated by numbers and boundaries, but in the more popular and ordinary sense, as embracing any piece of ground. *City of Savannah v. Steamboat Co. (Ga.) R. M. Charit.* 342, 351.

In a statute authorizing the sale of "lots" in towns and cities that have been forfeited to the state for nonpayment of taxes, the word "lot" includes any parcel or piece of land lying in a town or city. *Texarkana Water Co. v. State*, 35 S. W. 788, 790, 62 Ark. 183.

Within the meaning of Act Cong. April, 21, 1806, providing that "the Governor and judges of the territory of Michigan are authorized to lay out a town, including the whole of the old town of Detroit and 10,000 acres adjacent, and finally adjust all claims to lots therein, and give deeds for the same," the term "lot" is not limited or confined to such lots only as they should lay out on their plan, but included all lots or tracts of ground as to which there were claims to be adjusted. *People v. Jones*, 6 Mich. 176, 187.

Under Rev. St. § 1174, providing that the printer who shall publish the list and notice of the time when the redemption of land sold for taxes will expire shall receive 30 cents for each lot or tract of land in such list, it is held that the words "lot or tract of land" do not refer to each subdivision which has been made of the land, but that, where several parcels of land are assessed together as contiguous and owned by the same person, or as being so improved or occupied with buildings as to be practically incapable of separate valuation, they constitute one "tract" within the meaning of the statute. *Bohan v. Ozaukee Co.*, 60 N. W. 702, 88 Wis. 498.

Two or more lots.

Under Code Civ. Proc. § 1191, giving to a contractor for grading a "lot" a lien thereon to secure the pay for his work, the lot upon which a lien is authorized is not limited to any artificial subdivision upon the surface of the earth, or to any official designation upon a map, but its meaning includes whatever territory is owned by a person which he may cause to be graded under a single contract; as in this case, where the owner of two blocks contracted for the grading of both, the earth taken from one block being used to fill in the other, both blocks constituted the lot to which the lien attached. *Warren v. Hopkins*, 42 Pac. 986, 988, 110 Cal. 506.

The word "lot," as used in the mechanic's lien law giving a mechanic a lien on a lot, is not synonymous with "city lot" or "platted lot," but it may include more, and may include less, than a lot as platted. Two owners in severalty of contiguous city or platted lots may by their acts connect them so as to constitute one lot. They do so connect them when they treat them as one tract for the purpose of building, as where they join in the construction of a single building on both lots. *Menzel v. Tubbs*, 53 N. W. 653, 654, 51 Minn. 364, 17 L. R. A. 815.

In Act March 11, 1843, giving a mechanic's lien upon the lot of land on which improvements are erected, etc., for the construction thereof, the words "lot of land" do not mean merely the ground covered by the building, nor do they confine the lien to the particular lot as known on the town plat on

which the building stands. Where two adjacent town lots are used without any actual division between them, as one mill lot or the like, a part of the buildings and machinery being upon one and a part upon the other, the lien extends to both lots, although the precise spot where the work was done may be within the limits of one of them. The same rule applies to two or more adjacent lots thrown for any common purpose into one, the ideal lines of division being disregarded. *Choteau v. Thompson*, 2 Ohio St. 114, 123.

LOTO.

"Loto" is a game of chance and a gambling device, and therefore an indictable offense. *Lowry v. State*, 1 Mo. 722; *State v. Foster*, 2 Mo. 210.

LOTTERY.

See "Class Lottery"; "Dutch Lottery"; "Genoese Lottery"; "Numerical Lottery."

The term "lottery" has no technical meaning in the law distinct from its popular signification. A lottery is a scheme for the distribution of prizes by chance. *Dunn v. People*, 40 Ill. 465, 467; *Thomas v. People*, 59 Ill. 160, 163; *Commonwealth v. Mackay*, 58 N. E. 1027, 177 Mass. 345; *State v. Shorts*, 32 N. J. Law (3 Vroom) 398, 401, 80 Am. Dec. 668; *Rolfe v. Delmar*, 80 N. Y. Super. Ct. (7 Rob.) 80, 81; *People v. Noelke*, 94 N. Y. 137, 141, 46 Am. Rep. 128; *State v. Willis*, 2 Atl. 848, 849, 78 Me. 70; *Randle v. State*, 42 Tex. 580, 585; *Quatsoe v. Eggleston*, 71 Pac. 66, 42 Or. 315.

A lottery is a scheme for the distribution of prizes by chance, or the distribution itself when the latter depends on chance. *Commonwealth v. Sullivan*, 15 N. E. 491, 493, 146 Mass. 142; *Commonwealth v. Manderfield* (Pa.) 1 Leg. Gaz. R. 37, 39; *Holoman v. State*, 2 Tex. App. 610, 611, 28 Am. Rep. 439. A lottery which does not involve the determination of any right to property is not illegal. *People v. Payne* (N. Y.) 3 Denio, 88, 90; *People v. Noelke*, 1 N. Y. Cr. R. 252, 258.

The word "lottery," as used in the statute forbidding the same, is used in its ordinary and popular sense. The statute aimed to prohibit the mischief of that species of gambling. *People v. Noelke*, 1 N. Y. Cr. R. 252, 257.

"Lottery" is defined as a hazard in which sums are ventured for a chance of obtaining a greater value. Lotteries are nuisances in the eye of the common law. In re *Smith*, 39 Pac. 707, 708, 54 Kan. 702; *Ford v. State*, 37 Atl. 172, 174, 85 Md. 465, 41 L. R. A. 551, 60 Am. St. Rep. 337.

"Lotteries," within the meaning of Mills' Ann. St. § 2928, prohibiting lotteries, includes an arrangement by which the members of an association each pay a certain sum a week, and at drawings held each week one of the members receives a lot. *Branham v. Stallings*, 40 Pac. 396, 21 Colo. 211, 52 Am. St. Rep. 213.

"A 'lottery' may be defined to be a game by which a person paying money becomes entitled to money or other thing of value on certain contingencies, determinable by lot cast in a particular way by the manager of the game." *Chavannah v. State*, 49 Ala. 396, 397.

Chance is an essential element of a lottery, whether that chance be as to any return, or merely as to the amount or value of the return. *Commonwealth v. Moorhead*, 7 Pa. Co. Ct. R. 513, 516.

A lottery is a scheme for the distribution of property by chance or lot among persons who have paid or agreed to pay a valuable consideration for the privilege of participating in such scheme. *New Orleans v. Collins*, 27 South. 532, 536, 52 La. Ann. 973.

To be a criminal lottery, there must be a consideration, and when small amounts are hazarded to gain large amounts, and the result of the winning is to be determined by the use of a contrivance of chance in which neither choice nor skill can exert any effect, it is gambling by lot, or a prohibited lottery. *Johnson v. State*, 34 South. 1018, 1019, 137 Ala. 101.

In *Stearnes v. State*, 21 Tex. 692, Judge Roberts defines a "lottery," which he terms a "grand raffle," as "a game in which there is a keeper or exhibitor who has the real fund, and against this the bettor stakes his money, which may be evidenced by tickets. On the side of those who hold tickets, it is a perfect game of chance. On the side of the keeper, there are both chance and skill." On the other hand, he defines a "raffle," which is authorized by our Code, as a game of perfect chance in which every participant is equal with every other in the proportion of his risk and prospective gain. The prize is a common fund, or that purchased by a common fund. The successful party takes the whole prize, and the rest lose. *Risein v. State*, 71 S. W. 974, 975, 44 Tex. Cr. R. 413.

There are three essential ingredients in a lottery—consideration, prize, and chance. *Equitable Loan & Security Co. v. Waring*, 44 S. E. 320, 345, 117 Ga. 599, 62 L. R. A. 93, 97 Am. St. Rep. 177.

A lottery is a scheme by which a result is reached by some action or means taken in which result man's choice or will has no part, nor can human reason, sagacity, fore-

sight, or design enable him to know or determine such result until the same has been accomplished. *People v. Elliott*, 74 Mich. 264, 267, 41 N. W. 916, 917, 3 L. R. A. 403, 16 Am. St. Rep. 640. To constitute a lottery, it must be a matter depending entirely on chance. *United States v. Rosenblum* (U. S.) 121 Fed. 180, 182.

Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what the party who pays the money is to have for it, or whether he is to have anything, it is a lottery. *State v. Lovell*, 39 N. J. Law (10 Vroom) 458, 461 (quoting *State v. Clarke*, 33 N. H. 329, 66 Am. Dec. 723; *Hull v. Ruggles*, 56 N. Y. 424); *Swain v. Russell*, 10 Ind. 438, 441; *MacDonald v. United States* (U. S.) 63 Fed. 426, 430, 12 C. C. A. 339; *Cross v. People*, 32 Pac. 821, 822, 18 Colo. 321, 36 Am. St. Rep. 292; *Long v. State*, 22 Atl. 4, 5, 74 Md. 565, 12 L. R. A. 425, 28 Am. St. Rep. 268; *State v. Overton*, 16 Nev. 136, 142; *State v. Mercantile Ass'n*, 25 Pac. 984, 985, 45 Kan. 351, 11 L. R. A. 430, 23 Am. St. Rep. 727; *Wilkinson v. Gill*, 74 N. Y. 63, 65, 30 Am. Rep. 264; *Yellow-Stone Kit v. State*, 7 South. 338, 88 Ala. 196, 7 L. R. A. 599, 16 Am. St. Rep. 38; *Kohn v. Koehler*, 96 N. Y. 362, 368, 48 Am. Rep. 628.

"The term 'lottery' has no technical meaning in the law distinct from its popular signification, and it is defined by various lexicographers as follows: 'A distribution of prizes and blanks by chance; a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or other articles.' Worcester's Dictionary. 'A scheme for the distribution of prizes by chance.' Webster's Dictionary. 'A kind of game of hazard wherein several lots of merchandise are deposited in prizes for the benefit of the fortunate.' Rees' Cyclopædia. 'A sort of gaming contract by which, for a valuable consideration, one may by favor of the lot obtain a prize of a value superior to the amount or value of that which he risks.' Am. Cyclopædia." *State v. Mumford*, 73 Mo. 647, 650, 39 Am. Rep. 532. See also *Governors of the Almshouse v. American Art Union*, 32 How. Prac. 341, 347; *Wilkinson v. Gill*, 74 N. Y. 63, 65, 30 Am. Rep. 264; *Cross v. People*, 32 Pac. 821, 822, 18 Colo. 321, 36 Am. St. Rep. 292; *State v. Overton*, 16 Nev. 136, 142; *State v. Mercantile Ass'n*, 25 Pac. 984, 985, 45 Kan. 351, 11 L. R. A. 430, 23 Am. St. Rep. 727; *United States v. Olney* (U. S.) 27 Fed. Cas. 233, 234; *Horne v. United States*, 13 Sup. Ct. 409, 147 U. S. 449, 37 L. Ed. 237; *United States v. Politzer* (U. S.) 59 Fed. 273, 274; *Yellow-Stone Kit v. State*, 7 South. 338, 88 Ala. 196, 7 L. R. A. 599, 16 Am. St. Rep. 38 *State v. Bonell*, 8 South. 298, 300, 42 La. Ann. 1110, 10 L. R. A. 60, 21 Am. St. Rep. 413; *State v. Lovell*, 39 N. J. Law (10 Vroom) 458, 461;

Ballock v. State, 20 Atl. 184, 185, 73 Md. 1, 8 L. R. A. 671, 25 Am. St. Rep. 559; *Meyer v. State*, 87 S. E. 98, 112 Ga. 20; *State v. Dalton*, 46 Atl. 234, 236, 22 R. I. 77, 48 L. R. A. 775, 84 Am. St. Rep. 818. "In one respect we think all these definitions are too narrow to cover some of the modern devices resorted to in order to evade the lottery laws, and that whether the consideration paid or given for the token or chance to win something, generally called a 'prize,' consists of money or any other thing of value, makes no difference." *Long v. State*, 22 Atl. 4, 5, 74 Md. 565, 12 L. R. A. 425, 28 Am. St. Rep. 268; *Equitable Loan & Security Co. v. Waring*, 44 S. E. 320, 345, 117 Ga. 599.

In the *Century Dictionary*, under the word "lottery," is the following definition: "A scheme for raising money by selling chances to share in a distribution of prizes; more specifically, a scheme for the distribution of prizes by chance among persons purchasing tickets, the correspondingly numbered slips or lots, representing prizes or blanks, being drawn from a wheel on a day previously announced in connection with the scheme of intended prizes." In law, the term "lottery" embraces all schemes for the distribution of prizes by chance, such as policy playing, gift exhibition, prize concert, raffles at fairs, etc., and includes various forms of gambling. Most of the governments of the Continent of Europe have at different periods raised money for public purposes by means of lotteries, and a small sum was raised in America during the Revolution by a lottery authorized by the Continental Congress. Both state and private lotteries have been forbidden by law in Great Britain and in nearly all of the United States, Louisiana and Kentucky being the notable exceptions. In general, lotteries consist of a certain number of tickets drawn at the same time, some of which entitle the holders to prizes, while the rest are blanks. This species of gaming has been resorted to at different periods by most of the European governments as a means of raising money for public purposes. *United States v. Politzer* (U. S.) 59 Fed. 273, 274.

The term "lottery" has often been defined by high authority, and, in speaking of the United States statute authorizing prosecutions for depositing in the post office a document concerning a lottery, Judge Deady says: "It is directed against the use of the mails for the conveyance of any lottery or gift enterprise of any kind. This language is sufficiently comprehensive to include any scheme in the nature of a lottery. It cannot be deemed necessary to enumerate the similar definitions given by lexicographers and courts of the term 'lottery.' It may be sufficient to say that it embraces the elements of procuring, through lot or chance, by the investment of a sum of money or something

of value, some greater amount of money or thing of greater value. When such are the chief facts of any scheme, whatever it may be christened, or however it may be guarded or concealed by cunningly devised conditions or screens, it is, under the law, a lottery." *United States v. Fulkerson* (U. S.) 74 Fed. 619, 627; *United States v. Wallis* (U. S.) 58 Fed. 942, 943.

A lottery is a game of hazard in which small sums are ventured for the chance of obtaining greater. Payment of prizes in money is not necessary to bring the transaction within the meaning of the Constitution or statutes prohibiting lottery. The *American Encyclopedia* defines "lottery" as a gaming contract by which, for a valuable consideration, one may by favor of the lot obtain a prize of a value superior to the amount or value of that which he risks. The writer says: "In its best and most frequent application, the word describes those schemes of this nature which are conducted under the supervision and guaranties of government." Two kinds of lottery may be distinguished. The Genoese or "numerical," and the Dutch or "class" lottery. The former is described as a scheme by which, out of 90 consecutive numbers, five are to be selected or drawn by lot. The players fixed on certain numbers, wagering that one, two, or more of them would be drawn among the five, or that they would appear in a certain order. Of the Dutch or "class" lottery the author says: "In this species the number and value of the prizes are regularly estimated, all the ticket holders are interested at once in the play, and chance determines whether a prize or a blank shall fall to a given number." *Fleming v. Bills*, 3 Or. 286, 289; *Bucklew v. State* 62 Ala. 334, 335, 34 Am. Rep. 22.

"Lotteries," as used in 2 Brev. Dig. 26, 27, providing for the punishment of any persons who set up lotteries under the denomination of the sales of houses, lands, plate, tools, goods, wares, merchandise, and other things by chances, is a term of art, for, if otherwise, it might mean anything, as in common parlance it is applied to one-half of the ordinary occurrences or accidents of life. Being a term of art, and applied to the class to which it belongs, it embraces only one class of adventure or hazards, the grand schemes of which our daily newspapers exhibit. It is not meant that a lottery cannot exist without this formality and publicity, but there may be an adventure or a hazard without a lottery. Every throw of the die, even for an ordinary wager, is an adventure or hazard, but it has never yet entered the mind of any man that it constituted a lottery. A raffle of watches or other articles, of which the owner fixes the value, which is equally apportioned among the adventurers, and the chances are usually

determined by throwing of dice, pieces of coin, or some substitute, is not a lottery. *State v. Pinchback* (S. C.) 2 Mill, Const. 128, 130.

"Lotteries," as used in an act prohibiting and punishing lotteries, must be understood in its general sense of a scheme for the distribution of prizes by chance. We must not confound the decision of certain questions by lot with a lottery. One, or two, or more persons may be obliged to do a certain thing, or go to a given place upon a specified day, and they may legally decide by lot which of them shall do the said thing, or go to the said place. The members of a deliberative body may by lot determine their seats. A division of property under some circumstances may be made by lot, and yet not be a lottery. Sacred history contains several instances where property has been parted and divided by lot: *Psalms* xxii, 18; *Matthew* xxvii, 35; *Acts* i, 26. *Leviticus* xvi, 8. The term as used in the criminal law refers to something in which there are supposed prizes and blanks. On the other hand, the disposal of any species of property, by any of the schemes or games of chance popularly regarded as innocent, comes within the terms of the law. The raffles which occur daily at the street corners, in barrooms, at fairs, and at other places, are as clearly violations of the criminal law as the most elaborate and carefully organized lotteries by which the ignorant and credulous are swindled out of their hard earnings. *Commonwealth v. Manderfield* (Pa.) 8 Phila. 457, 459.

A lottery is a scheme for the distribution of property, by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a "lottery," "raffle," or "gift enterprise," or by some other name. *Pen. Code N. Y. 1903, § 323.*

A lottery is any scheme for the disposal or distribution of property, by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a "lottery," "raffle," or "gift enterprise," or by whatever name the same may be known. *Pen. Code Cal. 1903, § 319; Comp. Laws Nev. 1900, § 4937; Rev. Codes N. D. 1899, § 7217; Pen. Code S. D. 1903, § 379.*

Bond investment scheme.

A bond investment scheme in which only a limited number, who are determined by the order in which their applications are received, are certain to receive a return, and the rest are dependent for any return, and for the time thereof, upon the probability

that the great majority will permit their bonds to lapse, is a scheme in which the prize is dependent on chance, and constitutes a lottery. *United States v. McDonald* (U. S.) 59 Fed. 263, 265.

The term "lottery" does not describe a transaction by which a foreign government, for the purpose of obtaining a loan, issues bonds providing that the government is to pay principal and interest and a premium named, together with one-fifth of any additional sum to which the holder may become entitled in case the number of his bond draws a prize in a specified drawing. *Kohn v. Koehler*, 96 N. Y. 362, 368, 48 Am. Rep. 628.

"Lottery," as used in Code Pub. Gen. Laws, art. 27, § 172, providing that no person shall draw any lottery or sell any lottery tickets in the state, should be construed to include a bond of a foreign government in which the purchaser would in all events receive his principal and interest at the time fixed by chance, and, if a certain wheel of fortune containing prize numbers should turn in his favor, a large premium in addition thereto. *Ballock v. State*, 20 Atl. 184, 185, 73 Md. 1, 8 L. R. A. 671, 25 Am. St. Rep. 559.

"Lottery," in Rev. St. § 3894, as amended by Act Sept. 19, 1890, c. 908, providing a punishment for any person depositing in the post office, to be carried through the mails, any letter, postal card, or circular concerning any "lottery," so called, gift concert, or other similar enterprises offering prizes dependent upon lot or chance, should be construed to include a transaction by a foreign government which offered to every holder of a bond, if it was redeemed during the first year, considerably more than its face value, and during the second year a larger increase, and so on, with an increase of a certain amount each year, and offering to the holder, as part of the bond, a chance of drawing a prize, varying in amount from a small to a large sum of money, every holder of a bond having an equal chance with the holder of every other bond of drawing one of such prizes. This species of gaming has been resorted to at different periods by most of the European governments as a means of raising money for public purposes. *Horne v. United States*, 13 Sup. Ct. 409, 147 U. S. 449, 37 L. Ed. 237.

Disposal of property by chance.

The term "lottery," in a statute declaring lotteries to be common nuisances, etc., includes a scheme for the disposal of land by chance. *Seidenbender v. Charles' Adm'rs* (Pa.) 4 Serg. & R. 151, 159, 8 Am. Dec. 682.

Where a scheme provides for a sale of a tract of land in lots of unequal value, to be distributed among the purchasers by

chance, by means of tickets of members bought at a fixed price, greatly exceeding the value of the majority of the lots, and much less than the value of other lots, such scheme constitutes a lottery, as it would be a mere device to attract adventurers, holding out the hope of great gain by mere chance. *Elder v. Chapman*, 52 N. E. 10, 12, 176 Ill. 142.

The term "lottery," in the constitutional provision prohibiting lotteries, was construed to include a scheme by which a tract of land was subdivided into lots, and the lots divided into three classes, and sold by parties paying \$25 down for a share in the scheme, with a condition that they should pay an additional sum, differing in amount with the class to which the lot drawn should belong, one inducement for the sale of the lots in such manner being that there was a house on one of the lots in the first class. *Guenther v. Dewien*, 11 Iowa, 183, 134.

A scheme by which town lots were sold in parcels at a uniform price, each purchaser to receive at least one lot, of an estimated value of \$50, some of the parcels being of the value of \$5,000, and after all were sold the parcel to be received by each purchaser to be determined by lot, was clearly a lottery. *United States v. Olney* (U. S.) 27 Fed. Cas. 233, 234.

The term "lottery," in the Maryland act of 1792, c. 58, § 1, making it unlawful to propose any scheme of a lottery to be drawn within the state, includes a lottery for the sale of lands or lots. *Hawkins v. Cox* (U. S.) 11 Fed. Cas. 878.

Within the meaning of a New York statute forbidding "lotteries," that term includes a scheme whereby a tract of land is divided into lots of unequal value, which are sold to a number of purchasers at a uniform price, and are distributed among those purchasers by drawing or lot, and a deed given to each purchaser for the lot drawn by him. *Wooden v. Shotwell*, 23 N. J. Law (3 Zab.) 465.

"Lottery" is defined to be any scheme whereby one, on paying money or other valuable thing to another, becomes entitled to recover from him such a return in value, or nothing, as some formula of chance may determine; and pursuant to this definition it is held that where, by contract, parties bought lots of different values, each paying \$100, and the lot each purchaser was to receive was determined by drawing from a box a card with the description of the lot on it, the transaction was a lottery. *Paulk v. Jasper Land Co.*, 22 South. 495, 496, 116 Ala. 178.

The word "lottery" has not acquired a technical or legal significance different from that of approved usage. A distribution of prizes by lot or chance may constitute a lottery. To constitute a "lottery" within the

meaning of the statute prohibiting lotteries, something of value must be parted with, directly or indirectly, by him who has the chance. There must be some plan or scheme, on the part of the promoter of the enterprise alleged to be unlawful as a lottery, for the sale or disposition of property by lot or chance, before it can be said to have the character of a lottery. Certain lots contracted for by the promoter of a packing-house plant were subscribed for under an agreement to take the number set opposite the name of each subscriber if the packing house were secured. The lots were to be apportioned in such manner as the subscribers might decide. At a meeting called by the promoter to divide the lots by a method to be decided upon by a vote of the subscribers, the plan of one of the promoters was adopted, the others taking no part, and having announced that they left the method and apportionment to the subscribers. The subscribers' names were thrown into one box, and the number of lots to correspond were thrown into another by two of the subscribers agreed upon. None of the lots were worth more than the price paid. Held, that the method was not a "lottery" within the meaning of the statutory provision (Code 1873, § 4043) prohibiting lotteries. "We have discovered no authority," says the court, "denying the subscribers the right to apportion the lots by chance. Joshua so apportioned the promised land among the several tribes of the children of Israel, and the disciples of Christ chose Matthias to succeed Judas by casting lots." *Chancy Park Land Co. v. Hart*, 73 N. W. 1059, 104 Iowa, 592.

Under a statute prohibiting lotteries, but not defining the term, it must be construed in a popular sense, and means a scheme for the distribution of property by chance among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a "lottery," "raffle," or "gift enterprise," or by some other name. Where clubs of 40 persons each were formed by a merchant tailor for the disposition of suits of clothing, each at a stipulated value, at \$40 by lot, under nominal contracts of purchase, the price to be paid in weekly installments of \$1 each, such payments entitling the holders of tickets to participate in weekly drawings by lot, with the chance of securing goods of the value of \$40 at any drawing, without further additional payments than the weekly installments then paid, it was held that the transaction was a lottery. *State v. Moren*, 48 Minn. 555, 51 N. W. 618, 619.

Game of skill.

By Pen. Code, § 323, a "lottery" is defined to be a scheme for the distribution of property, by chance, among persons who have paid or agreed to pay a valuable con-

consideration for the chance, whether called a "lottery," "raffle," "gift enterprise," or by some other name. And a fish-pond game seeming to involve no element of chance, and calling wholly for the exercise of skill, is probably not subject to inhibition against lotteries. In most instances the chances are that the anglers are found to be unskillful, but that does not make the result of the angling depend upon chance. *People v. Fuerst*, 34 N. Y. Supp. 1115, 1117, 13 Misc. Rep. 304.

Gift enterprise.

Where a merchant gave to a designated class of customers an opportunity to secure by lot or chance any article of value additional to that for which such customers paid, he violated the provisions of Pen. Code, § 407, which declares that no person "shall keep, maintain, employ or carry on any lottery in the state or other scheme or devise for the hazarding of any money or valuable thing." *Meyer v. State*, 37 S. E. 96, 112 Ga. 20, 51 L. R. A. 496, 81 Am. St. Rep. 17.

The term "lottery" includes the sale of prize candy packages, some of which contain tickets with the name of a piece of silverware thereon, to which the lucky purchaser is entitled. *Hull v. Ruggles*, 56 N. Y. 424, 427.

Lottery is a game of hazard, in which small sums are ventured for the chance of obtaining greater. The term includes what is called a "gift enterprise," by which a merchant or tradesman sells his wares for their market value, but by way of inducement gives to each purchaser a ticket which entitles him to prizes, to be determined after the manner of a lottery. *Bell v. State*, 37 Tenn. (5 Sneed) 507, 509.

Within the meaning of Battle's Rev. St. c. 32, § 69, forbidding lotteries, a "lottery" is a scheme, device, or game of hazard whereby, for a small sum of money or thing of value, the person dealing therein, by chance or hazard or contingency, may or may not get money or other thing of greater or less value, or, in some cases, of no value at all, from the owners or managers of such "lottery." The word includes the sale to customers of small boxes of candy, of trifling value, for the chance or opportunity of designating one of certain pictures conveniently arranged in defendant's place of business, behind some of which were small sums of money, and behind others a card on which was the letter "c," the purchaser getting either the money or the card accordingly as he may select, but if he got a card he became entitled to another box of candy. *State v. Lumsden*, 89 N. C. 572.

1 Rev. St. p. 664, provides that a "lottery" shall be an unlawful scheme, etc. A ticket issued by the managers of a concert stated

that the borrower was entitled "to admission to a grand concert, and to whatever gift might be awarded to its number," to which was added the number of the ticket. Held, that the enterprise was a "lottery" within the meaning of the statute. *Negley v. Devlin* (N. Y.) 12 Abb. Prac. (N. S.) 210, 212.

A firm operating a dry-goods store placed in its window a locked box containing \$25 in bills, and advertised that all persons buying goods in their store and paying 50 cents or more would be given a key, and only one key would be given out which would unlock the box; that the person receiving the key which would unlock the box would be given the \$25 in it. The firm sold goods at the usual and ordinary prices, without extra charge on account of the key, and gave to each purchaser a key, to which was attached a card stating the offer in substance. Held, that such transactions were in fact sales of merchandise and lottery tickets for an aggregate price, so that the arrangement constituted a lottery. *Davenport v. City of Ottawa*, 54 Kan. 711, 89 Pac. 708, 45 Am. St. Rep. 303.

Horse race.

A horse race, the winner of which is to receive a stake, is not a lottery. There is no foundation for such claim either in common speech or in legal definition. A lottery depends on lots or chance, such as the casting of lots, throwing of dice, or the turning of a wheel. *In re Dwyer*, 85 N. Y. Supp. 884, 14 Misc. Rep. 204.

A racing association permitted owners of horses of a certain age to compete for a prize of a certain amount to be furnished by the association, each person who entered a horse for the race being required to pay a sum known as "entrance money," which became the property of the association. The prize to be paid to the winner was contributed by the association without reference to the entrance money. It was held that such transaction was not a "lottery" within the prohibition of Pen. Code, § 323. A "lottery" is defined by the Penal Code to be a scheme for the distribution of property, by lot or chance, among persons who have agreed to pay a valuable consideration for the chance. The essential quality of a lottery is that the distribution of the property shall depend strictly upon chance, and that, so far as possible, if the lottery is honestly conducted, no other element whatever shall enter into it. There certainly is a wide distinction between the wager of money upon the result of any game and the possession of shares in a lottery. To a certain extent it may be said that what is called "chance" enters into the result of any game, and that nothing which is the result of contest or competition is decided without some other element entering into it than the mere skill of persons who

take part in the contest. Everybody recognizes that in a baseball game or in a running or walking match the result depends not only upon the skill and strength of the competitors, but upon numerous incidents which may or may not occur, and whose occurrence depends upon something which nobody can predict, and, so far as human knowledge is concerned, has no reason for existing. It is a chance pure and simple, and yet the result in those games cannot in any true sense be said to be a lottery. The distinction we apprehend to be that in a lottery no other element is intended to enter into the distribution than pure chance, while in the result of other contests which are forbidden under the act against betting and gaming other elements enter in, and the element of chance, although necessarily taken into consideration, may be and is eliminated to a very considerable extent by the skill, careful preparation, and foresight of the competitors. *People v. Fallon*, 39 N. Y. Supp. 865, 866, 4 App. Div. 82. See *Id.*, 46 N. E. 296, 152 N. Y. 12, 37 L. R. A. 227, 57 Am. St. Rep. 492.

Keno.

"A lottery," says Webster, "is a distribution of prizes by chance." "Keno" is not a lottery, though the winner is determined by chance, for in a lottery the prizes have an existence before tickets are sold, but in "keno" each player puts up a certain amount to make an aggregate sum, which is the amount played for. *Portis v. State*, 27 Ark. 360, 363.

Place for sale of tickets.

The term "lottery" cannot be applied to a place for the sale of lottery tickets. *People v. Jackson* (N. Y.) 8 Denio, 101, 102, 45 Am. Dec. 449.

Policy playing

See "Policy Playing—Policy."

Pool selling.

See, also, "Pool Selling."

Pool selling does not constitute a lottery, or a policy or bucket shop, within the meaning of a municipal ordinance prohibiting the keeping of such establishments. *People v. Reilly*, 50 Mich. 384, 15 N. W. 520, 45 Am. Rep. 47.

Selling pools on horse races is not a lottery, within Const. art. 1, § 10, prohibiting lotteries or the sale of lottery tickets; and therefore Laws 1887, c. 479, authorizing such pool selling on races conducted on the track of any incorporated association, is constitutional. *Reilly v. Gray*, 28 N. Y. Supp. 811, 814, 77 Hun, 402.

A pool on a race horse is a lottery, within the interdiction of Const. § 1071, provid-

ing, "nor shall any lottery ever be authorized, or any sale of lottery tickets allowed, within this state." *Irving v. Britton*, 28 N. Y. Supp. 529, 530, 8 Misc. Rep. 201.

Preference in distribution.

To constitute a lottery, there must be a prize offered, and the payment of something for the chance to obtain it. The prize may be anything of value. A preference or privilege in the distribution of a common fund among those entitled thereto may be a prize. A scheme whereby a common fund is to be produced by the contributions of various parties, and afterwards distributed among those contributing thereto, and a valuable preference in the distribution is made to depend upon chance, is a lottery. *State v. Nebraska Home Co.* (Neb.) 92 N. W. 763, 764, 60 L. R. A. 448.

Prize for suggestions.

A lottery is a scheme for the distribution of prizes by lot or chance. The proposal made by the owners of several suburban lots to pay a large sum of money to the person who would suggest the best name for a village to be built upon the lots, the choice of names to be determined by a committee, is not a lottery. *Holt v. Wood*, 14 Pa. Co. Ct. R. 499, 501.

Property owned by participants.

Sections 30, 31, Rev. St., entitled "Of Raffle and Lotteries," have reference only to the distribution of money or valuable things, to be determined by law or chance, which shall be dependent upon the drawing of a lottery over which the parties to the distribution have no control, and the distribution among the members of an art union of its works of art by a lot conducted by themselves is not embraced within it. *People v. American Art Union*, 7 N. Y. 240, 241.

Public or private.

Const. art. 4, § 24, declares that "no lottery shall be authorized by this state." Held, that the language means that no lottery, either public or private, shall be authorized by the state, and does not mean merely that no lottery shall be authorized for the purpose of raising revenue. *State v. Overton*, 16 Nev. 136, 150.

Redeemable coupons.

The term "lottery" does not include the selling of tickets with coffee, which absolutely entitles the holders in every case to certain articles. *People v. Gillson*, 17 N. E. 343, 347, 109 N. Y. 389, 4 Am. St. Rep. 465.

Slot machine.

A lottery is a game of hazard or chance, in which small sums are ventured for the chance of obtaining a larger sum of money.

Where a nickel-in-the-slot machine was so constructed that if the nickel, in falling into the machine, touched certain springs, a valve would be opened, and the machine would pay a certain amount of money in excess of the deposit, the nickel remaining in the machine, and the proportion of times when one playing the machine would win was less than the times when he would lose, such machine constituted a lottery. *Prendergast v. State*, 57 S. W. 850, 851, 41 Tex. Cr. R. 358.

The crime of conducting a lottery is similar to that of gaming, and in fact a lottery is a species of gaming. The use of a slot machine, where the element of chance determines whether the prizes are to be given, brings the operation thereof under the definition of lottery, whether the prizes given are stock in trade of licensed establishments or not. Therefore an ordinance of the city of New Orleans, making it unlawful for any person to engage in the operation of a slot machine, is legal. *City of New Orleans v. Collins*, 27 South. 532, 536, 52 La. Ann. 973.

Trading stamp business.

Pub. Laws, c. 652, making it a misdemeanor to sell or give a stamp or coupon, in connection with the sale of property, which shall entitle the purchaser to receive from some person other than the seller any article of merchandise other than that actually sold, and for such other person to deliver the extra article of merchandise on presentation of the stamp, does not prohibit a lottery. *State v. Dalton*, 46 Atl. 234, 236, 22 R. I. 77, 48 L. R. A. 775, 84 Am. St. Rep. 818.

Wheel of fortune.

A device whereby one having paid for the privilege of whirling an arrow was entitled to the prize opposite the number on which it stopped, was a "lottery," pure and simple. *Reeves v. State*, 17 South. 104, 105 Ala. 120.

LOTTERY GIFT.

The phrase "lottery gifts" does not embrace anything which is free from chance or hazard. Hence Act June 3, 1885, entitled "An act for the suppression of lottery gifts by storekeepers and others to secure patronage," reciting in the preamble that the laws against gambling and lotteries are evaded by the giving of tickets entitling the holders to money or articles of value as an inducement to purchase, and providing that merchants and others giving and selling such tickets shall be deemed guilty of a misdemeanor, is void, under the constitutional requirement that the subject of every act must be clearly expressed in its title. *Commonwealth v. Moorhead*, 7 Pa. Co. Ct. R. 513, 516.

LOTTERY TICKET.

As letter, see "Letter."

A lottery ticket is any device whatsoever by which money or any other thing is to be paid or delivered on the happening of an event or contingency in the nature of a lottery. *Smith v. State*, 11 Atl. 758, 759, 68 Md. 168.

A ticket which purports to entitle the holder to whatever prize may be won by its corresponding number in a scheme called a prize concert, in which the prizes consist of gifts in greenbacks and in other kinds of property, and one-half of the tickets represent blanks in the awarding, is a lottery ticket. *Commonwealth v. Thacher*, 97 Mass. 583, 584, 93 Am. Dec. 125.

A guaranty, or a written assurance or promise, whereby the guarantor binds himself that he will pay the prize which may be drawn to a certain number in a lottery, is a lottery ticket, within the meaning of the law prohibiting the sale of lottery tickets when made by the proprietor of the lottery or a duly authorized agent of the proprietor. There is no set form of a lottery ticket. It is a written promise that the proprietors will be responsible for the prize, and, whether they use the usual form or not, their responsibility is the same. If a man opens an office, from which he vends assurances or guaranties, as a substitute for lottery tickets, and for the purpose of evading and defeating the law, although he does not strictly and literally sell lottery tickets, yet he does sell those papers which are substantially lottery tickets, if it can be proved or inferred from the evidence in the cause he holds the tickets themselves for the benefit of the purchaser. *Commonwealth v. Chubb* (Va.) 5 Rand. 715, 720.

A "ticket," within the meaning of Act Dec. 19, 1842, to establish lotteries and to prohibit the sale of lottery tickets, includes a ticket entitling the holder to one-fourth the prize drawn by its members, although such a ticket is usually called a quarter of a ticket. *Freleigh v. State*, 8 Mo. 606, 612.

The term "tickets," when speaking of the sale of lottery tickets, is equivalent to "chances." *Saloman v. State*, 27 Ala. 26-30.

The sale of a lottery ticket is in violation of Const. art. 4, § 28, forbidding any person to sell any lottery ticket, though the ticket had drawn the prize before the sale. *Kitchen v. Greenabaum*, 61 Mo. 110, 111.

LOVE.

"Love between the sexes has different constituents from those found in mere friendship. It is very variable in its constitution. It may be refined, having elevated

aims, or it may be gross, in which the baser desires predominate. So that evidence that a person acted toward another as a lover is inadmissible." *Carney v. State*, 79 Ala. 14, 19.

LOVELY CLAIM.

A "lovely claim" is a donation made by the general government of two quarter sections of the public lands, according to the legal subdivisions of the public surveys, to a particular class of people embraced by the act of Congress of May 24, 1828, who have complied with the conditions therein imposed, and also with the stipulations of the treaty ratified between the United States and the Cherokee nation of Indians on the 28th of May, 1828. *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338.

LOW.

"Low" is a relative term. A thing is said to be low when compared to other structures. A structure is said to be low according to the uses to which it is to be put. As used with relation to a bridge over a railroad track, the bridge is high or low according to the height of cars to pass under it. *Louisville & N. R. Co. v. Tucker's Adm'r* (Ky.) 65 S. W. 453, 454.

"Low" is defined in the *Century Dictionary* as "not high in character or condition; not haughty or proud; meek; lowly; lacking in dignity, refinement, or principle; vulgar, groveling, abject, mean, base; in a mean condition, as a low-born fellow;" and such is its meaning in a bill to restrain the importation of armed men alleged to be of a low and lawless type. *Arkansas v. Kansas & T. Coal Co.* (U. S.) 96 Fed. 353, 362.

LOW DILIGENCE.

"Low or slight diligence" is that which persons of less than common prudence, or, indeed, of any prudence at all, take of their own concerns. *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 167, 180.

LOW WATER.

See "Ordinary Low Water."

LOW-WATER MARK.

The "low-water mark" of a fresh-water river is the point to which the river recedes at its lowest stage. *Paine Lumber Co. v. United States* (U. S.) 55 Fed. 854, 864.

In a case involving the construction of the statute fixing the boundary line between New York and Kings counties at low-water

mark on the Long Island shore, it was said that "low-water mark" means the low-water mark as the water flows after the land is reclaimed from the bay or river by the erection of wharves and piers, and the filling from the shore for that purpose; but it was held that the Atlantic Basin, which was originally below the low-water mark on the Long Island shore, which was originally and had always continued below low-water mark, was in New York county, although practically inclosed by piers, wharves, etc. *Orr v. City of Brooklyn*, 36 N. Y. 661, 664.

As margin of sea at low tide.

"Low-water mark," as used in reference to tide waters, is the margin of the sea when the tide is out. *Storer v. Freeman*, 6 Mass. 435, 439, 4 Am. Dec. 155.

"Low-water mark is the line or the margin of the water at ordinary low tides, and not the lowest possible state of the water at some particular time, from natural causes." *Gerrish v. Proprietors of Union Wharf*, 26 Me. 384, 395, 46 Am. Dec. 568.

Colony Ordinance 1641-47 provided that the title of the owners of land adjoining tidal waters should extend to low-water mark. Held, that the phrase "low-water mark" meant the lowest line made by the receding tide with the land, not the lowest line with a stream of fresh water emptying into the sea, or a cove or tidal river mixed with the land. It has nothing to do with a fresh-water stream or with a tidal channel, through which only fresh waters flow at low tide. *Tappan v. Boston Water-Power Co.*, 31 N. E. 703, 705, 157 Mass. 24, 16 L. R. A. 353.

As ordinary low-water mark.

"Low-water mark" does not mean the lowest stages of water in seasons of great drought, but the height of the water in ordinary stages of low water. *Kentucky Lumber Co. v. King* (Ky.) 65 S. W. 156, 157.

"Low-water mark," as a terminus of boundary, means ordinary low-water mark, and not the lowest point to which the water has ever receded. *McBurney v. Young*, 32 Atl. 492, 493, 67 Vt. 574, 29 L. R. A. 539.

"Low-water mark," as used in deeds calling for the line of the land at low-water mark on a river, means the ordinary low-water mark unaffected by drouth. Low water, as distinguished from high water, does not mean the lowest water the stream may exhibit under special and extraordinary circumstances. Ordinary high water and ordinary low water each has its reasonably well defined mark, so nearly certain that there is not much difficulty in ascertaining it. The ordinary rise and fall of the stream usually finds nearly the same limits, but to

bound title by a mark which is set by an extraordinary flood or an extreme drouth would do injustice, and contravene the common understanding of the people. *Stover v. Jack*, 60 Pa. (10 P. F. Smith) 339, 342, 100 Am. Dec. 568.

By "low-water mark," as used where the level of a lake, or other body of water, is not constant, but is fluctuating, ordinary low-water mark is intended, or the line or level at which the waters of the lake usually stand when free from disturbing causes. *Slauson v. Goodrich Transp. Co.*, 69 N. W. 990, 991, 94 Wis. 642 (citing *Diedrich v. Northwestern Union Ry. Co.*, 42 Wis. 248, 24 Am. Rep. 399; *Seaman v. Smith*, 24 Ill. [14 Peck] 521).

LOW WINE.

Low wine is the product of the first process of distillation of spirituous liquors by the application of heat to a still containing the material, and differs from spirits, in that the latter passes through a second distillation. *United States v. Tenbroek*, 15 U. S. (2 Wheat.) 248, 258, 4 L. Ed. 231.

LOWEST.

"Lowest," in the meaning of a statute requiring that the contracts for public improvements shall be awarded to the "lowest responsible bidder," is that the contract, when awarded, shall be awarded to the lowest responsible bidder, but does not require the authorities to accept a bid when but one bid is made. In such case, there being no other bid with which to make comparison, such bid is not the lowest, but might as well be termed the highest. *People v. Kings County Sup'rs* (N. Y.) 42 Hun, 456, 458.

LOWEST AVERAGED PRICE.

Where a contract binds a gas company to furnish to a city such quantity of gas as may be required by the city council for public lamps at two-thirds of the lowest averaged price at which gas shall or may be furnished to private individuals in five certain specified cities, the words "lowest averaged price" means such cash price in each of the five cities named, averaged by adding together such lowest cash prices, and dividing the amount by five, the words "lowest averaged price" entitling the city to the benefit of such discounts as are or may be allowed to individuals by the company in each city furnished gas at the lowest price. *City of Cincinnati v. Cincinnati Gaslight & Coke Co.*, 41 N. E. 239, 242, 53 Ohio St. 278.

LOWEST BIDDER.

A statute requiring municipal contracts to be given to the lowest bidder is not to be

"construed literally, and accepted as an absolute restriction. In such case undoubtedly the bid should be bona fide, and should conform strictly to the prescribed specifications: but in determining whether a bid is the lowest among several others the quality and utility of the thing offered—in other words, its adaptability to the purpose for which it is required—must be first considered. The offer in nominal amount may be exceedingly low, while the thing offered may be exceedingly worthless." *Cleveland Fire Alarm Co. v. Metropolitan Fire Com'rs* (N. Y.) 7 Abb. Prac. (N. S.) 49, 55; *Id.*, 55 Barb. 288, 292.

Under the laws requiring that contracts for street improvements in New York City must be let to the lowest bidder, on estimates made by the surveyor, where the surveyor had made an estimate founded upon a surface examination of the locality and bids are invited upon that basis, he who is the lowest bidder upon those estimates is the lowest bidder under the law, and does not lose his rights because the estimates prove to be erroneous when the work is actually done. *Reilly v. City of New York*, 111 N. Y. 473, 474, 18 N. E. 623, 624.

It ought hardly to be supposed that a law requiring municipal authorities to let a contract to the "lowest bidder" means absolutely that the contract shall be given to the lowest bidder without regard to his fitness, responsibility, or capacity to perform the work, and generally such laws read to the lowest or best bidder, or the lowest responsible bidder. *Clapton v. Taylor*, 49 Mo. App. 117, 124.

The words "lowest bidder" in Baltimore City Charter, § 1415, requiring certain public contracts to be awarded to the lowest responsible bidder, necessarily implies a common standard by which to measure the respective bids, and therefore requires that specifications for the work and the materials be furnished as a basis upon which such bids may be made, and therefore it is improper to allow the bidders to furnish their own specifications. *Packard v. Hayes*, 51 Atl. 32, 36, 94 Md. 233.

LOWEST RESPONSIBLE BIDDER.

See, also, "Responsible Bidder."

Act 1874, requiring all public work and materials which are capable of being contracted for to be awarded to the "lowest responsible bidder," means the bidder lowest in amount and pecuniarily responsible. The word "responsible," as defined by Webster, means liable to accounting, accountable, answerable, able to discharge an obligation, or having an estate adequate to the payment of a debt. As used in the statute, it refers to the pecuniary ability of the bidder to answer to the undertaking, so that the interest of the

city should suffer no damage. Lowest in price and responsibility, in the sense of being accountable, able to discharge the obligation, so as to save the city from pecuniary loss, is what is intended by the act of 1874. *Gutta Percha Co. v. Stokely (Pa.)* 11 Phila. 219-221.

In the requirement that public work should be let to the lowest responsible bidder, the term "lowest responsible bidder" means one who complies with all the requirements of the statute, specifications, etc., not merely one whose bid is less than his competitors'. *Boseker v. Wabash County Com'rs*, 88 Ind. 267.

St. 1881, p. 59, § 5, providing that the board of commissioners having charge of the erection of an insane asylum may adopt or reject any or all bids for the erection of such asylum not being responsible or satisfactory, but in determining bids for the same work or material the "lowest responsible bid" shall be taken, means not only the bid by the one whose pecuniary ability to perform the contract is best, but the one in point of skill, ability, and integrity who is most likely to do faithful, conscientious work, and fulfill the contract promptly, according to its letter and spirit. *Hoole v. Kinkead*, 16 Nev. 217, 220.

Act May 23, 1874, directing municipal officers to award certain contracts to the lowest responsible bidder, applies not to pecuniary ability only, but also to judgment and skill. The duties imposed on the city authorities are not merely ministerial, limited to ascertaining whose bid was the lowest and the pecuniary responsibility of the bidder and his sureties, but it calls for the exercise of duties which are deliberative and discretionary. *Interstate Vitrified Brick & Paving Co. v. City of Philadelphia*, 30 Atl. 383, 164 Pa. 477; *Douglass v. Commonwealth*, 108 Pa. 559, 563, 42 Leg. Int. 387.

"Responsible," as used in Act 23d May, 1874, Pamph. L. 230, declaring that all work to be done for the city shall be performed under contract, to be given to the lowest responsible bidder, means not only pecuniary ability to make a good contract by security for its faithful performance, but means the one who, under all the circumstances, will probably best perform the work. *Commonwealth v. Mitchell*, 82 Pa. 343, 349.

"Responsible," as used in a corporate charter providing that contracts for public improvements shall be let to the lowest responsible bidder, is not limited to financial, but means ability to perform all the conditions of the contract; and the commissioner of public works may reject a bid notwithstanding it is the lowest made, and the bidder is able to give the required bond, if in the judgment of that official, after due investigation, the materials customarily used, and

the workmanship exhibited by the bidder in the performance of the kind of work required, are poor and unsatisfactory. *People v. Kent*, 48 N. E. 760, 761, 160 Ill. 655.

Laws 1875, c. 634, declaring that all contracts for certain work should be awarded to the lowest bona fide "responsible bidder," meant that the successful bidder should be one "able to respond or to answer in accordance with what is expected or demanded." *People v. Dorsheimer (N. Y.)* 55 How. Prac. 118, 120.

LOYAL VOTERS.

The words "loyal voters," as ordinarily used, is quite different in meaning from that of the phrase legal voters or qualified voters; and therefore an averment that plaintiff was elected by the loyal voters of the county is not equivalent to an allegation that he was elected by the legal or qualified voters. *Lee-man v. Hinton*, 62 Ky. (1 Duv.) 37, 41.

LTD.

As used in connection with the signature of a limited partnership, signed by only one manager of such partnership, "Ltd." does not create a general liability; Act June 2, 1874, providing for limited partnerships, requiring that the word "Limited" shall be the last word in the name of every such partnership. *Bernard & Leas Mfg. Co. v. Packard & Calvin (U. S.)* 64 Fed. 309, 310, 12 C. C. A. 123.

LUCID INTERVAL

"Lucid interval" does not mean a perfect restoration to reason, but a restoration so far as to be able beyond doubt to comprehend and do an act with such reason, memory, and judgment as to make it legal. *Frazer v. Frazer*, 2 Del. Ch. 260, 263.

The term "lucid interval" means not an apparent tranquillity or seeming repose, not a simple diminution or remission of the disease, but a temporary cure—an intermission so clearly marked that it perfectly resembles a return of health—and must be continued for a length of time sufficient to give certainty to the temporary restoration of reason. *Godden v. Burke's Ex'rs*, 35 La. Ann. 160, 173.

"A 'lucid interval,' as the term is used in speaking of lucid intervals of insane persons, is not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficiently to enable the party soundly to judge of the act. The evidence in support of a lucid interval, after derangement has been established, should be as strong and demonstrative of such fact as when the object of the proof is to

show insanity; and it ought to go to the state and habit of the person, and not to the accidental interview of any individual, or to the degree of self-possession in any particular act." *Ricketts v. Jolliff*, 62 Miss. 440-448.

The term "lucid interval," used in reference to insanity, means more than a mere remission of the manifestations of insanity. It must be such a full return of the mind to sanity as places the party in possession of the powers of his mind, enabling him to understand and transact his affairs as usual. *Ekin's Heirs v. McCracken* (Pa.) 11 Phila. 534, 539.

LUCKY.

"Lucky," as used in an agreement for the purchase of a horse, by which the purchaser agreed to pay £63, and, if the horse was lucky, would give seller £5 more, was too vague and uncertain a term to be considered in a court of law, and the only certain part of the agreement was that for £63. *Guthing v. Lynn*, 2 Barn. & Adol. 232.

Where a person has four bids from contractors on a house that he intended to construct, and, on the opening of the bids, such person stated to one of the bidders, "You are the lucky man," such phrase was merely a recognition that he was the lowest bidder, and was not equivalent to the award of the contract to him. *Laskie v. Haseltine*, 25 Atl. 886, 155 Pa. 98.

LUCRATIVE BAILMENT.

In an action against a corporation for the value of a picture lost by it while engaged in carrying on a public fair, it appeared that the article was shipped by plaintiff upon invitation of defendant, issued in pursuance of its general purpose to augment its receipts, and lost after the close of the exhibition by reason of the failure of defendant's agent to return the picture to plaintiff. Held, that the transaction was a lucrative bailment, and defendant was liable for the loss. *Prince v. Alabama State Fair*, 17 South. 449, 450, 106 Ala. 340.

LUCRATIVE OFFICE.

The office of colonel of volunteers is lucrative, and so is that of reporter of the Supreme Court; and a colonel of volunteers cannot hold both without violating Const. art. 2, § 9, providing that no person shall hold more than one lucrative office at the same time. *Kerr v. Jones*, 19 Ind. 351, 353.

Const. art. 2, § 9, declares that no person holding a lucrative office or appointment under the United States or under this state shall be eligible to a seat in the General As-

sembly, nor shall any person hold more than one lucrative office at the same time, except as in the constitution expressly provided, etc. Held, that the term "lucrative," as defined by Webster, means "yielding lucre; gainful; profitable; making increase of money or goods; as a lucrative trade, lucrative business or office"—and that the test was whether the office yielded a pay supposed to be an adequate compensation for the services or duties performed. The lucrativeness of an office, which is its net profits, does not depend on the amount of compensation affixed to it, but expenses incident to an office with a high salary may render it less lucrative in this latter sense than other offices having a much lower rate of compensation, but the office is nevertheless a lucrative one. *State v. Kirk*, 44 Ind. 401, 405, 15 Am. Rep. 239.

The office of county recorder and that of a county commissioner are lucrative offices. Pay, supposed to be an adequate compensation, is affixed to the performance of their duties. The lucrativeness of an office—its net profits—does not depend upon the amount of compensation affixed to it. The expenses incident to an office with a high salary may render it less lucrative, in this latter sense, than other offices having a much lower rate of compensation. *Dailey v. State* (Ind.) 8 Blackf. 329, 330.

"Lucrative office," as used in Const. art. 2, § 9, providing that no person shall hold more than one lucrative office at the same time, except as expressly provided, means an office, the incumbent of which is charged with duties under the laws of the state, for which he is entitled to compensation. If an office is purely municipal, the officer not being charged with any duty under the laws of the state, it is not a "lucrative office," within the meaning of the Constitution. The office of school trustee is a lucrative one, for the trustee is charged with the performance of duties imposed by state laws, for the performance of which compensation is provided. *Chambers v. State*, 26 N. E. 893, 127 Ind. 365, 11 L. R. A. 613.

"Lucrative office," within Const. art. 4, § 21, prohibiting the holder of a lucrative office from holding any other office of profit under the state, means an office attached to which is a pecuniary salary. Thus an office to which is annexed a salary of \$1,000 per annum is a lucrative office, within the section. *Crawford v. Dunbar*, 52 Cal. 36, 39.

The term "lucrative office," in Const. art. 4, § 20, providing that no person holding any lucrative office under the United States shall be eligible to any civil office of profit under this state, etc., refers solely to office under the United States. *People v. Leonard*, 14 Pac. 853, 855, 73 Cal. 230.

The term "lucrative office," in Rev. St. 5095, which prohibits a person holding a lu-

crative office from being interested, directly or indirectly, in any contract with the state, county, etc., in which he exercises any official jurisdiction, applies to the office of coroner. *Baker v. Crook County Com'rs*, 59 Pac. 797, 9 Wyo. 51.

The term "lucrative office," in Const. arts. 6, 16, prohibiting persons who hold lucrative offices under authority of the United States from being candidates for any elective office, includes officers of the United States on the retired list, as they constitute a part of the army of the United States, retain the actual rank held by them at the date of their retirement, receive 75 per cent. of the pay of such rank, are subject to trials by court-martial, and may be assigned to duty at the Soldiers' Home. *State v. De Gress*, 53 Tex. 387, 400.

LUCRATIVE TITLE.

Under the Spanish and Mexican law, property acquired by the husband and wife during the marriage, and whilst living together, whether by onerous or lucrative title, and that acquired by either of them by onerous title, belonged to the community, whilst property acquired by either of them, by lucrative title solely, constituted the separate property of the party making the acquisition. Lucrative title was created by donation, devise, or descent. *Scott v. Ward*, 13 Cal. 458, 471.

LUCRI CAUSA.

"Lucri causa," or with a view to pecuniary profit, is a term used in the law of larceny to characterize the nature of a taking sufficient to bring the act within the definition of the crime of larceny. *State v. Ryan*, 12 Nev. 401, 403, 28 Am. Rep. 802.

Eyre, C. D., says: "Larceny is the wrongful taking of the goods with the intent to spoil the owner of them—lucri causa." But Blackstone says the taking must be felonious; that is, done *animo furandi*, or, as the civil law expresses it, *lucri causa*. The point arrived at by these two expressions, "*animo furandi*" and "*lucri causa*," the meaning of which has been much discussed, seems to be this: that the goods must be taken into possession of the thief with the intention of depriving the owner of his property in them. (Roscoe, Cr. Ev. p. 621.) *State v. Slingerland*, 7 Pac. 280, 282, 19 Nev. 135.

LUGGAGE.

See, also, "Baggage"; "Personal Luggage."

"Luggage" or "baggage," as applied to a traveler, implies something which he bags

up or lugs along with him for his daily comfort and convenience on his journey. *McCaffrey v. Canadian Pac. Ry. Co.*, 24 Am. Law Reg. 175, 178.

Luggage may consist of any articles intended for the use of a passenger while traveling, or for his personal equipment. *Rev. St. Okl. 1903, § 709*; *Choctaw, O. & G. R. Co. v. Zwirtz* (Okl.) 73 Pac. 941, 942. Bicycles are declared to be, and are deemed, luggage. *Rev. Codes N. D. 1899, § 4233*. We take it that the term "luggage" is synonymous with "baggage"; the latter being in common use in this country, while the former seems to be almost exclusively used in England. Merchandise or other articles intended for business purposes are not included in the term "baggage." It is impossible to draw any very well defined line as to what is and what is not necessary or ordinary baggage for a traveler. That which one traveler would consider indispensable would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be deemed to be in the mind of the carrier when he receives a passenger for conveyance. *Choctaw, O. & G. R. Co. v. Zwirtz* (Okl.) 73 Pac. 941, 942.

"Luggage," as used in a contract whereby a shipowner contracted to carry "10 cubic feet of luggage," meant whatever the passenger might bring with him, of any character, proper to be transported, and was not limited to baggage. *Duffy v. Thompson*, 4 E. D. Smith, 178, 180.

Merchandise.

The luggage of a passenger, which a carrier is bound to convey, comprises clothing and such articles as a traveler usually carries with him for his personal convenience. Perhaps even a small present, or a book for the journey, might be included in the term; but certainly not merchandise, or materials bought for the purpose of being manufactured and sold at a profit. *Great Northern Ry. Co. v. Shepherd*, 8 Exch. 30, 37 (citing *Angell, Carriers, § 115*; *Story, Bailments, 526*).

LUMBER.

"Lumber" is a word of doubtful or indefinite signification, and includes any timber sawed or split for use. It would include hemlock or hardwood lumber as well as pine. *Williams v. Stevens Point Lumber Co.*, 40 N. W. 154, 155, 72 Wis. 487.

A contract providing that one of the parties should deliver the lumber in good order along the trackway on which lumber is delivered means the manufactured product of the logs. *Dutch v. Anderson*, 75 Ind. 35, 40.

The word "lumber" is used in the article relating to floating lumber to designate

all timber, whether in logs, boards, planks, or beams, or whether in rafts or otherwise, but does not include the sort of wood commonly called "driftwood." Pol. Code Cal. 1903, § 2389.

The term "lumber," as used in the chapter relating to liens upon logs and other timber, shall be held and be construed to mean all logs or other timber sawed or split for use, including beams, joists, planks, boards, shingles, laths, staves, hoops, and every article of whatsoever nature or description manufactured from saw logs or other timber. Ballinger's Ann. Codes & St. Wash. 1897, § 5931.

The word "lumber," as used in a contract for the sale of lumber, where there is no opportunity for examination by the vendee, means merchantable lumber. Merriam v. Fields, 39 Wis. 578, 582.

Building material.

Lumber is timber sawed or split for use in building, and is material essential for building any kind of a house ordinarily used for business or by families. It is included within the term "building material." Ward v. Kadel, 38 Ark. 174, 180.

"Lumber," as used in an assignment of a mortgage, which mortgage covered lumber and building material in a certain lot, will be held to include lumber which is sawed in proper widths and lengths for certain work, though such lumber is sometimes called "building material." Lawrence v. Comstock, 82 N. W. 808, 809, 124 Mich. 120.

Fence posts.

Under Laws 1893, p. 428, § 2, relating to liens for performing work or labor in manufacturing logs into lumber, and defining the term "lumber" as meaning all logs or other timber sawed or split for use, including beams, joists, planks, boards, shingles, laths, staves, hoops, and every article of whatsoever nature or description manufactured from saw logs or other timber, "lumber" will be held to include fence posts. Ryan v. Gullfoil, 43 Pac. 351, 352, 13 Wash. 373.

Lath.

The term "lumber," as used in Acts 1862, c. 154, providing for a lien on logs and timber for labor and services performed thereon, means the body, stem, or trunk of a tree, or the larger pieces or sticks of wood which enter the framework of a building or other structure, but does not include laths. Babka v. Eldred, 2 N. W. 102, 103, 47 Wis. 189.

Pulp wood and shingle bolts.

Poplar lumber for pulp is poplar cut into logs of four feet in length, for the principal purpose of being manufactured into pulp. It must be peeled before it can be thus

manufactured, in order to fit it for manufacture. Therefore peeling is an incident necessary to it as pulp lumber. And in a statute giving a lien on the lumber for the cutting thereof, the amount due under a contract for cutting and peeling such lumber may be secured by such lien. Bondur v. Le Bourne, 79 Me. 21, 7 Atl. 814.

Under a statute giving a lien to all persons performing work in manufacturing saw logs or other timber into lumber and shingles, and defining lumber to be "all logs or other timber sawed or split for use, and every article of whatsoever make or description manufactured from saw logs or other timber," shingle bolts prepared to be cut into shingles are lumber, and one preparing such bolts is entitled to a lien thereon. Hadlock v. Shumway, 11 Wash. 690, 40 Pac. 348.

Shingles.

In Rev. St. § 3341, which gives a lien on lumber to any person performing manual labor thereon, for or on account of the owner, agent, or assignee, "lumber" includes shingles. Gross v. Eldel, 11 N. W. 9, 10, 53 Wis. 543.

"Lumber," as used in a fire insurance policy on lumber, laths, and pickets, must be understood in its more restricted sense of sawed boards or logs, though, if it had been used alone, it would have included other items, as it would have been understood then in its broadest acceptation. It is not consistent with the enumeration contained in the policy that the term "lumber" should include shingles. West Branch Lumberman's Exch. v. American Cent. Ins. Co., 38 Atl. 1081, 1083, 183 Pa. 366.

LUMBER DEALER.

A lumber dealer is one who habitually deals in lumber, and the mere fact that a merchant in a country town may sometimes, as occasion requires, take lumber or shingles, or anything else, in exchange for goods kept by him for sale, does not make him a lumber dealer, within Laws 1899, c. 11, § 58, imposing a license tax on lumber dealers. State v. Barnes, 35 S. E. 605, 606, 126 N. C. 1063.

LUMBER WAGON.

"Lumber wagon" is a term generally applied to an ordinary double wagon used by farmers, and is sufficiently definite as a description in a chattel mortgage. Jordan v. Hamilton County Bank, 9 N. W. 654, 655, 11 Neb. 499; Rawlins v. Kennard, 41 N. W. 1004, 1005, 28 Neb. 181.

LUMP COAL

Coal is passed through several screens, and prepared by so doing in several sizes

Lump coal is coal not so prepared. *Wright v. Warrior Run Coal Co.*, 33 Atl. 491, 493, 182 Pa. 514.

LUMP WORK.

Lump work is the same as job work. *Dixon v. Cory*, 3 N. J. Law (2 Penning.) 1043, 1044.

LUMPERS.

Lumpers are men who erect a staging around the exterior hull of a vessel placed in a dry dock for the purpose of repairs, grave the vessel, and put on the felting, if necessary, and run the metal. *Butler v. Townsend*, 126 N. Y. 105, 107, 26 N. E. 1017.

LUMPING SALE.

The term "lumping sale," as applied to sales under execution, means a sale in mass, or where several distinct parcels of real estate or several articles of personal property are sold together for a single gross sum. *Anniston Pipeworks v. Williams*, 18 South. 111, 113, 106 Ala. 324, 54 Am. St. Rep. 51.

LUNACY.

See "Commission of Lunacy"; "Inquest of Lunacy."

"Lunacy" is that condition or habit in which the mind is directed by the will, but is wholly or partially misguided or erroneously governed by it, or it is the impairment of any one or more of the faculties of the mind, accompanied with or inducing a defect in the comparing faculties. For, as has been observed by a great philosopher, those who either perceive but dully, or retain the ideas that come into their minds but ill, who cannot readily excite or compound them, will have little matter to think on. Those who cannot distinguish, compare, and abstract, would hardly be able to understand and make use of language; or judge or reason to any tolerable degree; but only a little and imperfectly about things present and very familiar to their senses. *Owing's Case (Md.)* 1 Bland, 370, 386, 17 Am. Dec. 311.

The term "lunacy" includes both mania and dementia. In *re Vanauken*, 10 N. J. Eq. (2 Stockt.) 186, 193.

The term "lunacy" includes every kind of unsoundness of mind except idiocy. *Laws N. Y.* 1892, c. 677, § 7; In *re Clark*, 67 N. E. 212, 175 N. Y. 139; In *re Schrodtt*, 67 N. Y. Supp. 244, 246, 82 Misc. Rep. 540.

"Lunacy is a total deprivation or suspension of the ordinary powers of the mind. A mere failure of memory and decay and fee-

bleness of intellectual faculties are not evidence of that unsoundness of mind which will justify a jury in finding a man a lunatic." In *re Vanauken*, 10 N. J. Eq. (2 Stockt.) 186, 195.

Mania synonymous.

"Lunacy" is synonymous with "mania," whether total or partial, permanent or occasional. *Thompson v. Thompson (N. Y.)* 21 Barb. 107, 128.

Insanity synonymous.

The word "lunacy" was originally used to designate periodical insanity, but it is not confined to that meaning now, and is generally regarded as having the same extent of meaning as the word "insanity." While, then, an idiot or lunatic may be of unsound mind, a person may be of unsound mind, and not be an idiot or lunatic. *Smith v. Hickenbottom*, 11 N. W. 664, 667, 57 Iowa, 733.

As periodical insanity.

"Lunacy" is periodical madness. *Witte v. Gilbert*, 7 N. W. 288, 10 Neb. 539.

"Lunacy," in its strictest sense, implies unsoundness of mind; and, except where the inquisition of lunacy finds lucid intervals, the presumption of law is that there are none. Lunacy does not always have its sober intervals. It is not always easily discovered. It is sometimes latent. It frequently is accompanied by cunning, which enables the lunatic for a considerable space of time to make even his friends believe that he enjoys a lucid interval, when in fact he is insane. So, too, when persons are so insane upon some subjects as to be incompetent to transact business understandingly, they may upon other subjects be entirely rational. *Lewis v. Jones (N. Y.)* 50 Barb. 645, 667.

LUNATIC.

Sir William Blackstone, in the second volume of his Commentaries, p. 304, says a lunatic or non compos mentis is one who had understanding, but, by disease, grief, or other accident, has lost the use of his reason. A lunatic, indeed, is properly one that hath lucid intervals, sometimes enjoying his senses, and sometimes not, and that frequently depending on the change of the moon. But under the general name of "non compos mentis," which Sir Edward Coke says is the most legal name, are comprised not only lunatics, but persons under frenzies, or who lose their intellects by disease; those that grow deaf, dumb, and blind, not being born so, or such, in short, as are judged by the court of chancery incapable of conducting their own affairs. Mr. Fonblanque, in his treatise on Equity, vol. 1, p. 63, note "p," has transcribed the above passage, and observes that he was induced to

do so in order to obviate the error into which the learned commentator seems to have fallen in the concluding sentence. He then proceeds by saying that, the rules of judging upon the point of insanity being the same at law and in equity, the courts of chancery cannot assume any kind of discretion upon the subject. Littleton (section 405) speaks of a man of nonsane memory as one who is non compos mentis, upon which Lord Coke, in his commentary (Co. Litt. 246b, 247a), says, "Here Littleton explaineth a man of no sound memory to be non compos mentis. Many times, as here it appeareth, the Latin word explaineth the true sense, and calleth him not 'amens,' 'demens,' 'furiosus,' 'lunaticus,' 'fatuus,' 'stultus,' or the like, for a non compos mentis is the most sure and legal." Now, it is obvious that Lord Coke considered "non compos mentis" not only the legal, but the sure term, and not "amens," "demens," etc. He also divides non compos mentis into four sorts: (1) An idiot, who from his nativity by a perpetual infirmity is non compos mentis; (2) he that by sickness, grief, or other accident, wholly loseth his memory and understanding; (3) a lunatic who has sometimes his understanding, and sometimes not, and therefore is called non compos mentis as long as he hath not understanding; lastly, he that by his own vicious act for a time depriveth himself of his memory and understanding, as he that is a drunkard. And in *Beverly's Case*, 4 Coke, 124, a non compos mentis of the second sort is described to be he who was of good and sound memory, and, by the visitation of God, lost it. In *re Beaumont* (Pa.) 1 Whart. 52, 53, 29 Am. Dec. 33.

"Lunatics," as used in Rev. St. 1873, c. 227, declaring that the town in which a lunatic has a settlement at the time of his commitment to a state lunatic hospital shall be chargeable for the expenses of his support, does not include a person acquitted of homicide by reason of insanity and committed to a state lunatic hospital for life; it being shown that at the time of his commitment he was not, and has not at any time since been, an insane person or lunatic, so as to authorize the state to recover for his keeping from the inhabitants of the town in which he had a settlement at the time of his commitment. *Gleason v. Inhabitants of West Boylston*, 136 Mass. 489, 490.

Weakness or imbecility of mind in the grantor of land does not make him a lunatic, so as to avoid the deed. *Odell v. Buck* (N. Y.) 21 Wend. 142, 143.

The term "lunatic" includes a person of unsound mind. Pen. Code Ga. 1895, § 2.

Unless the context shows that another sense was intended, the word "lunatic" includes every species of mental derange-

ment. *Bates' Ann. St. Ohio* 1904, § 1536-907.

The word "lunatic" shall include every idiot, non compos, lunatic, and insane and distracted person. Rev. Laws Mass. 1902, p. 88, c. 8, § 5, subd. 6; *Hurd's Rev. St. Ill.* 1901, p. 1719, c. 131, § 1, subd. 6.

In the construction of statutes the terms "insane person" and "lunatic" include every idiot, non compos, lunatic, and insane person. Rev. St. Fla. 1892, § 1.

The word "lunatic" includes every species of mental deficiency or derangement. Rev. St. Wyo. 1899, § 2724.

The word "lunatic," as used in an act relating to lunatics and habitual drunkards, shall be construed to mean and include every person of unsound mind, whether he may be such from his nativity, as idiots, or become such from any cause whatever. P. & L. Dig. Laws Pa. 1894, vol. 1, col. 2816, § 16.

The word "lunatic" shall include every idiot, non compos, lunatic, and insane person. U. S. Comp. St. 1901, p. 3.

As used in the chapter relating to asylums for the insane, the term "lunatic" includes every species of insanity or mental derangement. *Bates' Ann. St. Ohio* 1904, § 720; Rev. St. Mo. 1899, § 4894.

The term "lunatic" includes all persons of unsound mind. *Shannon's Code Tenn.* 1896, § 62; *Civ. Code Ala.* 1896, § 1; *Cason v. Owens*, 28 S. E. 75, 76, 100 Ga. 142.

As insane person other than idiot.

A serious distinction has always been recognized between lunatics and idiots. The one has lucid intervals; the other, no power of mind whatever. The term "lunatic" has broadened to include all insane persons except idiots, as no other distinction seems to be essential. *Bicknell v. Spear*, 77 N. Y. Supp. 920, 921, 38 Misc. Rep. 389.

The term "lunatic," as used in provisions relating to the annulment of voidable marriages, shall extend to persons of unsound mind, other than idiots. V. S. 1894, § 2668.

The word "lunatic," as used in the chapter relating to insane persons, shall be construed to include every insane person who is not an idiot. Code W. Va. 1899, p. 630, c. 58, § 44.

As person having lucid intervals.

A lunatic is one who has possessed reason, but, through disease, grief or other cause, has lost it. The term is especially applicable to one who has lucid intervals, and may yet, in contemplation of the law, recover his reason. In *re Anderson* 43 S. E. 649, 650, 132 N. C. 243.

A lunatic or a person non compos mentis has been defined to be one "who hath had understanding, but by disease, grief or other accident, hath lost the use of his reason, sometimes enjoying his senses and sometimes not." Toml. Law Dict. II. 138. *Commonwealth v. Haskell* (Pa.) 2 Brewst. 491, 496.

A lunatic is a person of any form of unsoundness of mind other than idiocy; mental derangement, with intermittent, strictly periodically intermittent, lucid intervals. *Hiett v. Shull*, 15 S. E. 146, 147, 36 W. Va. 563.

The return to a writ de lunatico inquirendo recited that the person was a lunatic and of unsound mind, and "does enjoy lucid intervals, so that he is not capable of the government of himself, his lands, tenements, goods, and chattels." It was held that the statement that the person enjoyed lucid intervals was not objectionable, either in form or in fact. Those who are of unsound mind, but with intervals of sanity, require the protection of the courts with regard to their property quite as much as those whose condition is that of continued, unabating insanity, for obviously the contracts of the latter would be far more easily avoided than those of the former. Anciently only those insane persons who enjoyed lucid intervals were regarded as lunatics; the mental disorder being thought to be dependent on the moon, and therefore intermittent. Means, in the writ de lunatico inquirendo, were devised to meet the case of persons of unsound mind who had no lucid intervals, and who consequently were not considered lunatics. In *re Hill*, 31 N. J. Eq. (4 Stew.) 203.

"Lunatic," as used in Code 1873, § 892, providing that, if real property of any minor or lunatic is sold for taxes, the same may be redeemed within one year after such disability is removed, should not be limited to one who has lucid intervals, but was intended to include insane persons. *Hawley v. Griffin* (Iowa) 82 N. W. 905, 906.

As person incapable of governing self or affairs.

Under a statute confiding to the court of chancery, without any restriction or limitation, the care and custody of the persons and estates of lunatics, idiots, etc., it is sufficient to give the court jurisdiction if the jury find that the party is mentally incapable of governing himself or managing his affairs. In *re Mason* (N. Y.) 1 Barb. 436, 441.

"Lunatic," as used in a return to an inquisition in the nature of a writ de lunatico inquirendo that the party is a lunatic, imports such a deprivation of sense as renders the sufferer unfit for self-control, as well as for the management of his affairs. In *re*

Lindsley, 15 Atl. 1, 2, 44 N. J. Eq. (17 Stew.) 564, 6 Am. St. Rep. 913.

An incompetent person, unfit to manage his affairs, is a lunatic, though such infirmity manifests itself in weakness of mind only. In *re Wells*, 67 N. Y. Supp. 631, 632, 57 App. Div. 5.

The term "lunatic," as used in the chapter relating to lunatics, shall be construed to include idiots, insane and distracted persons, and every person who, by reason of intemperance or any disorder or unsoundness of mind, shall be incapable of managing and caring for his own estate. *Mills' Ann. St. Colo.* 1891, § 2968.

As person incapable of making will.

After the death intestate of a husband whose sole distributee was his wife, the latter was declared a lunatic at an inquisition. Act April 1, 1885, was subsequently passed, providing that where a lunatic dies intestate, and possessed of personalty derived from an intestate spouse, such property should pass to the next of kin of the person from whom it was derived. Though she lived several years after the act was passed, no one suggested that she make a will, and her guardian and physician testified that she was incapable of making a will. Held, that she was a lunatic, within the meaning of the act, and that the word "lunatic," as so used, denotes a person who has not sufficient mental capacity to make a will. *Stratton Claimants v. Morris Claimants*, 15 S. W. 87, 89, 89 Tenn. (5 Pickle) 497, 12 L. R. A. 70.

LUNGE.

A statement that a person made a lunge toward another likely means a certain pass or movement towards such person. *State v. Biggs*, 61 N. W. 417, 418, 93 Iowa, 125.

LYING.

A description in a deed as 70 acres "being and lying in the southwest corner" of a certain section includes the land in an equal square. *Walsh's Lessee v. Ringer*, 2 Ohio (2 Ham.) 327, 331, 15 Am. Dec. 555.

LYING AT ANCHOR.

"Lying at anchor," as used in Laws 1860, c. 253, providing that wharfage might be charged for every vessel lying at anchor within any slip or basin, does not include a vessel occupying a slip between two piers, and confined to its position only by being fastened to one of those piers and to the bulkhead between them. *Walsh v. New York Floating Dry Dock Co.* (N. Y.) 8 Daly, 387, 389; *Id.*, 77 N. Y. 448, 453.

A policy insuring a vessel while she was plying certain waters or lying at anchor ap-

plies to vessels afloat, unless only temporarily or accidentally aground, ready to move, and usually certain to move if the anchor is lifted, and does not apply to a vessel which was wholly unoccupied, and which was hauled up on the beach, and had holes in the hull to let the water in and out, and at low tide was a mile from the water's edge, although the vessel was held to its place on the beach by a cable and anchor, since the vessel was not in readiness for use, and was not accompanied with that care and oversight which belongs to vessels in use, but was abandoned and deserted, and was not casually or accidentally aground, but was drawn up on the beach to be kept stationary by its weight, and the blocks were withdrawn to prevent floating, and the sole purpose of the cable and anchor was to prevent its shifting position in its bed. *Reid v. Lancaster Fire Ins. Co.*, 90 N. Y. 382, 386.

A vessel driven by steam, head on, at high tide, on the beach, was not lying at anchor, within a policy of insurance covering the vessel while lying at anchor. *Reid v. Lancaster Fire Ins. Co.* (N. Y.) 19 Hun, 284, 286.

LYING IN WAIT.

Conceal as synonymous, see "Conceal—Concealment."

"Lying in wait, according to Bouvier, is being in ambush for the purpose of murdering another. It implies a hiding or secreting of one's self." *State v. Olds*, 24 Pac. 394, 403, 19 Or. 397.

To constitute lying in wait, within the meaning of Acts 1829, c. 23, § 1, providing that all murder perpetrated by means of lying in wait shall be murder in the first degree, three things must concur, to wit, waiting, watching, and secrecy. *Riley v. State*, 28 Tenn. (9 Humph.) 646, 651.

LYING ON.

"Lying on," as used in a will giving to testator's daughter that part of his land lying on the northeast side of a certain road, imports, in law, as well as in fact, that the land extends to and borders upon the boundaries designated in the description. *Carson v. Hickman* (Del.) 4 *Houst.* 323, 335.

An allegation of the ownership of property lying on the bay is not to be construed as showing a riparian proprietorship, as the phrase will include lands lying at some distance from the bay, when there is no intervening obstacle or structure. *Sullivan v. Moreno*, 19 Fla. 200, 223.

LYING UP.

An insurance policy on a vessel declared certain enumerated perils insured against

to be those which might occur on said trip or voyage, or while lying up in the port of New York. No mention was made in the policy of a trip or voyage, and a mere permission was given to tow such vessel from place to place in New York Harbor. Held, that a loss occurring while the vessel was being fastened to a pier in the East river, in the city of New York, just after having been towed from her previous berth in the Hudson river, should be deemed to have occurred while the vessel was lying up, within the meaning of the policy. "The meaning of the word 'lying,' as used in the enumeration of the perils, is not necessarily confined to mere inertness of position, joined, as it is, with the preposition 'up,' but embraces the idea of a change from a prior state of activity to one of repose. In this case it meant a cessation of active navigation—making trips or voyages from port to port. The vessel in question did not cease to lie up whenever she was towed from place to place in the harbor, any more than if she lay at the wharf, although, for greater caution, the privilege of towing was expressly reserved. She ceased to be in active service as a vessel capable of being navigated, and was kept as a mere floating warehouse, or receptacle for merchandise, to be towed or transported while afloat by external power, but even then only with the defendant's permission. *Dows v. Howard Ins. Co.*, 28 N. Y. Super. Ct. (5 Rob.) 473, 481.

LYING WEST AND ADJACENT.

Where a conveyance of land describes a part of the land conveyed as "lying west and adjacent" to a certain tract of land, the quoted phrase is to be construed as merely descriptive, and not amounting to a covenant that the land did lie west and adjacent to that mentioned. *Ferguson v. Dent*, 8 Mo. 667, 669.

LYNCH LAW.

"Lynch law," as defined by Anderson, is the action of private individuals, organized bodies of men, or disorderly mobs, who, without legal authority, punish, by hanging or otherwise, real or suspected criminals, without trial according to the forms of law. American lexicographers refer the origin of the term to the practice in the seventeenth century of a Virginia farmer named Lynch, who during the War of Independence was presiding justice of the county court of Pittsylvania, Va. The court in that state for the trial of felonies sat at Williamsburg, 200 miles distant. Horse thieves who had established posts from the north, through Virginia, into North Carolina, were frequently arrested and remanded to Williamsburg for trial. Not only was the attendance of

witnesses at that distance rendered uncertain, but when they did appear they were sure to be confronted by false witnesses for the outlaws. Moreover, the difficulty of conveying the accused to Williamsburg was increased, and the sitting of the court made uncertain, by the presence of the British under Cornwallis. Accordingly the justices of the county court of Pittsylvania assembled, and Judge Lynch proposed that since, for Pittsylvania, the court at Williamsburg had practically ceased to exist, and, in consequence, heinous crimes went unpunished, the court over which he presided should try all felonies committed in the county; that is to say, the place of trial was to be changed by mere resolution. The plan was adopted, with good results. The thieves were disbanded; many being hanged, which was the lawful penalty. The change of forum was against the words of the law, but justified, Lynch and others held, by the circumstances. Bouvier defines "lynch law" as a common phrase used to express the vengeance of a mob inflicting an injury and committing an outrage upon a person suspected of some offense; and Webster defines "lynch law" thus: "The act or practice by private persons of inflicting punishment for crimes or offenses without due process of law"—all of which definitions seem to concur in defining "lynch law" as something done without the

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warrant or sanction of law. *State v. Aler*, 20 S. E. 585, 588, 39 W. Va. 549.

LYNCHING.

Any collection of individuals assembled for any unlawful purpose, intending to do damage or injury to any one, or pretending to exercise correctional power over other persons by violence, and without authority of law, shall be regarded as a mob, and any act of violence exercised by them on the body of any person shall constitute a lynching. *Bates' Ann. St. Ohio 1904*, § 4428-4.

LYSOL.

Lysol, a liquid substance in which coal tar is the origin of the elements that give it its determining characteristic, the chief use of the article being otherwise than as a medicine, though used as such to a limited and comparatively insignificant extent—is dutiable under the provision in paragraph 15, Schedule A, § 1, c. 11, *Tariff Act July 24, 1897*, 30 Stat. 152 [*U. S. Comp. St. 1901*, p. 1627], for "preparations of coal tar, * * * not medicinal," and not under paragraph 3, Schedule A, § 1, c. 11, of said act (30 Stat. 151 [*U. S. Comp. St. 1901*, p. 1627]), covering chemical compounds. *United States v. Lehn (U. S.) 124 Fed. 87, 88.*

M

M. D.

"The degree of M. D. is something more than a mere honorary title. It is a certificate attesting the fact that the person on whom it has been conferred has successfully mastered the curriculum of study prescribed by the authorities of an institution created by law for the study of medicine, and by law authorized to issue such certificate. It thus has a legal sanction and authority, but it has more, in practical affairs. It introduces its possessor to the confidence and patronage of the public. Its legal character gives it a moral and material credit in the estimation of the world, and makes it thereby a valuable property right, of great pecuniary value." *Townshend v. Gray*, 19 Atl. 635, 636, 62 Vt. 373, 8 L. R. A. 112.

M. OF GOSPEL.

"M. of Gospel," as used after the signature of a person signing a marriage certificate, sufficiently indicates that the person who signed the certificate was a minister of the gospel. *Erwin v. English*, 23 Atl. 753, 754, 61 Conn. 502.

M. PER CENTUM.

A note containing the following clause, "with interest at the rate of 1 M. per centum," limits the interest on the note to 1 mill per centum. *United States v. Hardyman*, 38 U. S. (13 Pet.) 176, 178, 10 L. Ed. 113.

MACADAMIZE.

The word "macadamize" has a fixed and definite meaning, and refers not only to the kind of material to be used in covering a street or road, but also the manner in which it is to be laid. It means to cover a street or road by the process introduced by Macadam, which consists of the use of small stones, of a uniform size, consolidated and leveled by heavy rollers. *Partridge v. Lucas*, 33 Pac. 1082, 1083, 99 Cal. 519.

A "macadamized road" is a technical term well understood by all intelligent road builders and scientific men. Such a road is thus described in the *American Encyclopedia*: "To form a true macadamized road, the following principles must be fully understood and acted upon: That it is the native soil which actually supports the weight of traffic; that, while this soil is preserved in a dry state, it will carry any weight without sinking, and that it does in fact carry both the road and carriages; that this native soil

must be rendered quite dry by a thorough draining from all underwater, and a covering impenetrable to rain must then be placed over it, to preserve it in that dry state; that the thickness of a road should only be regulated by the quantity of material necessary to form such impervious covering, and never by any reference to its own power of carrying weight. This covering or roof of the soil must be made of clean, dry stone, broken into small fragments, each not exceeding six ounces in weight, about the size of a pigeon's egg, which must be so prepared and laid as to unite by its own angles into a firm, compact, impenetrable body. This cannot be effected unless the greatest care be taken that no earth, clay, sand, chalk, or other matter that will hold or conduct water be mixed with the broken stone. A road perfectly made on these principles completely excludes water, and therefore never can be affected by the action of frost. The thickness of the stratum of broken stone should never be less than seven nor more than ten inches, and the surface should be made nearly flat; never having a greater slope from the center to the sides than an inch in every five feet, which will be ample to carry off all the rain." Large, coarse pieces of sandstone, with which to make a road fit for travel, were hauled upon it, and mixed with dirt, and the dirt and stone afterward became worn down smooth. Considerable work was done, digging ditches and throwing up the dirt, to make a solid foundation for the road. It was held that the road was not a macadamized one within a charter authorizing one to collect tolls upon the making of a macadamized road between certain points. *State v. Curry*, 1 Nev. 251, 252.

Construction of gutter.

Macadamized roads, that they may shed water readily, and thereby prevent the road-bed from sinking in the mud or being thrown up by frost, are generally constructed with a raised center, sloping to each side. It is necessary, in the construction of a good road of this character, that the surface water which it sheds should have an easy and appropriate place in which to flow away. This is the purpose of the gutter constructed on the side of the road, and such a gutter is really a part of the road. Therefore a power to macadamize a road includes the power to trim and gutter it, and the expense thereof may be included, as a part of the macadamizing, in the assessment levied upon the property fronting upon such improvement. *McNamara v. Estes*, 22 Iowa, 246, 255, 256.

Under St. 1871-72, p. 804 (Act April 1, 1872), authorizing a board of supervisors to order a street to be macadamized and to

order any other work to be done which shall be necessary to make and complete the whole or any portion of said street, etc., the board had power, when a street was ordered to be macadamized, to order the construction of rock gutterways. *Burk v. Altschul*, 6 Pac. 393, 66 Cal. 533.

Curbing.

"Macadamizing," as used in a resolution for the improvement of a street, was held in *Beaudry v. Valdez*, 32 Cal. 269, 276, not to include curbing. *City St. Imp. Co. v. Taylor*, 71 Pac. 446, 138 Cal. 364.

Improvement of sidewalk.

An order directing that a street be macadamized meant that the roadway only should be thus improved. That is the usual acceptance of the term "macadamize," when applied to street work, which would not include the improvement of sidewalks. *Himmelmann v. Satterlee*, 50 Cal. 68, 70.

Representing a certain process of street improvement does not include the curbing of the sidewalks, when macadamizing the streets and curbing the sidewalks are by statute made distinct kinds of improvement. *Beaudry v. Valdez*, 32 Cal. 269, 276.

As pave.

Macadamizing is one mode of paving, deriving its name from the man who invented that particular mode. *Burnham v. City of Chicago*, 24 Ill. 496, 500.

The term "macadamizing" applies to the paving of city streets with cobblestones. Such work is paving, within the meaning of the statute giving the city power to pave its streets. *Huldekoper v. City of Meadville*, 83 Pa. 156, 158.

Power to macadamize a street included a power to pave. *State v. District Court of Ramsey County*, 22 N. W. 295, 296, 33 Minn. 164.

Macadamizing is not paving, within the meaning of a city ordinance requiring street railways to pay the cost of paving the streets. *Leake v. City of Philadelphia*, 24 Atl. 351, 353, 150 Pa. 643.

"Macadamizing," as used in Act April 23, 1889 (P. L. 44), authorizing boroughs to require the paving, curbing, and macadamizing of streets, etc., is synonymous with "paving." Macadamizing is regarded as a species of paving. The latter word is more general than the former. As properly understood, a macadamized street is a paved street, but every paved street is not necessarily a macadamized street. According to Webster, "paved" means "to lay or cover with brick or stone, so as to make a level or convenient surface for carriage or foot passengers; to floor with brick or other solid

material." The same author defines "macadamizing": "To cover, as a roadway or path, with small, broken stones, so as to form a smooth-laid surface." *City of Harrisburg v. Segelbaum*, 24 Atl. 1070, 1073, 151 Pa. 172.

MACHETE.

A machete is a heavy knife or cutlass used among Spanish colonists and Spanish-American countries both as a tool and a weapon. It is a large, heavy knife, used as a hatchet to cut their way through thickets, and for various other purposes, and is a weapon sufficient to indicate a military purpose when taken aboard a vessel bound for Cuba during the rebellion with Spain. *Wilborg v. United States*, 16 Sup. Ct. 1127, 1129, 163 U. S. 632, 41 L. Ed. 289.

MACHINE.

See "Newly Invented Machine"; "Original Machine"; "Perfect Machine."

Webster's definition of a machine is: "A construction more or less complex, consisting of a combination of moving parts or simple mechanical elements, as wheels, levers, cams, etc., with their supports and connecting framework, calculated to constitute a prime mover, or to receive force and motion from a prime mover or from another machine, and transmit, modify, and apply them to the production of some desired mechanical effect or work," etc. In Chambers' Encyclopedia machines are defined to be instruments interposed between the moving power and the resistance, with a view to change the direction of the force or otherwise modify it. *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co.* (U. S.) 66 Fed. 471, 475.

The term "machine" includes every mechanical device or combination of mechanical powers and devices to perform some function to produce a certain effect or result. *Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co.* (U. S.) 55 Fed. 301, 316; *Corning v. Burden*, 56 U. S. (15 How.) 252, 267, 14 L. Ed. 683; *Central Trust Co. v. Sheffield & B. Coal, Iron & Ry. Co.* (U. S.) 42 Fed. 106, 110, 9 L. R. A. 67 (citing *Piper v. Brown* [U. S.] 19 Fed. Cas. 718, 719); *Pratt v. Thompson & Taylor Spice Co.* (U. S.) 83 Fed. 516, 518; *Chicago Sugar Refining Co. v. Charles Pope Glucose Co.* (U. S.) 84 Fed. 977, 981, 28 C. C. A. 594.

A machine is a concrete thing, consisting of parts or of certain devices and combination of devices. The principle of a machine is properly defined to be its mode of operation, or that combination of devices which distinguishes it from other machines. A machine is not a principle or an idea. *Boydson Power Brake Co. v. Westinghouse*, 18

Sup. Ct. 707, 716, 170 U. S. 537, 42 L. Ed. 1136; Burr v. Duryee, 68 U. S. (1 Wall.) 581, 570, 17 L. Ed. 650, 660, 661.

A machine is an instrument composed of one or more of the mechanical powers, and capable, when set in motion, of producing by its own operation certain predetermined physical effects. It differs from all other mechanical instruments, in that its rule of action resides within itself. *Frederick R. Stearns & Co. v. Russell*, 85 Fed. 218, 225, 29 C. C. A. 121.

A machine is a concrete thing, being an entirety of co-operating elements and agencies. When it consists of a combination of old elements and devices, the leaving out of one of the essential elements of the combination destroys the identity of the combination, and a person cannot be sued as an infringer who uses a machine in which a material part of the combination patent is omitted. *Carter Mach. Co. v. Hanes* (U. S.) 70 Fed. 859, 868.

"Machine," as used in 1 Stat. 318, providing that any person or persons, having discovered or invented any new machine, etc., may make application for a patent, "includes new combinations as well as new organizations of machinery, and hence there may be a patent for new combinations of machinery to produce certain effects, whether the machines constituting the combination be new or old. In such a case the patent is not for an abstract principle, but for the particular application of the principle which the patentee professes to have made." *Wintermute v. Redington* (U. S.) 30 Fed. Cas. 367, 370.

Dredgeboat.

A dredgeboat, without power of self-propulsion, and capable of use as a dredging machine only, is a manufacture or machine, within the meaning of Rev. St. § 2505, entitling a manufacture or machine, after exportation from the United States, to be reimported without duty, if returned in the same condition as exported. *United States v. Dunbar* (U. S.) 67 Fed. 783, 784, 14 C. C. A. 639.

Fixtures.

"Machine," as used in Code, art. 63, § 22, providing that every machine, wharf, and bridge erected, constructed, or repaired within the state shall be subject to a lien in like manner as buildings are, is such a machine as is not an integral part of a building, and has not lost its character as a removable chattel. *Stebbins v. Culbreth*, 39 Atl. 321, 322, 86 Md. 656.

Acts 1845, § 4, providing that every machine thereafter erected, constructed, or repaired within the city of Baltimore should be subject to a lien in like manner as build-

ings are made subject, means a fixed or stationary machine, and not a movable machine. The term "machine," as used in the statute, is not extensive enough to embrace all kinds of machines. The word "machine," if to be taken in its most extended signification, means everything which acts by a combination of the mechanical powers, however simple or complex it may be. If the term be understood in its broad sense, it will not only comprehend locomotives, threshing machines, and such like, but all the various machines used in agriculture and commerce, carriages and vehicles in ordinary use, even watches and clocks, and all the machines in domestic use. *New England Car Spring Co. v. Baltimore & O. R. Co.*, 11 Md. 81, 89, 69 Am. Dec. 181.

Jail.

"Machine," as used in Patent Act 1836, authorizing the grant of patents for any new and useful art, machine, manufacture, or composition of matter, does not include jails. *Jacobs v. Baker*, 74 U. S. (7 Wall.) 295, 297, 19 L. Ed. 200.

Machinery distinguished.

See "Machinery."

Passenger elevator.

Within the meaning of the mechanics' lien law, subjecting a building to a lien for any machine furnished, an electric passenger elevator will be included; the term "machine" embracing any mechanical contrivance, as the wooden horse with which the Greeks entered Troy; a coach; a bicycle. *Lefler v. Forsberg*, 1 App. D. C. 36, 41.

Process distinguished.

The term "machine" includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result; but, when the result or effect is produced by chemical action, or by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called "processes." A new process is usually the result of discovery; a machine, or invention. *MacKay v. Jackman* (U. S.) 12 Fed. 615, 618, 20 C. C. A. 466; *Piper v. Brown* (U. S.) 19 Fed. Cas. 718, 719; *Risdon Iron & Locomotive Works v. Medart*, 15 Sup. Ct. 745, 749, 158 U. S. 68, 39 L. Ed. 899; *Corning v. Burden*, 56 U. S. (15 How.) 252, 267, 14 L. Ed. 683 (cited and approved in *Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co.* [U. S.] 55 Fed. 301, 316); *In re Weston*, 17 App. D. C. 431, 436.

Mr. Justice Bradley said in *O'Reilly v. Morse*, 56 U. S. (15 How.) 62, 14 L. Ed. 601: "A machine is a thing. A process is an act, or mode of act. The one is visible to the

eye—an object of perpetual observation. The other is a conception of the mind, seen only by its effect when being executed or performed. Either may be the means of producing a useful result." Either may be the subject of a patent. *Boyden Power Brake Co. v. Westinghouse*, 18 Sup. Ct. 707, 728, 170 U. S. 537, 42 L. Ed. 1136. So, also, *Tilghman v. Proctor*, 102 U. S. 707, 728, 26 L. Ed. 279.

Toy bank.

A machine is a definite combination of definite elements assembled to accomplish a given result, so that a toy bank, having a discharging aperture controlled by a spring latch operated by the weight of the accumulated coins within, is a machine. *Card v. Colby* (U. S.) 64 Fed. 594, 598, 12 C. C. A. 319.

MACHINE SHOP.

A fire insurance policy on a machine shop cannot be construed to include a building in which organs and melodeons are manufactured. *Goddard v. Monitor Mut. Fire Ins. Co.*, 108 Mass. 56, 58, 11 Am. Rep. 307.

The phrase "machine shop," as employed in a mortgage on a machine shop, includes all the fixed elements of it that give it its peculiar character of a machine shop, including the lathe. *Hoskin v. Woodward*, 45 Pa. 42, 44.

MACHINERY.

See "Fixed Machinery"; "Water Machinery."

"Machinery" is defined by Webster as the working parts of a machine, engine, or instrument, arranged and constructed so as to apply and regulate force, as the machinery of a watch; the means and appliances by which anything is kept in action. Worcester's definition is, "An artificial work which serves to apply or regulate moving power or to produce motion; an engine; a piece of mechanism." *Brewer v. Ford*, 12 N. Y. Supp. 619, 624, 59 Hun, 17.

By the Century and by the Standard Dictionaries "machinery" is defined as parts of a machine considered collectively; any construction of mechanical means designed to work together so as to effect a given end. *Brower v. Locke*, 67 N. E. 1015, 1017, 31 Ind. App. 353.

Bridges, posts, railings.

"Machinery" is defined as parts of machinery considered collectively; as the combination of mechanical means to a given end, such as the machinery of a locomotive or of a canal lock or a watch. The term comprises different mechanical appliances

and is more extensive in meaning than "machine." It does not, however, cover railings, posts, bridges, and such things. They are not in any respects part of a machine. *Benedict v. City of New Orleans*, 11 South. 41, 44 La. Ann. 793.

As building.

See "Building (In Lien Laws)."

Car axle.

A bill of lading exempting the carrier from liability for loss arising from collisions, explosions, and accidents to boilers or machinery, applies only to the group of mechanical parts connected with the boiler and steam supply by which power is generated and applied, and the vessel or train of cars is propelled, and it does not include an axle of one of the cars in the train. *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co.* (U. S.) 81 Fed. 289, 291, 26 C. C. A. 402 (reversing [U. S.] 66 Fed. 471).

Fixtures.

As fixtures, see "Fixtures for Manufacturing Purposes."

Wagner's St. pp. 907, 909, §§ 1, 5, authorize a mechanic's lien for the benefit of persons who furnish any materials, fixtures, engines, boilers, or machinery for any building, erection, or improvement on land. Held, that the machinery upon which a mechanic's lien can attach, under such statute, must be such as is used in the erection of a building, and which will, when placed in the building, erection, or improvement, become a fixture and a part of the realty, or at least such as is necessary in the erection of the improvement. Thus no lien could be filed for the furnishing of a carding machine used in the building, but not a part thereof, which did not in any sense become attached to the realty. *Graves v. Pierce*, 53 Mo. 423, 424.

Gas mains, etc.

"Machinery," as used in St. 1864, c. 208, § 5, relating to the taxation of a gas company if it shall be found that the market value of all the shares or capital stock of such corporation exceeds the value of its real estate and machinery as returned by the assessors of a town or city, should be construed to include the mains and pipes laid down in the streets and elsewhere to distribute the gas among those who are to consume it. "They constitute a part of the machinery by means of which the corporate business is carried on in the same manner as pipes attached to a pump or fire engine for the distribution of water, or wheels in a mill which communicate motion to looms and spindles, or the pipes attached to a steam engine to convey and distribute heat and steam for manufacturing purposes, make a portion of the machinery of the mill in which

they are used. In a broad, comprehensive, and legitimate sense, the entire apparatus by which gas is manufactured or distributed for consumption throughout a city or town constitutes one great, integral machine, consisting of retorts, station meters, gas holders, street mains, service pipes, and consumers' meters, all connected and operating together, by means of which the initial, intermediate, and final processes are carried on, from its generation in the retort to its delivery for the use of the consumers." *Commonwealth v. Lowell Gaslight Co.*, 94 Mass. (12 Allen) 75, 76.

Act April 9, 1873, § 1, exempting "machinery in manufactories" from taxation, does not exempt the pipes, lamp posts, and meters of a gas company. *Covington Gaslight Co. v. City of Covington*, 84 Ky. 94, 96; *City of Covington v. Covington Gaslight Co.* (Ky.) 2 S. W. 326, 328.

Hammer.

Where a hammer breaks in the hands of an employé, and it is unconnected with mechanical appliances, and is used directly by muscular strength, it is not machinery, within Code, § 3033, creating the presumption of negligence when any person is injured by the running of cars or other machinery of a railroad. *Georgia R. & Banking Co. v. Nelms*, 83 Ga. 70, 74, 9 S. E. 1049, 20 Am. St. Rep. 308.

"A hammer is a tool or instrument ordinarily used by one man in the performance of manual labor. It may be made an essential part of machinery when intended to be and is operated by means thereof, but, when disconnected from any other mechanical appliances, and operated singly by muscular strength directly applied, such hammer, when used for driving spikes in cross-ties on a railroad, is not machinery, in its most comprehensive signification, or in the meaning of Code 1886, § 2590, subd. 1, providing that an employer is liable for injuries to an employé when the injury is caused by any defect in the machinery used in the business of the master or employer." *Georgia Pac. Ry. Co. v. Brooks*, 4 South. 289, 291, 84 Ala. 138.

Joist.

A joist which workmen are placing in a building does not come within the term "machinery." *Griffiths v. New Jersey & N. Y. R. Co.*, 25 N. Y. Supp. 812, 5 Misc. Rep. 320.

Lead pipe machine.

Where a partnership owned, among other property, a steam engine, a rolling mill, and a pipe machine, and the contract of dissolution provided that one partner was to "take all the machinery," and to pay certain claims, the term "machinery," though more appropriate to the steam engine and its fixtures, is

sufficiently extensive to embrace both the lead pipe machine and the rolling mill. *Lowber v. Le Roy*, 4 N. Y. Super. Ct. (2 Sandf.) 202, 217.

Linotypes.

Linotypes, though they are indispensable parts of printing machinery, are not themselves machinery, so as to be exempt from taxation under article 207 of the Constitution. They have not the construction of parts required to constitute machinery. It is said in the brief that the printing machine or press could not be successfully operated without them. The ordinary hammer or the lever may be an essential part of the machinery, but it would not for that reason be machinery. *Nicholson v. Board of Assessors*, 21 South. 167, 168, 48 La. Ann. 1570.

Machine distinguished.

As the term "machinery" is used in insurance policies insuring machinery, it is not synonymous with "machine," but includes all instruments intended to be operated exclusively by machinery in the business, and which are so operated from time to time. *Seavey v. Central Mut. Fire Ins. Co.*, 111 Mass. 540, 541.

"Machinery" comprises different mechanical appliances, and is more extensive in meaning than "machine." *Benedict v. City of New Orleans*, 11 South. 41, 44 La. Ann. 793.

Patterns.

A contract between plaintiff and defendant's assignors provided for the sale "of a certain amount of machinery and all patterns pertaining to the lock business. Said machinery shall be the property of the said" plaintiff until paid for. Held, that the word "machinery" included the patterns. *Brewer v. Ford*, 12 N. Y. Supp. 619, 620, 59 Hun. 17.

Planer and saw in sawmill.

A written application for insurance on a sawmill, in which the property was described as "a boiler, engine, machinery, and belting contained in a certain building," includes a planing machine in the building on the same floor with the machinery proper, but about 25 feet distant, and attached to it by belting, and plainly visible. *James River Ins. Co. v. Merritt*, 47 Ala. 387.

The saw of a sawmill is a part of the machinery of a sawmill. The power is applied at the wheel, and the saw at the objective point does the work. Without the wheel, no power could be applied; without the saw, the power could do no work. The one is as indispensable as the other. *State v. Avery*, 44 Vt. 629.

Smokestack.

A declaration asking damages for the removal of a shingle mill outfit, consisting of engine, boiler, belts, and other machinery, should not be construed as limited to actual contrivances with wheels, etc., used in cutting shingles, but should be liberally construed, and, as so construed, would include a smokestack. *Wreggitt v. Barnett*, 58 N. W. 467, 99 Mich. 477.

Steel bar.

"Machinery," as used in Code, § 1749, subd. 1, authorizing a recovery by a servant for personal injuries caused by any defect in the condition of the machinery used in the business of the master, is not sufficiently broad to cover a steel bar used, among other things, to align the track, and operated by muscular strength applied directly. *Clements v. Alabama Great Southern R. Co.*, 28 South. 643, 645, 127 Ala. 166.

Tools and implements.

A policy of fire insurance upon a paper mill and machinery covers not only the machines, but the tools and implements used therewith for the manufacture of paper. *Buchanan v. Exchange Fire Ins. Co.*, 61 N. Y. 26, 34.

"Machinery," as used in policies of insurance insuring machinery, is not synonymous with "machine," but includes all instruments intended to be operated exclusively by machinery in the business of the assured, and which are so operated from time to time in the regular and ordinary prosecution of the business described or referred to in the policy. As used in a policy of insurance on an engine and machinery used for the manufacture of tinware, it would include dies of iron or steel used to give form to various utensils manufactured by the assured, though all of such dies were not in actual use at the time of the loss. *Seavey v. Central Mut. Fire Ins. Co.*, 111 Mass. 540, 541.

Under a statute giving to one who furnishes any material, machinery, or fixtures for any improvement on land a lien on such improvement and the land on which it is situated, there is no lien for wrenches or belting furnished, in no way attached to the real estate, or a necessary part of the machinery which is thus attached. *Meek v. Parker*, 63 Ark. 367, 369, 38 S. W. 900, 58 Am. St. Rep. 119.

MACHINERY ADAPTED TO THE CONSTRUCTION OF FIREARMS.

A corporate authority to manufacture firearms and other implements of war, applicable to the use of firearms and all kinds of "machinery adapted to the construction thereof," does not include a power to manu-

facture and deliver circular railroad locks. *Whitney Arms Co. v. Barlow*, 38 N. Y. Super. Ct. (6 Jones & S.) 554, 563.

MACHINIST.

A machinist is a constructor of machines, or one skilled in their construction. The word is not descriptive of a dealer in machinery and implements, so that an insurance policy covering machines used in his business as a machinist does not cover machinery, tools, and implements carried in stock for sale. *Michel v. American Cent. Ins. Co.*, 44 N. Y. Supp. 832, 835, 17 App. Div. 87.

A machinist, according to Webster, is a constructor of machines and engines, or one well versed in the principles of machines. Though a corporation cannot answer to the latter of these two definitions, it can to the former—not, it is true, in a strict sense, but in a general sense. A corporation, considered in itself, can construct nothing, can do nothing. It is in fact a myth, a fiction, and has no existence but in the imagination of the law. It may be a carrier, a banker, a manufacturer, and an insurer. By itself it can do nothing, but by its employés it can transport goods, sign a bank note, or execute a policy of insurance. Through the like instrumentalities it can construct machines and repair machinery, and therefore is a machinist, within Irwin's Code, § 1966, giving a machinist repairing or furnishing machinery a lien therefor. *Loudon v. Coleman*, 59 Ga. 653, 655.

MAD POINT.

The term "mad point" is used to designate the idea or object upon which the derangement of the mental faculties of one suffering with monomania is confined. In re *Owing's Case* (Md.) 1 Bland, 370, 388, 17 Am. Dec. 311.

MADE.

See "Duly Made"; "Legally Made."
See, also, "Make."

Completion imported.

In the statutory proviso that an act shall not affect any contracts heretofore made, the word "made" contemplates the completion of the contract, so that it is not made while anything yet remains to be done to give it legal efficacy. *United States Sav. & Loan Co. v. Miller* (Tenn.) 47 S. W. 17, 24.

Delivery imported.

It has been held that the averment, "he made the bill," when used in reference to the drawer of a bill of exchange, imports the delivery of the bill to the payee. *Churchill*

v. Gardner, 7 Term R. 596; *Higgins v. Bullock*, 66 Ill. 37, 39.

The term "made and executed," as often used, means a completion of the transaction to which it refers, and, when applied to a written instrument, imports not only the signing and acknowledgment thereof, but also a delivery of the same. *Elbring v. Mullen*, 38 Pac. 404, 405, 4 Idaho, 199.

If a note was never delivered by the maker to the payee, it is incorrect to say that he made his note, whereby he promised to pay, etc., for, in common parlance, "made" implies doing everything necessary to render it a valued instrument. *Burbank v. French*, 12 Wis. 376, 378.

An allegation in a complaint on a note that defendant made his note should be construed to import delivery, which is one of the essential elements of the complete making of a note. *Chappell v. Bissell* (N. Y.) 10 How. Prac. 274; *Sawyer v. Warner* (N. Y.) 15 Barb. 282, 285.

As executed.

"Made," as used in a mortgage which provides that it is agreed between the parties that the notes described therein and the mortgage shall be governed and construed by and under the laws of the state of Alabama, "where the same is made," means executed. *Farrior v. New England Mortg. Sec. Co.*, 7 South. 200, 88 Ala. 275.

In Comp. St. c. 6, § 1, providing that no voluntary assignments for the benefit of creditors hereafter made shall be valid, unless the same be made in conformity to the terms of this act, "made" will be construed to mean executed. *Sager v. Summers*, 68 N. W. 614, 615, 49 Neb. 459.

"Made," as used in a pleading alleging that defendants made an obligation in writing, will be held to mean executed, since "execute" is defined to mean make. *Hazelet v. Holt County*, 71 N. W. 717, 51 Neb. 716.

The use of the word "made" in a complaint alleging that defendant made and delivered to plaintiff his promissory note, etc., is a sufficient allegation of execution, without averring a delivery. *Keteltas v. Myers*, 19 N. W. 231, 233.

The word "made," used in speaking of a contract being made, means that the contract has been executed by both parties, so as to become binding upon them. *Holder v. Aultman, Miller & Co.*, 18 Sup. Ct. 269, 272, 169 U. S. 81, 42 L. Ed. 669.

An allegation in the petition that certain parties made and entered into a certain contract is a sufficient allegation of the execution thereof, "for that is the only manner in which a written contract can be made and

entered into." *Limerick v. Barrett*, 43 Pac. 853, 3 Kan. App. 573.

Where a bond was written in California, and signed by one of the obligors there, and the money was then loaned, and the bond was sent to the obligor, in Nevada, who signed it, and then sent it to the obligee, in California, the instrument was completed and took effect at the time it left the hands of the party who last executed it and sent it to the obligee, and was therefore made in Nevada, within the meaning of the statute of limitations of that state applying to instruments "obtained, executed, or made out of the state of Nevada." *Alcalda v. Morales*, 3 Nev. 132, 136.

The use of the word "made" in a declaration of assumpsit on a promissory note, reciting that it was made on a certain date, and was payable in a certain time after date, is a sufficient allegation that the note bore date on the date recited as the day on which it was made. *Robinson v. Grandy*, 50 Vt. 122.

MADE LAND.

"Made land" is a term applied to land reclaimed from the waters of a lake by filling out into the lake. *Carli v. Stillwater St. Ry. & Transfer Co.*, 10 N. W. 205, 207, 28 Minn. 373, 41 Am. Rep. 290.

MADE TO APPEAR.

"Made to appear," as used in Act Cong. March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508], providing for the removal of a suit from a state court to the circuit court of the United States when it shall be made to appear to the circuit court that, from prejudice or influence, the party will not be able to obtain justice in such state court, imports a duty on the part of the circuit court to investigate or examine the fact on which an alleged inability to obtain justice in a state court must rest. It requires the court to receive evidence on the point by affidavits, or by depositions, or by means of an oral examination of witnesses in its presence. The simple affidavit of the party, stating in general terms the existence of such prejudice and its effect, should not be accepted as sufficient evidence of the fact. *Malone v. Richmond & D. R. Co.* (U. S.) 35 Fed. 625, 626.

MADE UP.

A railroad train is said to be made up when the cars are coupled together, and the train is completed, ready to start out on a trip over the road. *Union Stockyards Co. v. Conoyer*, 59 N. W. 950, 954, 41 Neb. 617.

MADMAN.

Locke defined a madman to be one who reasoned correctly from false premises, but that would embrace a very large class who are commonly supposed to be sane. *Francke v. His Wife*, 29 La. Ann. 302, 303.

Madmen differ from idiots, in that madmen put wrong ideas together, and so make wrong propositions, but argue and reason right from them, but idiots make very few or no propositions, and reason scarcely at all. *Commonwealth v. Haskell* (Pa.) 2 Brewst. 491, 497.

MADNESS.

"Madness," says Sir William Scott, "is a state of mind not easily deducible to correct definition, since it is the disorder of that faculty with which we are little acquainted, for all the study of mankind has made but a very moderate progress in investigating the texture of the mind, even in a sound state. In disease, where it has pleased the Almighty to envelop the subject-matter in the darkness of disease, it will probably always continue so; but the effects of this disordered state are pretty well known. We learn from experience and observation all that we can know, and we see that madness may subsist in various degrees, sometimes slight, as partaking rather of disposition or humour, which will not incapacitate a man from managing his own affairs or making a valid contract. It must be something more than this—something which, if there be any test, is held by the common judgment of mankind to affect his general fitness to be trusted with the management of himself and his own concerns. The degree of proof must be still stronger when a person brings a suit on allegation of his own incapacity, by exposing to view the changes of his mind." And an eminent physician, in "An Inquiry Concerning the Indications of Insanity," observes that "the same intellectual light may be given to all; but in some obscured by a gross organization, and in others, more happily organized, shining forth more brightly. Itself out of reach of physical injury, it works by physical instruments; and the exactness of its operations depends on the growth, maturity, integrity, and vigor of its instruments, which are the brain and nervous system. If the nervous agents of sensation are unfaithful, the mind receives false intelligence, or transmits its orders by imbecile messengers; if the seat of thought, the center of intellectual and moral government, is faultily arranged; the operations of the understanding are impeded and incomplete. Nay, so dependent is the immaterial soul upon the material organs, both for what it receives and what it transmits, that a slight disorder in the circulation of the blood through different portions of the nervous sub-

stance can disturb all sensation, all emotion, all relation with the external and the living world; can obstruct attention and comparison; can injure and confound the accumulations in the memory, or modify the suggestions of imagination." In *re Owings' Case* (Md.) 1 Bland, 370, 384, 17 Am. Dec. 311.

MAGAZINE.

A magazine is a receptacle in which anything is stored; a storehouse; a warehouse. *State v. Sprague*, 50 S. W. 901, 903, 149 Mo. 409.

MAGISTERIAL PRECINCT.

A justice's precinct or magisterial precinct is a local subdivision of a county, and has no corporate autonomy. Its boundaries are fixed by the county court, and serve to define the territorial jurisdiction of justices of the peace and constables. It generally constitutes an election district, and the county assessment rolls are made out by precincts, as is the case with the wards of cities. The relation of such a precinct to the county, under the law of Kentucky, is substantially that of a ward to a city. While not a autonomous, self-governing body, it is a geographical and semipolitical entity. *Breckinridge Co. v. McCracken* (U. S.) 61 Fed. 191 194, 9 C. C. A. 442.

MAGISTRATE.

See "Police Magistrate."

A magistrate is a public civil officer invested with some part of the legislative, executive or judicial power given by the Constitution or the law. The President of the United States is chief magistrate of the nation. The Governors are the chief magistrates of their respective states. In a narrower sense, the term only includes inferior judicial officers, such as justices of the peace. *Martin v. State*, 82 Ark. 124, 127, 128; *Childers v. State*, 16 S. W. 903, 905, 30 Tex. App. 160, 28 Am. St. Rep. 899.

In an insurance policy providing that the company shall not be liable for damage by fire which shall happen or arise by any person or persons engaged or concerned in notorious resistance to the authority of magistrates, the word "magistrates" means public civil officers. *Straus v. Imperial Fire Ins. Co.*, 6 S. W. 698, 700, 94 Mo. 182, 4 Am. St. Rep. 368.

A magistrate is an officer having power to issue a warrant for the arrest of a person charged with the commission of a crime. *Ann. Codes & St. Or.* 1901, § 1582; *Rev. St. Utah* 1898, § 4607; *Code Cr. Proc. S. D.* 1903, § 90; *Pen. Code Cal.* 1903, § 807; *Ballinger's Ann. Codes & St. Wash.* 1897, § 4690; *Comp*

Laws Nev. 1900, § 4071; Pen. Code Idaho 1901, § 5220; Rev. St. Okl. 1903, § 5237.

The term "magistrate," as used in the Penal Code, signifies any judge of the Supreme Court or of the district court, justice of the peace, police magistrate and such other officer or officers as are authorized and empowered to issue warrants for the arrest of persons accused of crime. Rev. Codes N. D. 1899, § 7721; Pen. Code S. D. 1903, § 816.

"Magistrate," as used in the Penal Code, signifies any justice of the peace, judge of probate court, mayor of an incorporated city or town, and such other officer or officers whose duty it is made by law to examine and punish violations of the public peace. Rev. St. Okl. 1903, § 2694.

The term "magistrate," in the Criminal Code, when not otherwise expressly stated, is used to mean a justice of the peace, probate judge, mayor of a city or incorporated village, or police judge. Cobbe's Ann. St. Neb. 1903, § 2378.

The following officers are magistrates: (1) The judges of the Supreme Court, with authority to act as such throughout the state; (2) the judges of the district courts, with authority to act as such throughout the judicial districts for which they are respectively elected; (3) as limited by law directing the place of exercising their jurisdiction and authority, county, city, township, and other justices of the peace, police magistrates, and, when authorized by law, the judges of the county courts, with authority to act as such throughout the counties or the judicial subdivisions in which the county, city, township, or municipality of which they are respectively elected are located. Rev. Codes N. D. 1899, § 7885.

The following persons are magistrates: (1) The justices of the Supreme Court; (2) the judges of any city court; (3) the county judges and special county judges; (4) the city judge of the city of New York and the judges of the court of general sessions in the city and county of New York; (5) the justices of the peace; (6) the police and other special justices appointed or elected in a city, village, or town; (7) the mayors and recorders of cities. But in the city of New York the only magistrates authorized to commit children to institutions are the justices of the Supreme Court, the recorder, city judge of the city of New York, and judges authorized to hold the court of general sessions, and the police justices. Cr. Code N. Y. 1903, § 147; Cr. Code N. Y. 1903, § 959.

Bail commissioner.

The term "magistrate," in any section of these statutes which provides for admitting persons to bail in criminal cases, shall be construed to include a bail commissioner, so far as to give him authority to act in any

case of admitting prisoners to bail. Rev. Laws Mass. 1902, p. 1832, c. 217, § 80.

Consul.

In construing the term "magistrate" in St. 1783, c. 37, § 4, providing that deeds should be acknowledged before a justice of the peace in this state, or before a justice of the peace or magistrate in some other of the United States, or any other state of kingdom wherein the grantor or vendor may reside, the court says that it is difficult to fix any definite meaning to the word "magistrate." It is a generic term importing a public officer exercising a public authority, but it appears that the act intended to use a term sufficiently broad to indicate a class of officers exercising an authority similar to that of justices of the peace in Massachusetts, or as nearly so as the difference in the forms of government and institutions would permit. There is, says the court, nothing to indicate what kind of magistrate was intended, except the nature of the act to be done, and the connection in which the term was used. The act is a ministerial one, and, to be before a justice of the peace or magistrate, it must then be a ministerial officer exercising like powers with those of a justice of the peace in this commonwealth when acting in his ministerial capacity. As a result of this reasoning, it is held that a consul in a foreign country is a magistrate, within the meaning of the act. Scanlan v. Wright, 80 Mass. (13 Pick.) 523, 528, 25 Am. Dec. 344.

Justice of the peace.

In a narrower sense, the term "magistrate" includes inferior judicial officers, such as justices of the peace, etc. Childers v. State, 16 S. W. 903, 905, 30 Tex. App. 160, 28 Am. St. Rep. 899; Martin v. State, 32 Ark. 124, 127.

A justice of the peace is a magistrate; that term being defined by statute as an officer having power to issue a warrant for the arrest of a person charged with a public offense. Ex parte White, 15 Nev. 146, 147, 37 Am. Rep. 466.

A justice of the peace is a magistrate, and, when he sits for the purpose of inquiring into a criminal accusation against any person, he sits, not as a justice, but as a magistrate, and the court which he then holds is an examining court, so that when holding such a court his functions as a magistrate are the same as those of the courts of record when they sit as magistrates to hold an examining trial, and the same rules govern each. Kerry v. State, 17 Tex. App. 178, 181, 50 Am. Rep. 122.

Comp. Laws 1878, § 2301, providing that magistrates have jurisdiction to hear, try, and determine all public offenses, etc., where in the punishment does not exceed 6 months' imprisonment in a county jail, or a fine in

any sum less than \$300, or by both, includes justices of the peace. *Yearian v. Splers*, 10 Pac. 609, 613, 4 Utah, 385.

Notary public.

"Magistrate," as used in an insurance policy which required the assured to furnish and annex to the proofs of loss a certificate of a magistrate nearest the place of fire that he has investigated the facts of the case, and that the claim is just and honest, means an inferior judicial officer, as a justice of the peace, and it does not include a notary public. *Cayon v. Dwelling House Ins. Co.*, 32 N. W. 540, 542, 68 Wis. 510.

The word "magistrate," as used in a policy of fire insurance requiring proofs of loss to be made before a magistrate, does not necessarily imply an officer exercising any duties or functions, and might very well be held to embrace notaries and commissioners of deeds, but it is properly used to apply to justices only. *Schultz v. Merchants' Ins. Co.*, 57 Mo. 331, 336.

Police magistrate.

A magistrate is a judicial officer having a summary jurisdiction in matters of a permanent or quasi criminal nature, and is commonly used in the United States to designate two classes of judicial officers—justices of the peace and police justices. A police magistrate of a city in the state of New York is therefore a magistrate, within the meaning of Rev. St. § 5278 [U. S. Comp. St. 1901, p. 3597], providing that wherever the executive authority of any state or territory demands any person as a fugitive from the justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, etc. *Kurtz v. State*, 22 Fla. 36, 44, 1 Am. St. Rep. 173.

Laws 1899, c. 632, providing that any female convicted of a misdemeanor by a magistrate may be sentenced, etc., is general, and uses the term "magistrate" in its general sense, and is not applicable to the New York City magistrates, who have no jurisdiction of misdemeanors. *People v. State Reformatory*, 77 N. Y. Supp. 153, 154, 38 Misc. Rep. 243.

MAGNETIC FIRE BRICK.

Magnetic brick glazed, not known in commerce as fire brick, is not within Tariff Act Aug. 27, 1894, c. 349, § 1, Schedule B, par. 77, 28 Stat. 512, imposing a duty on magnetic fire brick. *Fleming v. United States*, 124 Fed. 1014.

MAGNETIC HEALING.

Defendant was charged with practicing medicine without a license, and it appeared

that he was a magnetic healer. The court, in discussing the question as to whether it was within the authority of the Legislature to discriminate against a particular school of practitioners, said: "We are not judicially advised that 'magnetic healing,' so called, is so far based on co-ordinated, arranged and systematized knowledge that it can be termed a science, or that any considerable degree of instruction is a prerequisite to its prosecution, as it is actually practiced by those whose knowledge does not go beyond the manifestation of the phenomena of magnetism. * * * The Legislature, in judging of a matter of this kind, was authorized to give heed to the opinions of scientific men, and, judged by such authority, it appears that, while the practice of magnetic healing is based on some elements of ascertained knowledge, its prosecution is attended with danger to such a degree that the Legislature was justified in its effort to take it out of the hands of the empirics. Thus J. G. McKendrick, professor of the Institute of Medicine, University of Glasgow, in concluding his learned article on 'Animal Magnetism' in the *Encyclopædia Britannica*, says: 'It is evident that animal magnetism, or hypnotism, is a peculiar physiological condition excited by perverted action of certain parts of the cerebral nervous organs, and that it is not caused by any occult force emanating from the operator. Whilst all the phenomena cannot be accounted for, owing to the imperfect knowledge we possess of the functions of the brain and chord, enough has been stated to show that, just in proportion as our knowledge has increased has it been possible to give a rational explanation of the phenomena. It is also clear that the perverted condition of the nervous apparatus in hypnotism is of a serious character, and therefore that these experiments should not be performed by ignorant empirics for the sake of gain, or with a view of causing amusement.'" *Parks v. State*, 64 N. E. 862, 867, 159 Ind. 211.

MAGNETO TRANSMITTER.

A "battery transmitter" is one in which a battery or strong current is utilized for the transmission of speech through a telephone, as distinguished from a "magneto transmitter," in which only a feeble current is generated by induction. It requires a battery current to transmit speech a long distance. *American Bell Tel. Co. v. National Tel. Mfg. Co.* (U. S.) 119 Fed. 893, 56 C. C. A. 423.

MAIDEN.

The usual and ordinary meaning of "maiden" is not virgin. Webster's and Worcester's Unabridged Dictionaries give as the first definition of "maid" and "maiden" "an

unmarried woman." They also give "virgin" as another definition. The first full definition of the word as contained in the Century Dictionary is "a young, unmarried woman; a girl. Specifically, a girl of marriageable age, but applied usually with 'little' or some other qualifying term to a female child of any age above infancy." Richardson's English Dictionary gives these meanings of the word: "A female child; a female who has preserved her chastity; a virgin; a female servant." From these definitions by the foremost lexicographers it results that the common, ordinary meaning of the word "maiden" is a young, unmarried woman or female. The word "maiden" in an indictment for adultery only means an unmarried woman. *State v. Shedrick*, 38 Atl. 75, 69 Vt. 428.

MAIL

"Mailing," to come within the provision of Rev. St. §§ 5467-5469 [U. S. Comp. St. 901, pp. 3691, 3692], must get into the mail in some of the ordinary ways prescribed by the postal authorities, and become fairly and reasonably a part of the mail matter under the control of the postal department. *United States v. Rapp* (U. S.) 30 Fed. 818, 822.

As carriage of letters by public authority.

The word "mail" with some changes in the orthography, is found in many languages. In its original signification, it means a wallet, sack, trunk, or bag, and in connection with the post office means the carriage of letters, whether applied to the bag into which they are put, the coach or vehicle by means of which they are transported, or any other means for their carriage and delivery by public authority. The term came originally into use as referring to the valise which postillions or couriers had behind them, and in which they carried letters, at an early period, when that was the mode in which letters were carried and delivered; and after the establishment of post offices, post routes, and post coaches, it became, as it is now, a general word to express the carriage and delivery of letters by public authority. *Wynen v. Schappert* (N. Y.) 6 Daly, 558, 560.

Under a statute providing that notice of protest of a note for nonpayment may be sent by mail, the mail referred to is the regular legalized mail of the government of the United States. No other mails, as applicable to the states of the Union, were known, none other then could have been intended. The intention of the law makes the law. The Confederate mails or mails of the rebel organization were merely mails so called. The attempt to send a notice by such a mode of conveyance is not sufficient under the statute, unless it appears that it was

actually carried. *Todd v. Neal's Adm'r*, 49 Ala. 268, 274.

As mail matter.

"Mail," as used in Post Office Act March 3, 1825 (4 Stat. 108) § 22, providing for the punishment of any person who steals the mail, or steals out of any mail any letter or packet, has, in general acceptance, both a generic and specific sense. It is employed as embracing the whole body of mailable matter transmitted from office to office, and also the particular packets addressed from and received at different post offices. *United States v. Marsellis* (U. S.) 26 Fed. Cas. 1167.

"Mail," as used in Rev. St. § 5469 [U. S. Comp. St. 1901, p. 3692], relative to robbing the "mail," may mean either the whole body of matter transported by the postal agents, or any letter or package forming a component part of it. *United States v. Inabnet* (U. S.) 41 Fed. 130, 131.

As receptacle for letters.

"A mail is a portable receptacle in which letters or packets of written or printed sheets are conveyed by post to an appointed station." *United States v. Kochersperger* (U. S.) 26 Fed. Cas. 803.

The term "mail" means a bag, valise, or portmanteau used in the conveyance of letters, papers, and packages by any person acting under the authority of the postmaster general from one post office to another. Each bag so used is a "mail," of which there may be several in the same vehicle, as the "way mail," the "general mail," the "letter mail," or the "newspaper mail." *United States v. Wilson* (U. S.) 28 Fed. Cas. 699, 711.

MAIL CARRIER.

See "Carrier of the Mail."

MAIL COACH.

"Johnson defines a mail coach as a coach that carries the mail, so that a mail coach is subject to payment of toll where toll is chargeable against coaches." *Cincinnati, L. & S. Turnpike Co. v. Neil*, 9 Ohio (9 Ham.) 11, 18.

The term "mail coach" in the toll clause in the charter of a turnpike company providing that for each passage over the company's road of a coach, chariot, or phaeton there shall be paid a toll of 33 cents, but that a "mail coach" may pass for only 6 cents, includes a coach which actually carries the public mail over the road under temporary arrangement fairly made with the Post Office Department, through a deputy postmaster, for the public convenience, and not for the mere purpose of evading the higher rate of toll. *Rhode Island & C. Turnpike Soc. v. Harris*, 6 R. I. 224, 230.

MAIL CRANE.

In an action for personal injury the court stated that a "mail crane" is an upright post planted close to the railroad track, with an arm, which, when not in use, hangs by the side of the post, but when in use is extended horizontally towards the track, and from which a suspended mail sack may be taken while the train is in motion by means of an iron hook or "mail catcher" attached to the door of the car, and operated by a mail clerk. *International & G. N. R. Co. v. Stephenson*, 54 S. W. 1086, 1087, 22 Tex. Civ. App. 220; *Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 272, 275.

MAIL MATTER.

The term "mail matter" in modern statutes in reference to the mails is a term which has grown in modern legislation to be a substitute for the old-fashioned phrase "letters and packets," and is a generic term, which includes all matters which may be transmitted in the mails. *United States v. Huggett* (U. S.) 40 Fed. 636, 641.

After the voluntary termination of the custody of a letter by the post office or its agents, it ceases to be "mail matter," and becomes the personal property of the addressee, and is under the guardianship of the local law of the jurisdiction in which the addressee lives, and is no longer subject to the laws of the United States. *United States v. Parsons* (U. S.) 27 Fed. Cas. 451.

A letter or packet, to become part of the mail matter, within Rev. St. §§ 5467, 5469 [U. S. Comp. St. 1901, pp. 3691, 3692], punishing the stealing of such matter, must get into the mail in some of the ordinary ways provided by the postal authority; and a decoy packet placed in a receptacle for apparently worthless or unmailable matter is not within the meaning of the term. *United States v. Rapp*, 30 Fed. 818, 820.

MAILABLE MATTER.

See "Nonmailable Matter."

An order for goods, folded and directed as a letter, is "mailable matter," within the meaning of Act Cong. March 3, 1825, § 10, prohibiting any stage coach, railroad car, steamboat, or other vehicle or vessel, or any of the owners, managers, servants, or crews of either, which regularly performs trips on a post route on which the mail is carried, from transporting letters, packages, or other "mailable matter," except such as may have relation to some part of the cargo or to some article at the same time conveyed in a stage or other vehicle. *United States v. Bromley*, 53 U. S. (12 How.) 88, 95, 13 L. Ed. 905.

MAILED.

A letter is "mailed," within the meaning of the law relating to the giving notice of dishonor of commercial paper, when it is dropped in a street letter box as well as when it is deposited in the post office. *Casco Nat. Bank v. Shaw*, 10 Atl. 67, 79 Me. 376, 1 Am. St. Rep. 319.

Prepayment of postage.

"Mailed," as applied to a letter, means that the letter was properly prepared for transmission by the service of the postal department, and that it was put in the custody of the officer charged with forwarding the mail, and a notary's certificate of protest "that he personally mailed" notices in the post office on a certain date is not objectionable in not stating that the postage was prepaid, as such would be implied. *Pier v. Heinrichshoffen*, 67 Mo. 163, 169, 29 Am. Rep. 501 (cited in *Rolla State Bank v. Pezoldt*, 69 S. W. 51, 53, 95 Mo. App. 404).

The word "mailed" is usually employed to designate the placing of letters or parcels in a post office to be delivered under the public authority, the delivery of which is prohibited unless the postage thereon is prepaid. When the word "mailed" appears as a note or memorandum in the official register of a deceased notary, it is consistent with reason and the actual meaning of the term to presume that it described what that act in its common and ordinary performance calls for. *National Butchers' & Drovers' Bank v. De Groot*, 43 N. Y. Super. Ct. (11 Jones & S.) 341, 344.

MAIM.

"Maim," as used in Code, § 2678, making it criminal to kill, maim, or disfigure any horse, cattle, etc., implies some permanent injury. *State v. Harris*, 11 Iowa, 414, 415.

7 & 8 Geo. 4, c. 30, § 16, inflicting a penalty for the wounding or "maiming" of an animal, means the infliction of a permanent injury. *Regina v. Jeans*, 1 Car. & K. 539, 540.

"To maim is to willfully and maliciously cut off or otherwise deprive a person of a hand, arm, finger, toe, foot, leg, nose, or ear, to put out an eye, or in any way to deprive the person of any other member of his body. Pen. Code, art. 509. It is maiming, under such statute, to knock out a front tooth, as it is a member of the body within the meaning of the statute." *High v. State*, 10 S. W. 238, 241, 26 Tex. App. 545, 8 Am. St. Rep. 488.

Under the statute of Arkansas, defining "maiming" to be unlawfully disabling a human being by depriving him of the use of a limb, or member, or rendering him lame, or defective in bodily vigor, it is implied

that the act, being unlawful in itself, evidences a malicious intent; and it is immaterial by what means or with what instrument the injury is effected, or whether the party is deprived of the use of a limb or member, or rendered permanently lame, or whether his bodily vigor is merely affected by his strength, activity, or the like being decreased. *Baker v. State*, 4 Ark. (4 Pike) 56.

Cripple synonymous.

Pasch. dig. art. 2345, provides that if any person shall willfully maim any dumb animal enumerated in the preceding article he shall be fined, etc. It was held that the word "maim" was there used in the sense of "to cripple"; the court saying: "If we were to go to the common law for the meaning of the word 'maim,' or 'mayhem,' as sometimes written, we would find it difficult to apply it to dumb animals, it being generally applied to rational beings, as men; but the language of the Code, except when a word, term, or phrase is specially defined, is to be taken and construed in the sense in which it is understood in common language. The word 'maim,' as a transitive verb, is defined by Webster, 'to deprive of a necessary part, to cripple, to disable,' 'the privation of any necessary part, a crippling;' and hence the word 'maim,' as applied to dumb animals, is synonymous, or very nearly so, with the word 'cripple.'" *Turman v. State*, 4 Tex. App. 586, 588.

Mayhem synonymous.

The word "maim" is defined to be the privation of the use of a limb or member of the body, by which one is rendered unable to defend himself or to annoy his adversary. The words "maim" and "mayhem" are at common law equivalent words, and mean the same thing. *State v. Johnson*, 51 N. E. 40, 58 Ohio St. 417, 65 Am. St. Rep. 769.

Mayhem, at common law, is defined by Blackstone as the violently depriving another of the use of such of his members as may render him less able in fighting either to defend himself or to annoy his adversary. 4 Bl. Comm. 204. The first general comprehensive statute on the subject in England was the statute of Charles II, which enacted that "any person who should on purpose and with malice aforethought, unlawfully cut out or disable the tongue, put out the eye, slit the nose or lip, or cut off or disable any limb or member, or disfigure him in any of the manners with intent to maim or disfigure him, shall be guilty of felony." Since this statute the crime of mayhem includes those injuries only which are therein enumerated. 2 Rev. St. § 36, was intended as a statutory definition of the crime. Under that definition a blow aimed and delivered upon the head cannot constitute the crime of assault

and battery with intent to maim. *Foster v. People*, 50 N. Y. 598, 604.

In a statute declaring that if any person with malice aforethought, and with an intention to maim and disfigure, shall unlawfully cut off an ear of another, he shall be punished, etc., the word "maim" is used in the popular sense of "mutilated," and not as synonymous with the technical word "mayhem." *Commonwealth v. Newell*, 7 Mass. 245, 249.

MAIN.

The chief or principal part, the main or most important thing. *Webst. Dict.*

MAIN BRANCH.

The "main branch" of a river is not necessarily that in whose channel water may be found at all seasons of the year at a point farthest removed from its mouth. The largest volume of water is one indication of the main stream. The length of the stream is another. It is obvious that two branches may pursue such a course that the source of the longest may be nearer the mouth of the river than that of the shortest. When France ceded to Great Britain all her pretensions to the country lying east of the Mississippi "from its course to the river Iberville," no man could have been so extravagant as to assert that the source of the Mississippi was to be looked for through all its branches, and fixed at that point in the channel of either in which water might be found farthest removed from the mouth of the river. Where one branch of a small stream has by consent retained the name of the main river in exclusion of others, that branch must be considered, in the absence of other circumstances, as the true boundary intended by the parties in a deed which calls for the stream by its name. *Reynolds v. McArthur*, 27 U. S. (2 Pet.) 417, 440, 7 L. Ed. 470.

MAIN CHANNEL.

It is difficult to define the "main channel" of a river with precision, but it is sufficient to say that it is that bed of a river over which the principal volume of water flows. The words "main channel" do not mean the habitual course of navigation, though they may be employed in that sense by pilots or other boatmen. *Saint Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co.* (U. S.) 31 Fed. 755, 757.

Act Cong. June 6, 1836, designating the eastern boundary of Arkansas as the middle of the "main channel" of the Mississippi river, is to be construed as meaning "the point or line along the river bed equidistant from the permanent and defined banks of the

ascertained channel on either side." It does not mean the line of deepest water sought by boatmen, which is the meaning attached to the word by boatmen. *Cessill v. State*, 40 Ark. 501, 504.

"Main channel," as used in Act Cong. March 3, 1845, admitting Iowa into the Union, and also in the Iowa Constitution, in both of which the eastern boundary of the state of Iowa is declared to be the "middle of the main channel" of the Mississippi river, means middle of the principal channel of the river from bank to bank, and does not refer to the middle of the main navigable channel. *Dunleith & D. Bridge Co. v. Dubuque County*, 8 N. W. 443, 446, 55 Iowa, 553.

MAIN SEA.

The common-law definition of the "main sea" was that part of the sea lying outside of the fauces terræ or points on the opposite shore sufficiently near to enable persons standing on one shore to distinctly see and discern with the naked eye what is doing on the opposite shore. The water within the fauces terræ, although properly called the sea, or an arm of the sea, is not the main sea within the common-law definition. *People v. Board of Sup'rs of Richmond County*, 73 N. Y. 393, 396 (citing *Fitz. Abridg. Corone*, 399; 8 Edw. 2; *De Jure Maris*. Harg. Tracts, c. 4, p. 10; 2 East, P. C. c. 17, § 10, p. 804; *United States v. Grush* [U. S.] 26 Fed. Cas. 48); *United States v. Rodgers*, 14 Sup. Ct. 109, 111, 150 U. S. 249, 37 L. Ed. 1071; *United States v. Grush* (U. S.) 26 Fed. Cas. 48, 51; *People v. Ostego County Sup'rs*, 51 N. Y. 401, 406; *Baker v. Hoag*, 7 N. Y. (3 Seld.) 555, 561, 59 Am. Dec. 431.

The term "main sea" is used to designate that part of the sea which lies not within the body of a country. It is also known as the "ocean," and is distinguished from the "sea," which has been said to include arms or branches of the sea which lie within the fauces terræ, or at least may be within the body of a county. *De Lovio v. Bolt* (U. S.) 7 Fed. Cas. 418, 423.

The channel of a navigable river cannot be regarded as the main sea, so as to render property sunk there a wreck. *Baker v. Hoag* (N. Y.) 7 Barb. 113.

MAIN STEM.

The words "main stem," as used in a statute relating to taxation of railroads, etc., is expressly defined to include the roadbed, not exceeding one hundred feet in width, with its rails, sleepers, and depot buildings used for passengers, connected therewith. *State Board of Assessors v. Central R. Co.*, 4 Atl. 578, 609, 48 N. J. Law, 146.

MAINPRISE.

"Mainprise" was the taking or receiving of a person into friendly custody, who otherwise might be committed to prison upon security that he should be forthcoming. In *re Wolfe*, 3 N. Y. Leg. Obs. 383, 385.

MAINTAIN.

Webster's International Dictionary defines "maintain" to mean to hold or keep in any particular state or condition; to support; to sustain; to uphold; to keep up; to keep possession of; not to surrender; to continue; not to suffer to cease or fail; to bear the expense of. *Lucas v. St. Louis & S. Ry. Co.*, 73 S. W. 589, 591, 174 Mo. 270, 61 L. R. A. 452; *Breen v. City of Troy* (N. Y.) 41 How. Prac. 475, 479.

In a prosecution under the statute providing that "any free person who, by speaking or writing, shall maintain that owners have not right of property in their slaves, shall be punishable," etc., it is incumbent on the commonwealth to show in the alleged speaking that the defendant denied the right of owners to property in their slaves, and also to show that that denial was maintained by him, which would seem to imply the consideration of an effort made by adducing facts, or proofs, or arguments to verify that denial. *Bacon v. Commonwealth* (Va.) 7 Grat. 602, 608.

Under Rev. St. § 4947, requiring a county to pay a sheriff his expenses for maintaining persons confined in the county jail, the sheriff is entitled only to the actual expenses which he incurs in maintaining prisoners, including the cost of the materials used for food and for preparing and serving same, but without allowance for his individual services or for profits. *Doty v. Sauk County*, 67 N. W. 10, 11, 93 Wis. 102.

The term "maintaining highways" in a municipal charter providing that the common council may in each year cause a sum sufficient to pay all the ordinary and necessary expenses of maintaining the city government, including the "maintaining" of the highways of said city, to be raised by taxation, does not include the expense of establishing a grade of an avenue. Webster's Dictionary, which has become, in effect, a law book on questions of construction, defines the word "maintain" as follows: "To hold, preserve, or keep in any particular state or condition; to sustain; not to suffer to fail or decline." *Brenn v. City of Troy* (N. Y.) 60 Barb. 417, 421.

"Maintaining and sustaining" a railroad means keeping it in repair, supplying it with machinery, and such like acts; and thus a grant of a power to a corporation of "maintaining and sustaining" a railroad does not

apply to projects for maintaining its business by schemes and enterprises not contemplated and expressed in clear unambiguous terms by the charter itself. A power of maintaining and sustaining a railroad is included within a corporation grant of the power of laying, building, and making the road. *Central R. Co. v. Collins*, 40 Ga. 582, 624.

As bear the expense of.

Maintain means to bear the expense of, to support, keep up. Citing *Judson v. Blanchard*, 4 Conn. 566; *Rhodes v. Munney*, 48 Ind. 216, 217; and hence the provision in Const. art. 10, § 6, providing that in cities of the first and second class the public school system shall be maintained and controlled by the board of education apart and separate from the counties in which said cities are located, gives the board of education authority to bear the expense of such system. *Merrill v. Spencer*, 48 Pac. 1096, 1097, 14 Utah, 273.

As clean.

"Maintain," as used in an ordinance providing that a railroad company shall, at its own expense, furnish, construct, and maintain all necessary conduits and syphons for carrying water through its culverts, etc., does not impose upon it the keeping of the syphons clean and in a sanitary condition, since to maintain is to keep in repair or replace, and a failure to keep them clean in no way impairs their use or impedes the flow of water. *City of Denver v. Denver City Cable Ry. Co.*, 45 Pac. 439, 440, 22 Colo. 565.

As closing gate or fence.

Within a statute requiring railroads to maintain gates at private crossings, such gates are maintained when kept in a reasonably good condition and repair, and the railroad company is not required to keep them closed. *Swanson v. Chicago, M. & St. P. Ry. Co.*, 81 N. W. 670, 671, 79 Minn. 398, 49 L. R. A. 625.

The word "maintained" in Gen. St. c. 148, § 1, providing that the proprietors of every railroad shall erect and maintain a sufficient fence, etc., "clearly means keep in repair, or keep in the same condition. They are to erect a sufficient fence, and keep it sufficient. They are to make gates, crossings, and other facilities for the owner, and keep them in proper condition for use; but are not liable for killing stock getting into the right of way through gates or bars left open by the adjoining landowner or his servants." *Hook v. Worcester & N. R. R. Co.*, 58 N. H. 251, 252.

As commence an action.

In Comp. St. p. 610, providing that when the death of one is caused by the wrongful

act or omission of another the personal representatives of the former may maintain an action against the latter if the former might have maintained an action, had he lived, for an injury caused by the same act or omission, "maintain" means commence, institute, or begin an action. The word "maintain" is used as synonymous with the existence of a cause of action. In its ordinary and general use the word "maintain" means to hold, preserve, or keep in any particular state or condition; to support; to sustain; not to suffer to fall or decline. *Boutiller v. The Milwaukee*, 8 Minn. 97, 101 (Gil. 72, 76).

Within the meaning of Civ. Code, § 2468, providing that persons transacting business under a designation not showing the names of the persons interested as partners therein shall not "maintain" any action on contracts made in their partnership name until they have filed the certificate prescribed by section 2468, or made publication of it four weeks, the commencement of an action is a part of the maintaining of it, and such action cannot be commenced until the certificate has been so filed and published. *Byers v. Bourret*, 28 Pac. 61, 64 Cal. 73.

The use of the word "maintain" in a statute (Rev. St. 1875, tit. 19, pt. 15, § 1) providing that replevin may be maintained to recover any goods or chattels wrongfully detained, etc., does not make the act retroactive, although a critical analysis of the word "maintained" would disclose the idea of continuing a life already commenced. *Smith v. Lyon*, 44 Conn. 175, 179.

Under an act providing that no action shall hereafter be maintained against any city for injury by reason of a defective highway or bridge, etc., it is held that the word "maintain" means "brought," and does not apply to actions instituted prior to the passage of the act. *Burbank v. Inhabitants of Auburn*, 31 Me. 590, 591.

"Men both in and out of the profession of law often speak of maintaining an action, having reference to one yet to be instituted." *Pardoe, J., in Smith v. Lyon*, 44 Conn. 175, 178. And it is in this sense that the term is used in the statute providing that no action for personal injuries shall be maintained against any railroad company unless written notice of the claim shall have been given to defendant within four months after the alleged negligence. *Gumpper v. Waterbury Traction Co.*, 36 Atl. 806, 68 Conn. 424.

"Maintain," as used in 95 Ohio Laws, 357, § 6, providing that the partnership should not maintain an action upon any contract made with it in their partnership name until having first filed the certificate and made the publication required in the statute, applies to the institution of an action as well as to its continuance; and hence the right to

oring an action is prohibited unless the certificate has been filed and the publication thereof has been completed. *Kinsey & Co. v. Ohio Southern R. Co.*, 8 O. C. D. 249, 250.

"Maintain," as used in 91 Ohio Laws, 357, § 6, providing that any person doing business contrary to the provisions of the act should not maintain an action on or on account of any contract made, or transaction had in their partnership name until they have first filed the certificate and made the publication therein required, is synonymous with "begin" or "commence," and is not used in the sense only to carry forward. The word means to begin and prosecute the action to final judgment. Hence an action may not be commenced, notwithstanding the non-compliance with the conditions prescribed, but not pursued to final judgment until such conditions are fulfilled. *New Carlisle Bank v. Brown*, 5 O. C. D. 94, 95

As continue an action.

"Maintain," as used in a pleading means to support what has already been brought into existence, so that to maintain an action is not the same as to commence an action (*Moon v. Durden*, 2 Exch. 30); and is so used in St. 1875, 1876, p. 729, providing that a banking corporation shall not maintain or prosecute any action until it complies with the terms of such act. *California Sav. & Loan Soc. v. Harris*, 43 Pac. 525, 526, 111 Cal. 133.

The word "maintain" signifies literally "to hold by the hand"; hence, in ordinary use, "to uphold; to sustain; to keep up"; while in pleading it is defined to mean "to support what has already been brought into existence"; so that where a foreign corporation began an action before it was authorized it could maintain the same action after a subsequent authorization. *Carson-Rand Co. v. Stern*, 31 S. W. 772, 773, 129 Mo. 381, 32 L. R. A. 420 (quoting *Anderson's Law Dict.*).

"Maintain," in pleading, has a distinct technical signification. It signifies to support what has already been brought into existence. Thus a defendant who admits the right of plaintiff to bring, or to bring and up to the last pleading maintain, his action, but relies on matter disabling him from further proceeding, insists that plaintiff ought not by reason of such matter further to maintain his action. A plea in bar of the further maintenance of the action admits the plaintiff to have properly maintained it up to the time of the plea. *Moon v. Durden*, 2 Welsb., H. & G. 22, 30.

As having control and custody of place.

In St. 1876, No. 33, prohibiting the "keeping and maintaining" of a public resort for the unlawful sale of liquor, the words "keep-

ing and maintaining" are applicable to persons who are co-operating in the process of instituting and administering the establishment, whatever may be the peculiar relation they sustain to it and to each other in rendering such co-operation. *State v. Cox*, 52 Vt. 471, 474.

Within Rev. St. tit. 6, § 89, which provides that every justice of the peace may, on the complaint of an informing officer, require sureties of the peace and good behavior from any person who shall be guilty of frequenting, "keeping, or maintaining" houses reputed to be houses of bawdy and ill fame, the phrase "keeping and maintaining" implies much more than to live in such a house, as to keep a hotel implies more than to live in one. The controlling head of the hotel keeps it, while the individuals who take their meals and lodge in such hotel and have no other domicile live therein. So the controlling head of a house of ill fame or a house reputed to be a house of ill fame keeps such house. *State v. Main*, 31 Conn. 572, 574.

"Maintaining a boarding house for infants," as used in Act 1892, c. 318, § 7, requiring a license for the privilege of "maintaining a boarding house for infants," is constituted by a person having in his control and custody at one time more than one infant under the age of two years. *Commonwealth v. Johnson*, 39 N. E. 349, 162 Mass. 596.

Gen. St. c. 87, § 7, which declares that "whoever keeps or maintains" a common nuisance, shall be liable to punishment, etc., applies either to one who controls the occupation and procures or permits the illegal use, or to one who engages in the illegal use, and thus maintains or aids in maintaining the public nuisance. Hence a clerk or servant who was employed to run a place for the selling of liquors is liable under this section on an indictment for keeping a liquor nuisance. *Commonwealth v. Kimball*, 105 Mass. 465, 467.

As cultivation.

A contract requiring the defendant to "cultivate and maintain" a hedge in a skillful manner until the same shall be sufficient to turn ordinary stock means maintenance in the nature of cultivation, as plowing, hoeing, trimming, plashing, replanting, etc., and does not mean the building and maintaining of fences on both sides of the hedge to protect it from the casual depredation of roaming cattle. *Usher v. Hlatt*, 21 Kan. 548, 550.

As referring to future action.

"Maintained," as used in St. 1875, c. 217, authorizing a certain city to take water from a pond, provided that a dam shall be built where it flows into a certain river sufficient in height to retain sufficient water for one

year's supply for the city, and that the natural flow of the pond into such river was at all times to be "maintained," refers to a direct provision, and to future action to produce the desired result, as distinguished from noninterference with an existing condition. *Nemasket Mills v. City of Taunton*, 44 N. E. 609, 166 Mass. 540.

As hold; not regulate.

"Maintain," as used in a charter of a city authorizing it to set up, establish, keep, and maintain ferries, is derived from "maintenir"—to hold in or by the hand—and signifies to hold, preserve, or keep in any particular state or condition; not to lose or surrender; to continue. The words "keep and maintain" cannot be construed to stand consistent with the idea of a mere public authority to pass ordinances in relation to the number and location and management of ferries. *Benson v. City of New York* (N. Y.) 10 Barb. 223, 235.

As improve.

In Act June 24, 1895, authorizing the organization of park districts, and providing (section 1) that no portion of such park district should be already included in a park district or in a township whose corporate authorities are authorized by law to levy special taxes or special assessments to maintain a public park, "maintain" should be construed in the sense of "improve"; that is, the making of local improvements by special taxation or special assessments for park purposes, since to give the word "maintain" its strict meaning would render that clause of the statute meaningless, there being at the time the act was passed no law in the state authorizing the corporate authorities of townships to levy special taxes or special assessments to maintain public parks. *People v. Ennis*, 59 N. E. 236, 237, 188 Ill. 530.

As keep in repair.

Const. art. 4, § 31, provided that the Legislature may pass laws providing for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and to maintain levees, drains, and ditches, and to "keep in repair" all drains, ditches, and levees constructed under the laws of this state. It was held that the term "maintain" should be construed to be synonymous with the expression "keep in repair," the use of the words being merely a change of diction, and not of meaning. *McChesney v. Village of Hyde Park*, 37 N. E. 858, 862, 151 Ill. 634.

A deed containing a covenant requiring a certain passageway to be left open and "maintained" by the abutters in common should be construed to mean maintained in good order for use. *Attorney General v. Wil-*

liams, 2 N. E. 80, 83, 140 Mass. 329, 54 Am. Rep. 468.

The word "maintain" does not mean to provide or construct, but means to keep up; to keep from change; to preserve (*Worcester's Dict.*); to hold or keep in any particular state or condition; to keep up (*Webst. Dict.*). In *Moon v. Durden*, 2 Exch. 21, it was said: "The verb 'to maintain' signifies to support what is already brought into existence." "To repair" means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction. *Louisville, N. A. & C. Ry. Co. v. Godman*, 4 N. E. 163, 164, 104 Ind. 490. It will thus be seen that "maintenance" and "repair," when applied to a street, practically mean one and the same thing. *Barber Asphalt Pav. Co. v. Hezel*, 56 S. W. 449, 451, 155 Mo. 391, 48 L. R. A. 285; *Verdin v. City of St. Louis*, 33 S. W. 480, 494, 131 Mo. 26.

An averment that a railroad failed to maintain certain stockyards is only an averment that they were out of repair. *Louisville, N. A. & C. Ry. Co. v. Godman*, 4 N. E. 163, 164, 104 Ind. 490.

As operation.

A statute conferring upon municipalities the power to authorize a street railway company to "construct, maintain, and operate" its line in the streets of the municipality merely means the right to operate the line upon the location of its tracks in the street, which right the location of the tracks carried with it by common occupation. *Currie v. Atlantic City*, 48 Atl. 615, 617, 68 N. J. Law. 140.

Permanence.

In an instruction in an action for injuries caused by falling on an icy sidewalk due to water from a defective pipe on defendant's premises, that, to entitle plaintiff to recover, there must have been a nuisance on the walk due to defendant's neglect; that defendant was bound to construct and maintain the pipe so as not to conduct the water onto the sidewalk and maintain a nuisance—the word "maintain" conveys the notion of such continuance of conditions and mode of working as all would agree that defendant would be bound to know. *Davis v. Rich*, 62 N. E. 375, 376, 180 Mass. 235.

The proprietor of a building cannot be said to "keep or maintain" a common nuisance, within the meaning of Pub. St. c. 101, § 6, making a building used for the sale of intoxicating liquors a nuisance, on the strength of a single casual sale, made without premeditation in the course of a lawful business. The words "keep or maintain" import a certain degree of permanence. *Commonwealth v. Patterson*, 138 Mass. 498, 500.

As rebuild or reconstruct.

In Sess. Laws 1895, p. 421, § 26, providing that an annual tax shall be provided to maintain and keep in good condition and repair certain bridges and ferries, the word "maintain" is not broad enough to require a county to rebuild or reconstruct such bridges and ferries which have been destroyed or fallen into decay. *Kadderly v. Multnomah County Court*, 52 Pac. 515, 516, 82 Or. 580.

"Maintained," as used in 1 Gav. & H. Rev. St. pt. 1, p. 343, c. 62, § 15, providing that partition fences shall be maintained throughout the year equally by both parties, may properly be construed to require a fence to be rebuilt as well as repaired. *Rhodes v. Mummery*, 48 Ind. 216, 218.

The word "maintain" being equivalent to "repair" in connection with streets, the maintenance and reconstruction of a street are separate and distinct things. *Verdin v. City of St. Louis (Mo.)* 27 S. W. 447, 451.

Power to remove or sell.

A reservation to the grantor in a deed of the right to keep and maintain a dam cannot be construed to give him a right to remove such dam. *Shelby v. Chicago & E. I. R. Co.*, 32 N. E. 438, 143 Ill. 385.

The word "maintain" in a city charter authorizing a city to construct and maintain waterworks for protection against fires and for furnishing the inhabitants thereof with a supply of pure water for domestic purposes, requires the municipality to maintain the waterworks for public use, and does not authorize it to sell the works. *Huron Waterworks Co. v. City of Huron*, 62 N. W. 975, 977, 7 S. D. 9, 30 L. R. A. 848, 58 Am. St. Rep. 817.

As support.

"Maintain" means to bear the expense of; to support; to keep up; to supply with what is needed. *Alexander v. Parker*, 83 N. E. 183, 184, 144 Ill. 355, 19 L. R. A. 187 (citing *Webst. Dict.*).

MAINTAINABLE.

"Maintainable" is defined by Webster as capable of being maintained, sustainable. Worcester defines it that may be maintained, tenable, that may be supported by argument. As used within Bankr. Act March 2, 1869, declaring that no suit shall be maintainable by or against an assignee in bankruptcy after two years from the time when the cause of action accrued, the words "not maintainable" are employed *ex industria*, intending to preclude all doubt that might attend an implied construction by inhibiting in express and explicit terms any suit after the prescribed period. This is the special function of the terms "not maintainable." They go beyond

the parties, and reach the very jurisdiction of the court, defining it as to subject-matter. *McLaughlin v. Upton*, 2 Wyo. 82, 45.

MAINTENANCE.

A will bequeathing a "home and maintenance" to a daughter during the time she remains unmarried, the section of the will following such request providing that the remainder of the testator's property, both real and personal, of which he might die possessed, after the payment of debts and legacies and the decease of his wife, shall go to certain other children, means a home and maintenance on the premises where testator lived at the time of his death. *Parker v. Parker*, 126 Mass. 433, 436.

Build or construct distinguished.

"Maintenance," as used in an act incorporating a railroad company, providing that it should be lawful for the company to enter upon and take possession of and use all lands and real estate which might be indispensable for the construction and maintenance of the railroad, has reference to the powers to be exercised after the completion. This is the natural force of the expression. To build or construct a railroad is one thing, to maintain the structure after it is erected or built is another. *Moorhead v. Little Miami R. Co.*, 17 Ohio, 340, 353.

Creation of road system.

"Maintenance," as used in Const. art. 8, § 9, providing that the Legislature may pass local laws for the maintenance of public roads, is not limited in its meaning to the repair and reconstruction of roads already constructed, but has reference to maintaining a system of public roads and highways, and would authorize the passage of a statute creating a road system, or of any laws necessary to provide and keep up a system of highways. *Smith v. Grayson County*, 44 S. W. 921, 923, 18 Tex. Civ. App. 153.

Establishment of highway.

The use of the word "maintenance" in Const. art. 8, § 9, authorizing the Legislature to pass local laws for the maintenance of public roads and highways, does not limit the Legislature to such laws only for the purpose of maintaining existing law, but had reference to maintaining a system of public roads and highways, which would include all the necessary powers to provide and keep up such a system. The term includes the establishment of a highway. *Smith v. Grayson County*, 44 S. W. 921, 923, 18 Tex. Civ. App. 153.

As repairs.

"Maintenance," as used in a paving ordinance and contract requiring the contractor to pay the cost of "maintenance" of the

streets paved, has not the same meaning as "repairs," so as to conflict with a provision of the charter requiring the work of repairing the streets to be let to the lowest bidder; but the provision requiring maintenance of the streets is imposed as a mere guaranty of the perfection of the work when completed and the duty to preserve from decay and ordinary use, while the work of repairs mentioned by the charter is a restoration of a street already defective from use and decay. *Seaboard Nat. Bank v. Woesten*, 48 S. W. 939, 944, 147 Mo. 467, 48 L. R. A. 279.

The "maintenance" of a street within the meaning of an ordinance providing for the reconstruction and maintenance of a street for a period of years under one contract practically has the same meaning as the word "repair," and therefore an ordinance in requiring adjoining owners to pay for the construction and maintenance of a street is in violation of St. Louis Charter, art. 6, § 18, providing that the repairs of all streets shall be paid by the city. The word "maintain" does not mean to provide or construct, but means to keep up, to keep from change, to preserve (*Worcester Dict.*); to hold or keep in any particular state or condition, to keep up (*Webster Dict.*). In *Boon v. Dunden*, 2 Exch. 21, it was said the verb "to maintain" signified to support what has already been brought into existence. "To repair" means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction. *Barber Asphalt Pav. Co. v. Hezel*, 56 S. W. 449, 451, 155 Mo. 391, 48 L. R. A. 285.

MAINTENANCE (Of Persons).

See "Separate Maintenance"; "Sutable Maintenance."

In the statute relating to bastardy, and providing that the father should be liable for the maintenance of the child, maintenance includes the expenses of lying-in or child-bed expenses, such as board, wages, and other charges attendant on nursing the child, and necessary expenditures at the birth of the child, and even after the birth which do not extend beyond the period of sickness consequently resulting from the act of parturition. *Judson v. Blanchard*, 4 Conn. 557, 566; *Comstock v. Weed*, 2 Conn. 155, 159.

Within the meaning of a statute giving the court jurisdiction to charge a man with the maintenance of his illegitimate child, the term "maintenance" includes the reasonable cost of supporting the child and the necessary expenses incident to its birth and burial; but does not include the value of services rendered by an attorney for the mother in the bastardy proceedings. *Harshman v. Ingwersen*, 71 N. W. 980, 981, 52 Neb. 116.

The maintenance which the father of a bastard child must furnish does not include the lying-in expenses of the mother. *Commonwealth v. Cole*, 5 Mass. 517, 519.

The term "maintenance," as used in Gen. St. c. 17, § 6, relating to bastardy proceedings, must be held to include necessary lying-in expenses. *State v. Zeitler*, 28 N. W. 501, 502, 35 Minn. 238.

The term "maintenance" in a statute authorizing the institution of bastardy proceedings is broad enough to include the necessary expenses incident to the birth of the child, such as the employment of a nurse, midwife, and physician, and a decent burial of the infant; and, as so construed, the action, being based on the idea of enforcing the father's liability for maintenance, does not abate by the death of the child pending the prosecution. *Hanlisky v. Kennedy*, 56 N. W. 208, 37 Neb. 618.

"Maintenance" is defined to be aid, support, or assistance; the support which one person, who is bound by law to do so, gives to another for his living. Under this definition it is held that where the child is born dead, after the institution of bastardy proceedings, but before the trial, the action abates, on the ground that no judgment for the maintenance of a dead person can be recovered. *State v. Beatty*, 16 N. W. 149, 61 Iowa, 307.

The word "maintenance" in the statute appropriating money for the maintenance of patients in an insane hospital comprehends expenses incurred for the food, clothing, and care of the inmates, and for repairs to buildings and equipments, such as are necessary to keep the institution up to its original condition; but the appropriation cannot be applied either to the purchase of additional lands, the erection of additional buildings, or the furnishing of equipments thereof. In re *Warren Insane Hospital*, 3 Pa. Dist. R. 223, 224; *Id.*, 15 Pa. Co. Ct. R. 83, 84.

Comfort synonymous.

See "Comfort."

Education.

The words "support and maintenance," as used in a will directing that the interest accruing on the residue of testator's estate after the death of his wife, or so much thereof as might be necessary, should be applied to the "support and maintenance" of his infant grandchildren during their minority, should be construed to include their proper education at a private school. *Patterson v. Read*, 9 Atl. 579, 580, 42 N. J. Eq. 621.

The word "maintenance," as used in Rev. St. c. 27, art. 19, providing that the fiscal courts should have power to make provision for the maintenance of the poor, is not lim-

ited to mere sustenance or support, such as all supplies of food, clothing, and other conveniences, but authorizes such court to appropriate money towards paying the cost of educational buildings erected by the Orphans' Society of the City of Lexington, which provides for the support and education of a portion of the poor people of that city and the county. *Orphan Soc. of Lexington v. Fayette County*, 69 Ky. (6 Bush) 413, 415.

Medical attendance.

The term "maintenance" in a statute prohibiting the probate court from allowing a guardian in any case more than the clear income of the estate for the education and maintenance of the ward without authority of an order from that court directing such expenditures to be made, includes necessary medicines and the services of a physician in sickness. *Eastland v. Williams' Estate* (Tex. Civ. App.) 45 S. W. 412, 415.

As support.

"Maintenance" means sustenance, support by means of supplies of food, clothing, and other conveniences. *Wall v. Williams*, 93 N. C. 327, 330, 53 Am. Rep. 458; *Winthrop Co. v. Clinton*, 46 Atl. 435, 437, 196 Pa. 472, 79 Am. St. Rep. 729; *Alexander v. Parker*, 33 N. E. 183, 184, 144 Ill. 355, 19 L. R. A. 187 (citing *Webst. Dict.*).

"Support and maintenance," as used in a petition to recover damages for death, which alleges that the plaintiff and children were dependent upon deceased for "support and maintenance," means food, clothing, and shelter. *Kearney Electric Light Co. v. Laughlin*, 63 N. W. 941, 943, 45 Neb. 390.

"Maintenance," as used in a contract between the council of a borough and a county that all prisoners should be confined in the jail of the county and should receive their "support and maintenance" therein at so much a head, is not fulfilled by supplying such prisoners with room, clothing, bedding and fuel, but to also include salaries of officers and expenses of repairs of the prison, and hence that the borough was not responsible for the latter charges in addition to the agreed compensation. *Regina v. Gravesend*, 5 El. & Bl. 459, 466.

The term "maintenance" in a statute authorizing the county court to make provision for the maintenance of the poor has been defined to mean sustenance or support by means of supplies of food, clothing, and other conveniences. *Per Hardin, dissenting, in Orphan Soc. of Lexington v. Fayette County*, 69 Ky. (6 Bush) 413, 421.

MAINTENANCE (Of Suits).

See "Champertry."

"Maintenance is an officious intermeddling in a suit which in no way belongs to one,

by maintaining or assisting either party, with money or otherwise, to prosecute or defend it." *Spicer v. Jarrett*, 61 Tenn. (2 Baxt.) 454, 457; *Duke v. Harper*, 2 Mo. App. 1, 4 (affirmed in 66 Mo. 51, 37 Am. Rep. 314); *Andrews v. Thayer*, 30 Wis. 228, 233; *Christie v. Sawyer*, 44 N. H. 298, 303; *Key v. Vattler*, 1 Ohio (1 Ham.) 132, 144 (citing 4 Bl. Comm. 134); *Thalhimer v. Brinckerhoff* (N. Y.) 3 Cow. 623, 625, 15 Am. Dec. 308; *Johnston v. Smith's Adm'r*, 70 Ala. 108, 118; *Vaughan v. Marable*, 64 Ala. 60, 66; *Davies v. Stowell*, 47 N. W. 370, 371, 78 Wis. 334, 10 L. R. A. 190; *Joy v. Metcalf*, 37 N. E. 671, 161 Mass. 514. The definition of "maintenance" by the Colorado statute is somewhat different, in that it requires such officious intermeddling, by assisting a litigant with money or otherwise, to be done with a view to promote litigation. *Cassereigh v. Wood* (U. S.) 119 Fed. 308, 312, 56 C. C. A. 212.

"Maintenance" signifies an unlawful taking in hand or upholding of quarrels or sides to the disturbance or hindrance of common right. *Davis v. Settle*, 26 S. E. 557, 560, 43 W. Va. 17; *Richardson v. Rowland*, 40 Conn. 565, 570; *Bayard v. McLane* (Del.) 3 Har. 139, 208; *Gowen v. Nowell*, 1 Me. (1 Greenl.) 292, 296; *Hovey v. Hobson*, 51 Me. 62, 63; *Christie v. Sawyer*, 44 N. H. 298, 303; *Barnes v. Strong*, 54 N. C. 100, 103; *Waller's Adm'r v. Marks*, 38 S. W. 894, 896, 100 Ky. 541; *Brown v. Beauchamp*, 21 Ky. (5 T. B. Mon.) 413, 415, 17 Am. Dec. 81; *Sherley v. Riggs*, 30 Tenn. (11 Humph.) 53, 56; *Wheeler v. Harrison*, 50 Atl. 523, 526, 94 Md. 147; *Cassereigh v. Wood*, 59 Pac. 1024, 1027, 14 Colo. App. 265. As where one assists another in his pretensions to certain lands, or stirs up quarrels and suits in the country in relation to matters wherein he is in no way concerned, or as where one officiously intermeddles in a suit depending in any such court which no way belongs to him, by assisting either party with money or otherwise. A contract between an heir at law of a testatrix, and certain devisees and legatees under the will, by which the first party agreed to abandon a proposed contest of the will, in consideration of which he was to be paid the amount of a bequest intended to be given to him but omitted from the will by the mistake of the draftsman, is not in violation of the law against maintenance. *Waller's Adm'r v. Marks*, 100 Ky. 541, 552, 19 Ky. Law Rep. 121, 38 S. W. 894.

At the common law, if a person officiously interfered in a suit in which he had no present or prospective interest, to assist one of the parties against the other, with money or advice, without any authority of law, he was guilty of the crime of maintenance. *McIntyre v. Thompson* (C. C.) 10 Fed. 531, 532.

"Maintenance is support given to the litigant in any legal proceeding in which the

person giving the assistance has no valuable interest, or in which he assists from any improper motive. 2 Whart. Cr. Law (8th Ed.) § 1854. In 2 Bouv. Law Dict. (14th Ed.) 90, it is defined to be a malicious, or at least officious, interference in a suit in which the offender has no interest, to wit, to assist one of the parties against the other, with money or advice, to prosecute or defend the action, without any authority at law. So Mr. Addison involves in the definition the idea of agreeing to assist in the prosecution of a lawsuit in which the party making the agreement is in no wise interested, and in which he has no just or reasonable ground of interference." *Gilman v. Jones*, 5 South. 785, 788, 87 Ala. 691, 4 L. R. A. 113 (quoting 1 Add. Cont. § 256).

"Maintenance is divided into two classes: First, rurals, or in the country, as where one assists another in his pretensions to certain lands, or stirs up quarrels and suits in the country, in relation to matters wherein he is in no way concerned. Secondly, curials, or in a court of justice, as where one officiously intermeddles in a suit depending in any such court, which no way belongs to him, by assisting either party with money, or otherwise, in the prosecution or defense of any such suit. Of this second class of maintenance there are three species: First, where one maintains another in his suit without any contract to have part of the thing in suit, which generally goes under the name of 'maintenance'; secondly, where one maintains one side, to have part of the thing in suit, which is called 'champerty'; thirdly, embracery, as where one attempts to corrupt, or influence, or instruct a jury, or in any way to incline them to be more favorable to the one side or the other, by money, letters, promises, threats, or persuasions, except only by the strength of evidence, and the arguments of counsel in open court at the trial of the cause." *Brown v. Beauchamp*, 21 Ky. (5 T. B. Mon.) 413, 415, 17 Am. Dec. 81.

Entire want of interest.

If a man have any interest in the subject of the agreement about which suit is to be brought or is depending, this is not maintenance, be the interest ever so remote. *Thalhimer v. Brinkerhoff* (N. Y.) 3 Cow. 623, 625, 15 Am. Dec. 308.

"Maintenance," strictly speaking, is the assisting another person in a lawsuit without having any privity or concern in the subject. A person is not guilty of maintenance in carrying on a suit in the name of another, or assisting in its prosecution, where he has any legal or equitable interest in the land or subject of controversy. *Wickham v. Conklin* (N. Y.) 8 Johns. 220, 228.

One who, having an interest in the subject-matter of a suit, buys up the interest

of the plaintiff pending suit, and thereafter prosecutes the suit himself, is not guilty of maintenance. *Ross v. City of Ft. Wayne* (U. S.) 64 Fed. 1006, 1007, 12 C. C. A. 627.

Maintenance, in this country, is where one stirs up quarrels or suits in relation to matters wherein he is in no way concerned. Those who have a reversion expectant on an estate tail, those who have a bare contingency of an interest in the lands in question, which possibly may never come into existence, heirs apparent, or husbands of such heirs, may maintain and give aid without being guilty of the offense. So may those who are bound to warrant the lands in dispute, and those who have an equitable interest or have a common interest, as of a way, etc., by the same title. So, where various persons who were taxed for the support of public worship by a parish of a denomination other than their own executed a bond binding each to defray his proportion of the expense of defending any suit against one of their number for the recovery of such taxes, or of the cost of any other legal mode of resisting the payment thereof, it was held that the parties were not guilty of maintenance. *Gowen v. Nowell*, 1 Me. (1 Greenl.) 292, 295.

As intentional intermeddling.

The law of maintenance is, in the modern view, confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others to bring actions or to make defenses which they have no right to make. The gist of the offense is that the intermeddling is unlawful, that it is officious, and in a suit which in no way belongs to the intermeddler. The offense rests in intention, and no intermeddling in suits is regarded as officious if the party, under an honest, though mistaken, belief that he has an interest, interferes for its protection, and not for the purpose of fomenting litigation. *Vaughan v. Marable*, 64 Ala. 60, 66.

It is evident that wrongful intention is an essential ingredient in the offense of maintenance, since a father may lawfully assist a son in his lawsuit by counsel and his money, and vice versa, and the books mention other cases in which such assistance is not maintenance. *Christie v. Sawyer*, 44 N. H. 298, 303.

The doctrine of the common law as to maintenance does not apply to persons who either have any legal interest in the suit promoted by them, or who act under the bona fide belief that they have. *McCall's Adm'r v. Capehart*, 20 Ala. 521, 526.

As a criminal offense.

"Maintenance is strictly prohibited by the common law, as having a manifest tendency to oppression by encouraging and assisting

persons to persist in suits which perhaps they would not venture to go on in upon their own bottoms. In Coke's Commentaries upon the Statute of Westminster, 2 Inst. 208, it is also said to be an offense at common law, and he cites Bracton and Fleta to support his position. And he holds it to be malum in se, for the statute was enacted against the King's officers, and they were to be punished at the pleasure of the King by his justices, because they had greater opportunity to do mischief. Russell on Criminal Law also states maintenance, of which champerty is a branch, to be an offense at common law." *Thurston v. Percival*, 18 Mass. (1 Pick.) 415, 416.

"All maintenance is strictly forbidden by the common law, from motives of public policy, as having a tendency to oppression by encouraging and assisting persons to persist in suits which they would not otherwise venture upon. For all offenses of this kind the offender is not only liable at common law to an action of maintenance at the suit of the party aggrieved, but also to be indicted as an offender against public justice. 1 Hawkins, P. C. 543. The English common law and statutes against maintenance and champerty had their origin in a very different state of society from that which prevails at the present time either in England or in this country. When this doctrine was established, lords and other large landholders were accustomed to buy up contested claims against each other, or against commoners with whom they were at variance, in order to harass and oppress those in possession. On the other hand, commoners, thinking they had title to land, would convey part of their interest to some powerful Lord, in order through his influence to secure their pretended right. The want of any sufficient written conveyances and records of land titles, and the feudal relation of villein and liege lord, afforded great facilities for the combinations and oppressions which followed this state of things. The power of the nobles became mighty in corrupting the fountains of justice, and subverting the freedom and independence of the judicial tribunals. It was to remedy these evils that the law of maintenance and champerty was introduced." *Hovey v. Hobson*, 51 Me. 62, 63. See, also, *Swett v. Poor*, 11 Mass. 549, 554.

Champerty distinguished.

The distinction between "maintenance" and "champerty" seems to be this: that, where there is no agreement to divide the thing in suit, the party intermeddling is guilty of maintenance only; but, where he stipulates to receive part of the thing in suit, he is guilty of champerty. *Quigley v. Thompson*, 53 Ind. 317, 320; *Lytle v. State*, 17 Ark. 608, 624; *Stotsenburg v. Marks*, 79 Ind. 193, 196.

Aiding criminal prosecution.

Where the principal witnesses on the part of the commonwealth contributed sums of money to employ counsel to aid in carrying on the prosecution, they are not guilty of the crime of maintenance, so as to impeach their credit. Maintenance is committed by a person who has no interest or concern in the cause therein instituted, or stirring up one man to sue another, or it may be committed by such a person in supplying money to commence and carry on a suit with which he has no concern. If, however, he should be the guardian or attorney of the plaintiff, he will be excused; or, if he be otherwise interested in the matter, he will be justified. Interest in the cause of action is sufficient to justify his interference, and, if so, it is manifest that maintenance cannot be committed by any one of a community in taking a part in commencing and carrying on a prosecution, in the name of the commonwealth, charging the defendants with a public offense, because he has an interest in bringing to justice all such as have been guilty of a public offense. Every individual of the community may be considered as a plaintiff in such cases. *Commonwealth v. Dupuy* (Pa.) 1 Brightly, N. P. 44, 45.

Aiding poor man.

It is now held to be the law that any one may lawfully give money to a poor man to enable him to carry on his suit, and that whoever is in any way of kin or of affinity to either of the parties may assist or apply to counsel to assist him, without being guilty of the offense of maintenance. *Perine v. Dunn* (N. Y.) 3 Johns. Ch. 508-519.

"The law of maintenance, as I understand it, upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions or to make defenses which they have no right to make. I do not like to give an opinion upon an abstract case, and therefore am not desirous to consider it, but if a man were to see a poor person in the street oppressed and abused and without the means of obtaining redress, and furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife, and to be guilty of the crime of maintenance. I am not prepared to say that in modern times courts of justice ought to come to that conclusion." *Findon v. Parker*, 11 Mees & W. 675, 682.

Aiding relative.

It is lawful for a brother to aid his sister in the pursuit of her legal rights, and he does not thereby become liable for the charge

of maintenance, or of officiously meddling in an affair which did not concern him. *Crowell v. Gleason*, 10 Me. (1 Fairf.) 325, 330.

Assigning interest to brother.

An assignment, in consideration of love and affection, by a sister, of her interest in her father's estate to her brother, who has commenced an action against the administrator to recover his distributive share of such estate as an heir, did not come within the denunciation of any of our statutes against champerty or maintenance. *Blackerby v. Holton*, 35 Ky. (5 Dana) 520, 522.

Buying claims for suit.

The purchase by an attorney, for a very small and inadequate consideration, of a matter in litigation, and for the very purpose of renewing the litigation, the purchase being avowedly made as a matter of speculation, and at a time when this attorney knew from previous disclosures made to him in his character of attorney all the facts on which the foundation of the claim so purchased rested, and which created a belief in his mind that the same could be recovered, cannot be sustained. It is champerty for the unlawful maintenance of a suit, and the contract was therefore unlawful, as well by common law as by statute. *Arden v. Patterson* (N. Y.) 5 Johns. Ch. 44-48.

Where plaintiff, knowing that certain lands were in the actual occupation of sundry persons who claimed to hold the same by title, and that this possession had continued for nearly 30 years, but believing that the defendants had a paramount, although dormant title, owing to some defect supposed to exist in the title of the occupants, applied to the defendants to purchase their claim and interest, they not being aware that they had any available interest, and bargained with them for a deed and for their power to commence suits for the purpose of removing the occupants, and commenced such suits, such bargain undoubtedly constituted the offense of maintenance, which is odious to the laws and may be punished on indictment. *Swett v. Poor*, 11 Mass. 549, 554.

MAJORITY.

"The general character of an accused is not what the majority of his neighbors think of him, and therefore a witness to such fact is not required to know what a majority of defendant's neighbors say or think of him, but the only test of his competency is whether he knows the general character of accused among his neighbors or those acquainted with him. The word 'majority' is usually understood in a less comprehensive sense than the word 'general,' and in case of doubtful reputation a bare majority might

be sufficient to make the reputation good, when by regular rule it would be equivocal only. On the other hand, a person's position in a community may be so obscure that a very few of his neighbors know anything of him, though his general character may be very circumscribed. To hold that he could not prove his general character except by witnesses who could swear as to what the majority of his neighbors said or thought of him would be to deprive him of the benefit of this species of testimony." *Dave v. State*, 22 Ala. 23-38.

Laws 1889, c. 174, § 1, providing that a petition for removal of county seat must be signed by not less than 60 per cent. of the whole number voting, the word "majority," used in the second clause of the section, will be construed to mean the majority required by the first clause, or 60 per cent. *Slingerland v. Norton*, 61 N. W. 322, 323, 59 Minn. 351.

Laws of 1886, c. 368, provided that the board of supervisors of the city of Lockport should be authorized "by a majority vote" to raise by a tax the amount due the city for a water main. It was held that the act was mandatory, and that the board had no discretion as to whether they would perform the duty prescribed. In reaching this conclusion it was said: "The act, being passed to enable the defendant to perform a public duty in discharge of a just claim, is upon well-settled principles entitled to such construction as will give mandatory import to the words used, and impose upon the defendant the duty to exercise the power thus given. *People v. Ostego County Sup'rs*, 51 N. Y. 401; *People v. Livingston County Sup'rs*, 68 N. Y. 114. It is contended on the part of the defendant that the words 'by a majority vote of said board,' in the act, fairly indicate and require the conclusion that it was passed merely to remove the disability, and to enable the defendant, when a majority so voted, to make the levy, and that such result was dependent upon the voluntary action of such majority. It is not entirely clear what was the purpose of the insertion of those words in the act. They are an expression of the ordinary methods of proceedings and of producing results of the actions of such bodies. By emphasizing the use of those words in the act, and applying to them their literal import, there might be some difficulty in supporting the position of the relator. But the considerations bearing upon the purpose of the statute, indicated by its title and general provisions, as well as the circumstances leading to its passage, of which the Legislature are presumed to have been fully advised, are such as to require for it the construction which renders its terms mandatory." *People v. Niagara County Sup'rs*, 1 N. Y. Supp. 460, 462, 49 Hun, 32.

As majority of entire body.

In construing a party rule giving the executive committee of the party the power to fill vacancies on the county ticket by a majority vote of all the executive committee, it was said by the court that it seems clear, taking the whole rule together, that the provision for filling vacancies on the ticket by a "majority of all the executive committee" means, at the least, a majority vote of all the persons who are in fact members of the committee at the time the vacancy is filled. Ordinarily the phrase quoted might not receive such a construction. We have so decided in two cases recently before us, but, of course, the question in every case is, what do the words mean in a particular connection, and under the particular set of circumstances? In general, they mean a majority of a quorum (the quorum being a majority of the whole body), but when the rule provides for a different test, such decisions cease to apply. *In re Berlin*, 22 Pa. Co. Ct. R. 615, 616.

As majority of those entitled to vote.

"Majority," as used in Const. art. 16, § 1, requiring a majority of the electors to ratify an amendment to the Constitution, means more than half of those qualified to vote at the time the election is held. *In re Denny*, 59 N. E. 359, 361, 156 Ind. 104, 51 L. R. A. 722.

The expression "majority of legal voters of said county," as used in the constitutional provision requiring submission of questions to voters in the county, does not mean a majority of those voting on the question to be submitted, but a majority of all the legal voters of the county. *State v. Lancaster County Com'rs*, 6 Neb. 474, 483 (citing *In re Linn County Seat*, 15 Kan. 500, 530; *State ex rel. Dobbins v. Sutterfield*, 54 Mo. 391, 396; *Braden v. Stumph*, 84 Tenn. [16 Lea] 581; *Vance v. Austell*, 45 Ark. 400).

As majority of legal votes cast.

"Majority," as used in an allegation in an election contest proceedings that the relator received a majority of the votes cast at a certain election, should be construed to mean a majority of the legal votes. *Hahn v. Stinson*, 3 S. E. 490, 491, 98 N. C. 591.

The phrase "majority of same voting at such election shall have voted therefor," in a statute providing that the purpose for which a certain tax is intended shall be submitted to a vote of the property taxpayers entitled to vote, and the "majority of same voting at such election shall have voted therefor," means that the tax must receive the vote of the majority of the taxpayers who voted at the election, or, in other words, the majority of the legal votes cast at the election. *Duperler v. Viator*, 35 La. Ann. 957, 961.

The "majority of the persons voting," within the meaning of a statute authorizing a county to issue bonds when a majority of the persons voting at an election called to vote on such a question vote in favor of such issue, means a majority of those rightfully voting. *Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs*, 17 Kan. 29, 40.

Under a statute providing that, in an election on the question of corporate subscription to a railroad, it should be necessary only that a majority of the legal voters of the municipality voting at such election should vote in favor of the proposed subscription, it was not essential that a majority of all the legal voters should vote, but only that a majority of legal voters voting should vote in favor of the issue. *People v. Supervisor and Clerk of Town of Harp*, 67 Ill. 62, 64.

As majority of quorum.

A corporate by-law declared that a "majority vote" of the directors should determine the action of that body. Under this by-law, there being thirteen directors in all, seven constituted a majority. The court said: "In treating this subject, Chancellor Kent says: 'There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case a majority of those who appear may act, but in the former a majority of the definite body must be present, and then a majority of the quorum may decide.' Here a majority of the definite body who are present, and a quorum of those present, to wit, six, did act, and they were sufficient for the passage of the resolution. Thus it has been held that, if there are nine directors, five constitute a quorum, and a resolve passed by the majority at a meeting where a least five are present is binding on the company. 1 Mor. Corp. (2d Ed.) § 531, and cases cited. Field, Corp. §§ 238, 239. And it will be presumed that the words 'the majority vote,' as employed in the by-laws, were intended to bear the above-mentioned signification, since that, according to the authorities, is the ordinary import of those words." *Foster v. Mullanphy Planing-Mill Co.*, 4 S. W. 260, 262, 92 Mo. 79.

In construing Const. art. 7, § 7, providing that no county, city, town, etc., shall contract any debt, etc., except for necessary expenses, unless by a vote of the majority of the qualified voters therein, the court said that: "We think that the words 'by a vote of the majority,' as an entirety, cannot be interpreted as equivalent to, 'with the concurrence or with the assent of the majority,' which can be manifested just as each house of the General Assembly is in the habit of giving assent of the body to a law by a majority of a quorum. Where the word 'majority' is used in the statute to define a quo-

rum, the concurrence of the majority is ascertained by a universal rule governing deliberative bodies. Judge Cooley says a simple majority of a quorum is sufficient unless the Constitution establishes some other rule, and where, by the Constitution, a two-thirds or three-fourths vote is made essential to the passage of any particular class of a bill, two-thirds or three-fourths of a quorum will be understood, unless the terms employed properly indicate that this proportion of all the members or of all those elected is intended. Cooley, Const. Lim. marg. p. 141." There is a concurrence of the majority within the meaning of Code, § 707, subd. 10, prohibiting the commissioners from constructing certain bridges except by the concurrence of a majority of the justices of the peace—by the concurrence of a majority of the justices of the peace sitting as an organized body. *Cleveland Cotton Mills v. Cleveland County Com'rs*, 13 S. E. 271, 273, 108 N. C. 678.

As majority of statutory number.

3 Rev. St. 687, providing that the board of trustees of a railroad's corporation shall not transact any business unless at least "a majority of the vestrymen are present," requires that a majority of the number which the statute requires to compose the board of trustees be present, and not merely a majority of the number to which the body of vestrymen may have been reduced, either by design or accident. *Moore v. St. Thomas' Church*, 4 Abb. N. C. 51, 54, 55.

As majority of those present and voting.

Priv. & Loc. Laws 1866, c. 411, declares that a "majority of the legal voters" of a school district may determine the amount of money to be levied and collected, at any legally called special or annual meeting of said voters. Held not to require a majority of all the qualified electors of the district in order to levy a tax, but only a majority of those actually present and voting at the meeting. *Sanford v. Prentice*, 28 Wis. 358, 361.

An act of the Assembly provided for the removal of dead bodies from the burial grounds of religious societies, and directed that no application should be made therefor, "except in pursuance of the wishes of the 'majority' of the members of such society or church, expressed at a church election held for that purpose." Held, that the "majority" meant by the act was a majority of those present and voting at such election. *Craig v. First Presbyterian Church of Pittsburgh*, 88 Pa. 42, 48, 32 Am. Rep. 417.

Where the board of directors of a corporation, consisting of seven members, met for the purpose of electing a president, and on a ballot being taken five votes were cast, of which one received three and the other two, the two who were candidates for the

presidency not voting, the one receiving the three votes was elected. *Booker v. Young* (Va.) 12 Grat. 303, 307.

It is held that a "majority" of the electors means a majority of those voting, and not a majority of all the qualified electors present and entitled to vote; so that where several illegal voters were permitted to vote at a parish meeting, and many of the legal voters protested against the proceeding and withdrew without voting, but the persons declared to be elected received a majority of the votes of the legal voters who remained and voted, they were duly elected. *Inhabitants of First Parish in Sudbury v. Stearns*, 38 Mass. (21 Pick.) 148-154.

The term "majority," in a statute requiring the county superintendent of schools to be elected *viva voce* by a majority of the whole number of directors present, is not satisfied by the election of a superintendent by an affirmative vote of only one-half of the members present, although one of the members refuses to vote, so that there is less than a half of the votes cast in the negative. *Commonwealth v. Wickersham*, 68 Pa. (16 P. F. Smith) 134, 136.

Under Const. art. 212, providing for a vote of the majority of the property taxpayers in number and value, is meant a majority of the taxpayers actually present and voting at an election. *Citizens and Taxpayers of De Soto Parish v. Williams*, 21 South. 647, 654, 49 La. Ann. 422, 37 L. R. A. 761.

As majority of those voting.

A "majority" consists of more than one-half of those who vote at a given election, not of those who might have voted but did not vote, for there is no machinery for ascertaining the number of the latter class, and it would be still more difficult to find on what side they should be counted. *Schlichter v. Keiter*, 27 Atl. 45, 59, 156 Pa. 119, 22 L. R. A. 161.

In a statute providing for the change of a county seat when a majority of the voters of the county shall vote for the change, by the term "majority of voters" is meant a majority of the legal votes cast at that election. *People v. Warfield*, 20 Ill. (10 Peck) 159, 160, 165.

In an act authorizing a submission of a question of the issuance of bonds to any railroad, and declaring that the subscription for stock might be made if a "majority of the voters" shall decide in favor of taking the stock proposed, the expression "majority of the voters" does not mean a majority of the voters in the county, since what is a majority of the voters in the county at any given time could be determined only by the ballots cast, but the phrase must be construed to mean a majority of the voters in the county who see fit to exercise their privilege

of voting. *Louisville & N. R. Co. v. Davidson County Court*, 33 Tenn. (1 Sneed) 637, 693, 62 Am. Dec. 424.

Act III. Feb. 28, 1867, § 14, providing that the supervisor shall subscribe to the capital stock of a railroad, etc., if it shall appear that a majority of the legal voters of any township have voted for subscriptions, etc., the expression "majority of the legal voters" should be construed to mean a majority of all the legal voters of such township voting at such election. *St. Joseph Tp. v. Rogers*, 83 U. S. (18 Wall.) 644, 655, 21 L. Ed. 328.

The term "majority of registered votes," as used in the Act Jan. 28, 1869, providing that the county site of a county may be changed by a majority of registered votes, must be construed to mean a majority of those qualified electors who vote at the election, and not a majority of all who had a right to vote. *State v. Sumpter County Com'rs*, 19 Fla. 518, 539.

A "majority of the voters of the city or town," as used in Code, § 471, providing that a proposition for the erection of waterworks by a city must be approved by a "majority of the voters of the city," means a majority of the votes cast at an election therefor, and not a majority of all the voters residing in the city or town. *Taylor v. McFadden*, 50 N. W. 1070, 1071, 84 Iowa, 262.

A "majority" does not mean a majority of all those qualified to vote, but merely a majority of all those voting. *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53, 59.

Under a statute providing for calling an election, and declaring that if a majority of the votes shall be for subscription to the stock of a railroad within the county the city, town, or township shall cause the subscription to be made and bonds to be issued therefor, the provision evidently refers to the majority of the votes cast at that election, and not to the majority of the legal voters residing in the district so voting. If such had been the intention, other and very different language would have been employed. *Dunnovan v. Green*, 57 Ill. 63, 68.

Under a statute providing that it shall be lawful for the commissioners of a town to subscribe for such an amount of stock of a steam ferry company as they shall be authorized to subscribe by a "majority" of the voters of the town, whose sense of subscribing a particular amount shall be previously ascertained by opening a poll for that purpose, at such time and on such notice and in such mode as the commissioners shall direct, all the voters who do not choose to attend at the poll are to be taken as assenting to the result of the election, according to the votes actually polled, and a majority of all the voters of the town is not required, but only a

majority of the votes cast. *Reiger v. Town of Beaufort Com'rs*, 70 N. C. 319, 321.

Although it is the rule that a candidate for office cannot be elected unless he receives a majority of the legal votes cast, it is the theory and practice of our government that a minority of the whole body of qualified electors may elect to an office when a majority of that body refuse or decline to vote for any one for that office. Those of them who are absent from the polls, in theory and practical result are assumed to assent to the action of those who go to the polls; and those who go to the polls, and who do not vote for any candidate for an office, are bound by the result of the action of those who do; and those who go to the polls and who vote for a person for an office, if for any valid reason their votes are as no votes, are also bound by the result of the action of those whose votes are valid and of effect. But where a majority of the electors, through ignorance of the law or the fact, vote for one ineligible to the office, the votes are not nullities; but while they fail to elect, the office cannot be given to the qualified person having the next highest number of votes. *People v. Clute*, 50 N. Y. 451, 461, 10 Am. Rep. 508.

Where a constitutional provision declared that constitutional amendments, if adopted by the Legislature, should be published for three months immediately preceding the next election for senators and representatives, at which election they should be submitted to the electors for approval, and if a majority of the electors voting at such election adopt the amendments they should become a part of the Constitution, the term "majority," as so used, meant a majority of all the votes cast at such general election, and was not limited to or affected by the number of votes cast at such election for senators or representatives. *Tecumseh Nat. Bank v. Saunders*, 71 N. W. 779, 781, 51 Neb. 801.

Where an act of the General Assembly gave permission to municipal corporations to allow the sale of refreshments upon any day of the week when authorized by a "majority" of the legal voters of the respective cities, a vote of 5,000 cast for such permission, out of a vote of 13,000 cast for city officers at the election on the same day, is not the vote of the majority, 2,000 votes being cast against such permission. *State v. Winkelmeier*, 35 Mo. 103, 106.

Const. art. 10, § 5, declares that "the Legislature shall provide by general law for township organization under which any county may organize whenever a majority of the legal voters of such county voting at any general election shall so determine." In construing this provision in a case where there were 2,451 legal voters of the county who

voted at the general election, and 952 votes were cast in favor of township organization and 601 votes were cast against it, the court said: "I think this provision must be construed according to the plain meaning of the words used, and that the language employed therein is mandatory, and therefore, as the affirmative vote on the question submitted was less than a majority of all the legal voters voting at the general election, the proposition to adopt township organization was defeated. *State v. Lancaster County Com'rs*, 6 Neb. 474, 484.

A "majority of the electors voting," within the meaning of Const. art. 11, § 6, authorizing towns to reorganize under the general laws relating to municipal corporations whenever a majority of the electors voting at a general election shall so determine, means a majority of all the electors voting at such election, and not merely a majority of those voting on the reorganization proposition. *People v. Town of Berkeley*, 36 Pac. 591, 593, 102 Cal. 298, 23 L. R. A. 838.

As majority voting on particular issue.

Under the Constitution requiring that a "majority" of the voters shall vote in favor of the removal of a county seat before it may be removed, it is not sufficient merely that a majority of those voting on the question vote in favor of the removal, but a majority of the voters who vote at that election must vote in favor of the removal, or it will not be authorized. *People v. Wiant*, 48 Ill. 263, 285.

In Const. art. 11, § 1, requiring all laws for removing county seats to be submitted to the electors of the county at the next general election, and to "be adopted by a 'majority' of such electors," the word "majority" means only a majority of the electors present and voting at such election, and does not mean a majority of the electors residing within the county. *Taylor v. Taylor*, 10 Minn. 107, 126 (Gil. 81, 99); *Everett v. Smith*, 22 Minn. 53, 54; *Bayard v. Klinge*, 16 Minn. 249, 254 (Gil. 221, 228).

The term "majority," in a statute providing for the submission of the question at a general election whether a county shall give a bounty for the growing of hedges, and providing that such bounty shall be given if a majority of the votes are for the bounty, means a majority of the votes cast on the question of bounty or no bounty, and does not require a majority of all the votes cast at the election to be in favor of the bounty. *Marion County Com'rs v. Winkley*, 29 Kan. 86, 40.

"Majority of electors," as used in a legislative act authorizing the trustees of a township to levy a special taxation if a majority of the electors of said township at

some regular election shall vote in favor of said levy, means a majority of all the votes cast at such regular election, and not simply a majority of those voting for or against the levy. *Enyart v. Trustees of Hanover Tp.*, 25 Ohio St. 618, 619.

Under Laws 1864, c. 555, which provided that any issue of school bonds must be authorized by a vote of a "majority" of all the inhabitants of any school district entitled to vote, a vote in favor of bonds by the majority of those voting is sufficient to authorize the issue of the bonds, though such majority is less than half of the voters actually present at the meeting. *Smith v. Proctor*, 29 N. E. 312, 130 N. Y. 319, 14 L. R. A. 403.

As used in Rev. St. 1894, § 4208 (Rev. St. 1881, § 3233), providing for the union of a town and city where the "majority" of the qualified voters shall decide therefor, means a majority of the votes cast for or against the proposition, and not a majority of all the votes cast at the city election, where the proposition was voted on at such election. *City of South Bend v. Lewis*, 37 N. E. 986, 988, 138 Ind. 512.

Act Feb. 25, 1889, for the establishment of Harney county, declared that at the next general election the question of the location of the county seat shall be submitted to the legal voters of the county, and the place receiving a majority of all the votes cast shall be the permanent county seat of the county. Held, that the words "a majority of all the votes cast" referred to the "place" receiving them, and should be construed as limited to a majority of the votes cast "on the question of the location of the county seat," and not to require a majority of the votes cast on some other question for which votes might have been cast at such election. *State v. Grace*, 25 Pac. 382, 385, 20 Or. 154.

Act 1886, c. 248, § 7, provides that the voters of a certain county, at the general election, shall determine the question of the adoption of high license, etc. Section 8 gives the act effect, etc., "if a majority of the voters of said county shall determine by their ballots in its favor." Held, "a majority of the voters," as used in section 8, means a majority of all the voters of the county who vote upon this act, and not a majority of the voters of the county voting upon some other subject. *Walker v. Oswald*, 11 Atl. 711, 715, 68 Md. 146.

In Laws 1886, c. 147, providing for the establishment of a high school in a district "if a majority of all the votes cast shall be in favor of establishing such high school," the term "majority of all the votes cast" means a majority of those cast upon the proposition itself, and not a majority of the number of votes cast at the same election upon any other question. *State v. Echols*, 20 Pac. 523, 524, 41 Kan. 1.

The "majority of the electors voting" at an election for senator or representatives, which by Const. art. 16, § 1, is necessary to the adoption of a constitutional amendment, means a majority of all the votes cast at such election, instead of a majority voting for the amendment. *State v. Foraker*, 23 N. E. 491, 46 Ohio St. 677, 6 L. R. A. 422.

The term "majority of the electors voting at such election," in Const. art. 15, § 1, providing for the submission of constitutional amendments at certain elections for senators and representatives, and the adoption thereof by a majority of the electors voting at such election, means the majority of all the votes cast in the state at that election for senators and representatives. *State v. Babcock*, 22 N. W. 372, 17 Neb. 188.

The phrase in Const. art. 17, § 1, requiring a "majority of all qualified voters who vote" at elections in which constitutional amendments are submitted, to vote in favor of such amendment in order to pass it, means a majority not only of those who vote on the amendment, but of all those who deposit ballots at that election for any purpose. *May & Thomas Hardware Co. v. City of Birmingham*, 26 South. 537, 542, 123 Ala. 306.

Const. 1851, art. 16, § 1, declares that it shall be the duty of the General Assembly to submit any proposed amendment of the Constitution to the electors of the state, and, if a "majority" of said electors shall ratify the same, it shall become a part of this Constitution; and, as the amendment had received the votes of less than a majority of all the electors who had voted at such election, though receiving a majority of the votes cast for and against itself, it was neither ratified nor rejected, and, under a valid statute, might again be submitted. The amendment must be ratified by the votes of a majority of the electors of the state. *State v. Swift*, 69 Ind. 505, 510.

In *State v. Winkelmeier*, 35 Mo. 103, under a law which empowered the city authorities of St. Louis to grant permission for the opening of establishments for the sale of refreshments on any day of the week whenever a "majority" of the legal voters of the city authorizes them to do so, it was held that there must be a majority of the voters participating in the election at which the vote was taken, and not merely a majority of those voting upon that particular question. *Cass County v. Johnston*, 95 U. S. 360, 365, 366, 24 L. Ed. 416.

The "majority of the electors" mentioned in Const. art. 20, § 1, providing that proposed constitutional amendments passed by the Legislature shall become a part of the Constitution if ratified at a general election by a majority of the electors, means a majority of the electors voting on the amendment, and does not require a majority of the

votes cast at such election for state officers. *Green v. State Board of Canvassers*, 47 Pac. 259, 260, 5 Idaho, 130, 95 Am. St. Rep. 169.

Const. art. 14, § 1, relating to amendments to the Constitution, requires that a majority of the voters present and voting shall have ratified such alterations or amendments. Held, that the words "majority of the voters," etc., meant a majority of the voters who are present and vote on the proposition submitted to the electors, without respect to those who may be present and vote for other purposes at any election which may be held at the same time and place at which the proposition may, for reasons of convenience or other reasons, be submitted, and that those who may at such time and place come and vote for other purposes only are not to be regarded as presenting votes, so far as respects the proposed amendment. *Dayton v. City of St. Paul*, 22 Minn. 400, 402.

The "majority" of votes necessary, under a statute authorizing a city to issue bonds when the same shall be authorized by a vote of the people, is a majority of all the votes cast at the election, and not a mere majority of the votes cast on the bonding proposition. *Bryan v. City of Lincoln*, 70 N. W. 252, 253, 50 Neb. 592, 35 L. R. A. 752.

The "majority of legal votes cast," in the enabling act of Congress of February 22, 1889, authorizing the people in what is now the state of North Dakota to elect delegates to the constitutional convention, and to submit the constitution by separate articles or ordinances to the popular vote, and requiring for their adoption a "majority of the legal votes cast," means a majority of the votes cast either for or against any particular provision of the Constitution, even though the vote would not constitute a majority of the total votes cast for Governor. *State v. Barnes*, 55 N. W. 883, 3 N. D. 319.

The term "majority of voters," in Act March 7, 1867, entitled "An act to prevent domestic animals from running at large in certain counties," and providing that the act shall not be enforced until it is ratified by the majority of the legal voters of the county, is to be construed as meaning a majority of the legal voters voting on the proposition. *Holcomb v. Davis*, 56 Ill. 413, 416.

Many distinguished.

See "Many."

As embracing plurality.

As the term "majority" is used when speaking of the majority of a legislative body, it means, in its broadest sense, the greatest of any number of unequal divisions of the whole body. In its strictest sense it means the greater of any two unequal divisions of the whole body, and embraces

what is denoted by "plurality." *State v. Anderson*, 12 N. E. 656, 658, 45 Ohio St. 196 (citing Cushing's Law of Legislative Assemblies).

MAJORITY OF THE CORPORATION.

"Majority of the body," as used in a corporation by-law providing that corporate action might be taken and by-laws made and repealed by "the corporate body or a majority thereof," means a majority of the collective body of individuals who are members of the corporation, and not a majority of the capital stock. "The term 'body' certainly refers to the collective number of individuals who are incorporated, and not to the aggregate amount of property, and the term the 'majority of the body' can therefore only mean a majority of the individuals composing the body." *Taylor v. Griswold*, 14 N. J. Law (2 J. S. Green) 222, 239, 27 Am. Dec. 33.

MAJORITY OF STOCKHOLDERS.

The phrase "majority of shareholders," as used in Act March 21, 1872, relating to the removal of the officers of a corporation, and providing that, on petition by a majority of the shareholders, proceedings for the removal of officers may be enjoined, means a majority of the persons holding shares, and not the holders of a majority of the stock; hence a petition signed by less than a majority of the shareholders, though the signers held a majority of the stock, is insufficient. *Chollar Min. Co. v. Wilson*, 5 Pac. 670, 671, 66 Cal. 374.

A "majority of stockholders," as ordinarily used, means a majority per capita when the right to vote is per capita, and a majority of the stock where each share of the stock is entitled to one vote. *Mower v. Staples*, 20 N. W. 225, 32 Minn. 284.

The phrase "majority of stockholders," as used in the books of a corporation reciting that at a meeting of such corporation it appeared that a "majority of the stockholders," either by person or by proxy, were present, means such a majority as the law required, to wit, holders of the majority of the stock. *Grays v. Lynchburg & S. Turnpike Co. (Va.)* 4 Rand. 578-581.

The words "majority of stockholders" of a corporation, when used without other qualifications, indicates a majority in interest, and not in number. *Weinburg v. Union St. Ry. Advertising Co.*, 37 Atl. 1026, 1027, 55 N. J. Eq. 640.

MAKE.

See, also, "Made."

"To make," in the mechanical sense, does not signify to create out of nothing,

for that surpasses all human power. It does not often mean the production of a new article out of materials entirely raw, but generally consists in giving new shapes, new qualities, or new combinations to matter which has already gone through some other artificial process. *Norris v. Commonwealth*, 27 Pa. (3 Casey) 494, 496.

Account.

Code, § 2599, declares that, on proof of citation by a distributee to an executor or administrator, the ordinary may proceed to "make an account," hear evidence on any contested question, and settle finally between the distributee and administrator. Held, that the term "make an account," should be construed as an ascertainment by figures what is due after expenses to the complaining heir or the heirs complaining, or require its payment by the administrator. *Cook v. Weaver*, 77 Ga. 9, 15.

Award.

To "make an award" is to form and publish a judgment on the facts. *Hoff v. Taylor*, 5 N. J. Law (2 Southard) 829, 833.

Case.

In the practice act of 1849, requiring the making of a case for appeal, the words "making of a case for appeal" means the bringing up of so much of the evidence as may be material to the question accompanying the motion for review. *Smith v. Harris*, 43 Mo. 557, 564.

Crop or hedge.

The meaning of the word "make," when used in relation to a crop, is as well understood as any other word in our language; it means produce at maturity. A growing crop is not "made," but in the process of being "made." What it will make, or would have made but for having been destroyed, is a very different thing from the amount of unformed, or half formed, or unmade ears that may be found upon it in its immature condition. *Texas & P. Ry. Co. v. Bayliss*, 62 Tex. 570, 574.

To "make," as used in a contract by a tenant to pay one-fourth and one-third of the corn and cotton he "makes," means "to gather and house; to fit it for use or market. If after the tenant lays by the crop for want of keeping up the fence himself, and charging the landlord for it, or for want of notice to the landlord, if for this neglect of a most reasonable duty on his part the crop is lost or destroyed in whole or in part, he shall still pay the rent." *Driver v. Maxwell*, 56 Ga. 11, 20.

To "make," within a contract providing that a lessee of land would make a good and substantial hedge fence, means only that the lessee would make as good a hedge as

could be made by proper planting and cultivating within the duration of the lease. Such a hedge as could be produced in five years, the term of the lease, was the substance of the undertaking. *Gilchrist v. Gilchrist*, 76 Ill. 281, 284.

Deed or will.

Execute synonymous, see "Execute."

A contract for the sale of lands, whereby a party agreed, in consideration of a certain amount in cash to be paid in 60 days, the balance in equal installments, that on receipt of such cash payment and within the 60 days he would "make a deed," should be construed to mean that the deed should convey the land, the legal effect of the covenant to sell being that the land should be conveyed by a deed from one who had a good title or full power to convey a good title; and hence a declaration, in an action for breach of such contract by the purchaser, alleging that the seller was ready and willing to convey, does not show compliance with the requirement of the contract that he "make a deed." *Washington v. Ogden*, 66 U. S. (1 Black) 450, 456, 17 L. Ed. 203.

St. Ohio Dec. 17, 1811, provided that no estate in lands should be given by deed or will to any person or persons but such as are in being, or to the immediate issue or descendants of such persons as are in being, "at the time of the making of a will." It was held that since the phrase "the time of making such deed or will," as applied to a deed, designated the time both of its execution and of its taking effect, such phrase, as applied to a will, would be deemed to refer to the time when it takes effect by the death of the testator, and not the date of its formal execution. *McArthur v. Scott*, 5 Sup. Ct. 652, 663, 113 U. S. 340, 28 L. Ed. 1015.

As used in Act Feb. 24, 1770, declaring that when husband and wife desire to convey the estate of the wife in any lands it shall be lawful for them to "make," seal, deliver, and execute a deed for the same, and after such execution acknowledge the same, the use of the words "make the deed" clearly import the signing thereof, so that sealing and delivering are not the only requisites which must precede the acknowledgment. *Miller v. Ruble*, 107 Pa. 395, 401.

False entry.

"Making an entry," within Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], making it a misdemeanor for any officer or clerk to make, with intent to defraud, any false entry in any book or statement of the bank, embraces the erasure of figures constituting part of a number already written on an account book of a national bank, and a writing of different figures in place of those erased. *United States v. Crecilius* (U. S.) 34 Fed. 30.

False writing.

Within the rule that forgery is the fraudulent "making" of a false writing, the making does not consist alone of the manual operation of putting the instrument into form as the apparent obligation or act of another, and the authorities establish numerous instances wherein forgeries were found apart from the manual making or signing, as in the fraudulent procurement and use of a signature or writing as an obligation when it is not so intended or understood by the maker. In re Count De Toulouse Lautrec (U. S.) 102 Fed. 878, 881, 43 C. C. A. 42.

Ordinance.

The terms "make," "ordain," "constitute," "establish," and "pass," as used with relation to a grant of legislative authority to a municipal corporation to enact ordinances, mean the same thing. *Kepner v. Commonwealth*, 40 Pa. (4 Wright) 124, 129.

Patent.

The covenant of a deed "to make a patent" means only to obtain one and deliver it to the grantee. *Willis v. Bucher* (U. S.) 30 Fed. Cas. 63, 66.

Policy.

Where a statute makes it a crime to "make and establish a policy," it is well understood to be a form of gambling in which bets are made on the numbers to be drawn by lottery. *State v. Wilkerson*, 70 S. W. 478, 480, 170 Mo. 184.

Property in good condition.

"Make," as used in the clause of a lease in which one of the parties agreed, during the term of the lease, to repair the water pipes, etc., and to do all other necessary repairs to "make" the property in a good and tenantable condition, means "put." *Gerzebek v. Lord*, 33 N. J. Law (4 Vroom) 240, 245.

Railroad.

A grant to a railroad company, in its charter, of the power of "laying, building, and making" a road, includes the power of maintaining and sustaining it, which has reference to keeping it in repair, supplying it with machinery, and such like acts, but does not extend to projects for extending its business by schemes and enterprises not contemplated and expressed in clear, unambiguous terms. *Central R. Co. v. Collins*, 40 Ga. 582, 624.

River navigable.

A corporation was created to make a river navigable which was not so, but no particular mode of accomplishing that result was pointed out in the charter. It was held that the Legislature intended that the river

was to be made navigable in any of the known modes in which the navigation of a river might be improved. When we speak of "navigating a river," without reference to the state or condition of it, ordinarily the navigating of it in its natural course is meant; but when the making a river navigable, which was not so before, is spoken of in general terms, without the designation of any particular mode of doing it, no particular mode is understood to be intended, the making it navigable in its natural course no more than the making it navigable in any other way, there being various modes of making a river navigable; and, indeed, to say that such a river is made navigable or may be made navigable by means of a canal is a common mode of expression. The words of the charter, standing alone, should not be understood as requiring the river to be made navigable in its bed or natural course. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. (Md.)* 4 Gill & J. 1, 97.

Sale.

"Making of the sale," as used in Laws 1871, c. 844, amending Laws 1867, c. 658, § 1, relating to the payment into the proper surrogate's court of the surplus money arising on the sale of real property, if letters testamentary or of administration have been issued within a certain time, and providing that this act shall not apply to any case where letters testamentary or letters of administration within this state have been or shall be issued to the personal representative or representative of such deceased person four years previous to the "making of the sale" on which such surplus money arises, refers to the date of the sale, not to the commencement of the action or proceedings resulting therein. *White v. Pollan (N. Y.)* 25 Hun, 69, 71.

Signature.

Act 1851, Nix. Dig. 917, which states as one of the requisites to a valid will that the signature shall be "made" by the testator, or the making thereof acknowledged by him in the presence of two witnesses, is so construed that the testator must sign the will himself, and a signature made by another at the request and in the presence of the testator is insufficient. In *re McElwaine's Will*, 18 N. J. Eq. (3 C. E. Green) 499, 502.

Street.

The International Dictionary defines the word "make" as meaning to form of materials, to cause to exist in a certain form, to construct, to fabricate. When used with reference to streets, it is synonymous with "build" or "pave." *Morse v. City of Westport*, 19 S. W. 831, 832, 110 Mo. 502.

"Making," as used in an act appointing road commissioners, in giving them such powers as the highway surveyors and select-

men have, etc., over the laying out, "making," discontinuing, and repairing of ways, etc., means something more than the repairing, and may properly include the making improvements and alterations on an existing way for the purpose of rendering it more safe for travelers. *McManus v. Inhabitants of Town of Weston*, 41 N. E. 301, 308, 164 Mass. 263, 31 L. R. A. 174.

Writ.

"Make," as used in Gen. St. c. 12, § 26, providing that no sheriff or deputy sheriff shall be allowed to "make" any writ, declaration, or process, means to form or compose, and the manual act of writing out a complaint, even by the dictation of another, by a sheriff or deputy sheriff, is prohibited by the statute. *State v. Drew*, 51 Vt. 58, 58. A mere alteration of a writ already perfect, which leaves it substantially the same writ, between the same parties, for the same cause of action, and stated in the same form, is not an act forbidden by the statute. *Hunt v. Viall*, 20 Vt. 291, 292.

MAKE AWAY WITH.

Words charging the plaintiff with being the father of a bastard child by his sister-in-law, of which she was pregnant, and that he wished the defendant to "make away with it," are actionable per se, as importing a wish that the defendant should destroy the child as soon as born. They import that the plaintiff applied to defendant to commit murder. *Demarest v. Haring (N. Y.)* 6 Cow. 76, 88.

The words "made away with," in a charge that a person made away with some of another's logs, do not of themselves import a charge of larceny, and therefore are not slanderous per se. *Brown v. Brown*, 14 Me. (2 Shep.) 317, 318.

MAKE FOR.

The expression "make for," as used in a statement of the conductor of a street railroad, in an action for personal injuries, that he saw the decedent "make for" the car, means that the man was trying to board the car, and hence was sufficient to indicate that the conductor knew that the man intended to become a passenger on that car, so as to make the company liable under the rule of liability relating to the carriage of passengers. *Dean v. Third Ave. R. Co.*, 54 N. Y. Supp. 490, 492, 34 App. Div. 220.

MAKE IT WORTH.

In a warranty that land was worth a certain sum, and that if it was not worth such sum, the grantor "would make it worth" that sum, to "make it worth" means to make up the deficiency if the land was not worth

the specified sum. *Whitehall v. Conner*, 55 Ind. 354, 355.

MAKE OVER.

In construing a deed where the language used was "for value received of G. and B., I hereby make over and confirm unto them and their heirs," etc., the court observed that the words "make over" have no precise technical import, and must be taken in their popular sense. The word "confirm" has no application unless there is a previous estate in possession. A confirmation makes a voidable estate sure or increases a particular estate. There must be a previous estate on which it is to operate. It was held that the words used were sufficient to raise an order under the statute, and to convey the premises to the bargainee in fee. *Jackson v. Root* (N. Y.) 18 Johns. 60, 68, 79.

Though in its original meaning the word "grant" applied only to a conveyance of incorporeal hereditaments which could not pass by livery of seisin, yet in conveyances under the statute of uses the words "make over and grant" are sufficiently operative to convey land. *Jackson v. Alexander* (N. Y.) 3 Johns. 484, 495, 3 Am. Dec. 517.

MAKER.

Of cider.

The word "makers," as used in a statute providing that nothing therein contained shall apply to sales of cider or native wines by the makers thereof, includes both farmers and manufacturers, and cannot be limited to those who buy apples from which they make cider, or to those who buy cider manufactured in the state. *Commonwealth v. Boyden*, 66 N. E. 202, 203, 183 Mass. 1.

Of goods.

In St. 50 Geo. III, c. 41, § 23, exempting from the penalty of hawking without a license, sales by the real workers or "makers of goods" applies to manufacturers on a large scale, employing workmen on premises where they do not reside, and doing no manual labor themselves. *Rex v. Faraday*, 1 Barn. & Adol. 275.

Of libel.

He is the "maker of a libel" who originally contrived and either executed it himself, by writing, printing, engraving, or painting, or dictated or caused it to be done by others. *Pen. Code Tex.* 1895, art. 724.

Of note.

See "Accommodation Maker"; "Joint Maker."

In a statute providing that, "in any case where the holder of a usurious note sells the same to an innocent purchaser, the maker of

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said note, or his representatives, shall have the right to recover back from said original holder the amount of principal and interest paid by him on said note," the words "maker" and "note" include the maker of a guaranty of payment of a promissory note indorsed thereon, where he has been obliged to pay a usurious note by reason of the guarantied note having been sold to an innocent purchaser. *Fredin v. Richards*, 63 N. W. 1081, 1032, 61 Minn. 490.

A provision in a note for an extension on request of the makers includes sureties, where they signed as makers, though the payee of the note knew that they were sureties only, for the word "makers" intended to refer to all persons who had signed the note. *Sawyers v. Campbell*, 78 N. W. 56, 57, 107 Iowa, 397.

"The difference between a maker of a note and an indorser or guarantor is that the contract of the first, by its terms, imports an unconditional obligation to pay money, and that of the last, by its terms, imports a conditional obligation. The rules of law settle this species of contracts as well as others, and prescribe how they may be created, their legal effect, and mode of enforcement." *Aud v. Magruder*, 10 Cal. 282, 290.

MAKING.

The word "making," as used in patent laws, is as applicable to machines as to compositions of matter. *Whittemore v. Cutter* (U. S.) 29 Fed. Cas. 1120, 1121.

The word "making" is formed from a present participle, and literally applies to the present and not the future time. In common parlance, when it is used with reference to a will, it signifies the signing, sealing, and publication of it. Another common meaning of the word is the creation of a thing. *Means v. Evans* (S. C.) 4 Desaus. 242, 249.

MAL.

Webster defines the prefix "mal" as ill or evil; derived from the Latin "malus," meaning bad or ill. *Tallafarro v. Lee*, 13 South. 125, 129, 97 Ala. 92.

MALA FIDE.

"Mala fide," as used in reference to the character of a transaction which will render a conveyance void, is an intent not simply to assert one's rights, but, in addition thereto, to defeat the rights of another, participated in by both parties to the instrument. *Lenhardt v. Ponder*, 42 S. E. 169, 172, 64 S. C. 354 (citing *Magovern v. Richard*, 27 S. C. 286, 3 S. E. 340).

A mala fide possessor of real estate is one who is in possession, knowing that the title is contested by a third person claiming a better right to it. *Canal Bank v. Hudson*, 4 Sup. Ct. 303, 311, 111 U. S. 66, 28 L. Ed. 354; *Green v. Biddle*, 21 U. S. (8 Wheat.) 1, 78, 5 L. Ed. 547.

The taking of an estate after notice of a prior right makes one a mala fide purchaser. *Kellar v. Stanley*, 5 S. W. 477, 479, 480, 86 Ky. 240, 9 Ky. Law Rep. 388, 391.

MALA IN SE.

Acts mala in se are felonies or breaches of public duties, injuries to person or property, outrages upon public decency or good morals, and breaches of official duty, when done willfully or corruptly. *Commonwealth v. Adams*, 114 Mass. 323, 324, 19 Am. Rep. 362.

The offense of mischievously destroying property is a misdemeanor of the first class, penal at common law, and is mala in se. *People v. Maxon*, 1 Idaho, 330, 344.

There is a clear distinction between acts which are mala in se, which are generally regarded as absolutely void, in the sense that no right or claim can be derived from them, and acts which are mala prohibita, which are void or voidable according to the nature and effect of the act prohibited. Where the act is malum in se, neither party to the contract can have relief. Where it is malum prohibitum, as in the case of usury, the lender cannot enforce the contract, but the bearer can have relief against it notwithstanding he is particeps criminis. *Turner v. Merchants' Bank*, 28 South. 469, 475, 126 Ala. 397.

MALA PROHIBITA.

Acts mala prohibita are acts forbidden by statute, but not otherwise wrong. *Commonwealth v. Adams*, 114 Mass. 323, 324, 19 Am. Rep. 362.

A misdemeanor of the second class, penal by statute, is mala prohibita. *People v. Maxon*, 1 Idaho, 330, 344.

MALADMINISTRATION.

"Maladministration" means wrong administration, and includes repeated acts of removal of government section corner stones by a county surveyor, under a claim of right so to do, for the purpose of rectifying the original government survey. *Minkler v. State*, 15 N. W. 330, 331, 14 Neb. 181.

Code, § 1696, which makes the wasting, embezzlement, or any other maladministration of the estate a cause for the removal of an administrator, means acts injuriously

affecting the property or assets of the estate of which wasting and embezzlement are specimens. *Forrester v. Forrester's Adm'rs* 37 Ala. 398, 399 (citing *Johnson v. State*, 33 Ala. 583).

MALCONDUCT.

"Malconduct" means essentially the same thing as "actual fraud and wickedness," though it is a less strong term, and does not include mere negligence on the part of election officers, which did not proceed from evil motives or wickedness of purpose, but from mere omission of official duty, so as to be a ground for the contest of an election, under Code, § 396, providing that elections may be contested for malconduct of the election officers. *Taliaferro v. Lee*, 13 South. 125, 129, 97 Ala. 92.

The word "malconduct," in Galveston City Charter, § 156, giving the city council power to remove any officers for incompetency, malfeasance, or nonfeasance in office, means malconduct in office. "Malconduct," as used, means misconduct, and the offense is official misconduct. The commission of an assault by striking a person with a pistol is not malconduct authorizing the removal of such an officer. *Johnson v. City of Galveston*, 33 S. W. 150-152, 11 Tex. Civ. App. 469.

It is malconduct in the office of an attorney and counselor at law for him to insert an advertisement in a newspaper reading: "Divorces legally obtained very quietly; good everywhere. Box 2324, Denver"—for it is against good morals, and is a false representation and a libel on courts of justice, for which the Supreme Court may strike his name from the roll of attorneys. *People v. MacCabe*, 32 Pac. 280, 281, 18 Colo. 186, 19 L. R. A. 231, 36 Am. St. Rep. 270.

MALE.

The right to hold office, given to males of the age of 21 years, etc., by Mill. & V. Code, § 936, does not extend to women, though section 48 provides that words used in the statute importing the masculine gender shall include the feminine and neuter. *State v. Davidson*, 22 S. W. 203, 204, 92 Tenn. 531, 20 L. R. A. 311.

In holding that a woman could not be admitted to practice law in the Supreme Court of Wisconsin, the court say: "We would refer to a case in Iowa, which unfortunately we do not find in the Reports of that state, holding a woman not excluded by the statutory description of 'any white male person.' If we should follow that authority in ignoring the distinction of sex, we do not perceive why it should not emasculate the constitution itself, and include females in the

constitutional right of male suffrage and male qualification." In re Goodell, 39 Wis. 232, 242, 20 Am. Rep. 42.

MALE CHILDREN.

A will naming as beneficiaries certain men and women of his family, and the children of the women, and, in a like manner, the male children of the above-named men, means male descendants, which means descendants claiming through males only. Bernal v. Bernal, 3 Mylne & C. 559, 581.

MALE CITIZEN.

An affidavit of the service of summons stating that the affiant is a male citizen of the United States, over 18 years of age, was not sufficient to show that he was over 18 years of age at the time of the service of the summons, on the contention that the words "male citizen of the United States" indicated that he was an elector, and therefore 21 years of age or over, since, while it is true that a citizen, in the full acceptance of that term, is a member of the civil state, entitled to all its privileges, the possession of all political rights is not essential to citizenship, which term is a comprehensive one, and includes citizens of the state and citizens of the United States, and these include political as well as civil citizens, electors and nonelectors. And hence a person may be a citizen of the United States, though under age and not entitled to vote. Lyons v. Cunningham, 4 Pac. 938, 939, 66 Cal. 42.

MALE HEIRS.

See "Heirs Male."

MALE HOG.

"Male hog," as used in an information charging the theft of a male hog, does not mean one which has been changed from a boar to a barrow by alteration; that is, depriving such hog of its seed. Williams v. State, 17 Tex. App. 521, 524.

MALE ISSUE.

A will providing that, if a certain daughter should die without male issue, the estate should go to certain others, means all male descendants of the male line of such daughter to the remotest generation. Pennington v. Pennington, 17 Atl. 329, 331, 70 Md. 418, 3 L. R. A. 816.

A will devising property to the male issue of a certain person means the whole class of male descendants, whether descended through or from males or females. Wistar v. Gillilan (Pa.) 4 Atl. 815.

Where a devise of a contingent remainder was, on the determination of a preced-

ent estate, to the male issue then living of testator's son R., R. taking no interest, and the testator's intent being unexplained by the context, the words "male issue," etc., are to be construed as words of purchase, designating a class of devisees, to wit, all the lineal descendants of R. who are males living at the determination of the life estate; and such male lineal descendants take in equal shares, whether they trace their descent from R. through males or through females. Wistar v. Scott, 105 Pa. 200, 207, 51 Am. Rep. 197.

MALE LINE.

Testator gave personalty to be accumulated for 21 years, and then to be paid to "my then nearest of kin in the male line, in preference to the female line." Testator died a bachelor, leaving two brothers who died bachelors, three sisters who died spinsters, and three other sisters who were married. Of all these, only one sister survived the period of 21 years. Two of the married sisters had sons who survived, and the testator had a cousin who was the son of a paternal uncle. Held, that the surviving sister was entitled; the words "male line," under the circumstances, being equivalent to "ex parte paterna." Boys v. Bradley, 17 Eng. Law & Eq. 132; Id., 19 Eng. Law & Eq. 73, 80.

MALE LINEAL DESCENDANT.

The term "male lineal descendant," in a will, was not applicable to a male person claiming in part through a female. Oddie v. Woodford, 3 Mylne & C. 584, 628.

MALFEASANCE.

See "Willful Malfeasance."

Malfeasance is the doing of an act which is wholly wrongful and unlawful. Coite v. Lynes, 33 Conn. 109, 115; Minkler v. State, 15 N. W. 330, 331, 14 Neb. 181.

Malfeasance is the doing of an act which a person ought not to do at all. Bell v. Joselyn, 69 Mass. (3 Gray) 309, 311, 63 Am. Dec. 741.

Malfeasance is the unjust performance of some act which the party has no right, or which he had contracted not, to do. Dudley v. City of Flemingsburg (Ky.) 72 S. W. 327. In other words, the performance of the act, the party being aware of the fact that the right to act did not exist. Stokes v. Stokes, 48 N. Y. Supp. 722, 726, 23 App. Div. 552.

Malfeasance is defined to be evil doing; ill conduct; the doing of what one ought not to do; the unjust performance of some act

which the party had no right, or which he had contracted not, to do; the omission of some act which is positively unlawful. Hence it is held that, under a provision of the Constitution that a district judge may be removed for nonfeasance or malfeasance in office, it is not necessary that the malfeasance charged must, as a condition precedent to removal, be proved to be criminal or corrupt. *State ex rel. Atty. Gen. v. Lazarus*, 1 South. 361, 376, 39 La. Ann. 142.

MALICE.

See "Actual Malice"; "Constructive Malice"; "Express Malice"; "General Malice"; "Implied Malice"; "Particular Malice"; "Preconceived Malice"; "Premeditated Malice."

"Malice," in common acceptance, means ill will against a person; but in its legal sense it means a wrongful act done intentionally, without just cause or excuse. *Ohio Valley Tel. Co. v. Meyer* (Ky.) 56 S. W. 673; (quoting *Rap. & L. Law Dict.* p. 784); *Jones v. Fruin*, 42 N. W. 283, 284, 26 Neb. 76; *Davis v. State*, 70 N. W. 984, 987, 51 Neb. 301; *Housh v. State*, 61 N. W. 571, 572, 43 Neb. 163; *Shannon v. Jones*, 13 S. W. 477, 478, 76 Tex. 141; *Evans v. State*, 6 Tex. App. 513, 520; *Farrar v. State*, 15 S. W. 719, 720, 29 Tex. App. 250; *Powell v. State*, 13 S. W. 599, 601, 28 Tex. App. 393; *Gallaher v. State*, 12 S. W. 1087, 1088, 28 Tex. App. 247; *Spangler v. State*, 61 S. W. 314, 318, 42 Tex. Cr. R. 233; *Bean v. State* (Tex.) 51 S. W. 946; *McDaniel v. Needham*, 61 Tex. 269, 276; *Ex parte Taylor*, 28 S. W. 957, 33 Tex. Cr. R. 531; *Fugate v. Millar*, 19 S. W. 71, 109 Mo. 281; *State v. Weeden*, 34 S. W. 473, 476, 133 Mo. 70; *Buckley v. Knapp*, 48 Mo. 152, 161; *Minter v. Bradstreet Co.*, 73 S. W. 668, 683, 174 Mo. 444; *United States v. Taylor* (U. S.) 28 Fed. Cas. 31, 32; *United States v. Harriman* (U. S.) 26 Fed. Cas. 172, 173; *United States v. Reed* (U. S.) 86 Fed. 308, 312; *Willis v. Miller* (U. S.) 29 Fed. 238, 244; *Wiggin v. Coffin* (U. S.) 29 Fed. Cas. 1157, 1159; *McDonald v. Woodruff* (U. S.) 16 Fed. Cas. 49, 50; *Atchison, T. & S. F. R. Co. v. Watson*, 15 Pac. 877, 880, 37 Kan. 773; *People v. Taylor*, 36 Cal. 255, 266; *People v. Ah Toon*, 9 Pac. 311, 312, 68 Cal. 362 (citing *Maynard v. Firemen's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672; *People v. Taylor*, 36 Cal. 255); *People v. Kernaghan*, 14 Pac. 566, 568, 72 Cal. 609; *People v. Abbott* (Cal.) 4 Pac. 769, 771; *Maynard v. Firemen's Fund Ins. Co.*, 34 Cal. 48, 53, 91 Am. Dec. 672 (citing *Bromage v. Prosser*, 4 Barn. & C. 247); *Commonwealth v. York*, 50 Mass. (9 Metc.) 93, 104, 43 Am. Dec. 373; *Well v. Israel*, 8 South. 826, 828, 42 La. Ann. 955; *State v. Wells*, 1 N. J. Law (Coxe) 424, 430, 1 Am. Dec. 211; *Benton v. State*, 36 Atl. 1041, 1045, 59 N. J. Law, 551; *Hoboken Printing & Pub. Co. v.*

Kahn, 35 Atl. 1053, 1055, 59 N. J. Law, 218, 59 Am. St. Rep. 585; *McClain v. Commonwealth*, 1 Atl. 45, 46, 110 Pa. 263; *Willard v. Holmes, Booth & Haydens*, 21 N. Y. Supp. 998, 999, 2 Misc. Rep. 303; *Bush v. Prosser* (N. Y.) 13 Barb. 221, 228; *Etchberry v. Levielle* (N. Y.) 2 Hilt. 40, 44; *Bromage v. Prosser*, 4 Barn. & C. 247, 255 (cited and approved in *State v. Schoenwald*, 31 Mo. 147, 157; *Haynes v. Haynes*, 29 Me. 247, 253); *Dozier v. State*, 26 Ga. 156, 160; *Kibler v. Southern Ry.*, 40 S. E. 556, 563, 62 S. O. 252 (quoting *State v. Doig* [S. C.] 2 Rich. Law, 179, 182); *Proctor v. Southern Ry. Co.*, 39 S. E. 351, 358, 61 S. C. 170; *Ludwig v. Commonwealth* (Ky.) 60 S. W. 8, 9; *Louisville Press Co. v. Tenny*, 49 S. W. 15, 17, 105 Ky. 365; *Dunn v. Hall*, 1 Ind. (1 Cart.) 344, 353; *State v. Stout*, 30 N. E. 437, 440, 49 Ohio St. 270; *Boyer v. Coxen*, 48 Atl. 161, 163, 92 Md. 366; *State v. Decklotts*, 19 Iowa, 447, 448; *True v. Plumley*, 36 Me. 466, 484; *State v. Robbins*, 66 Me. 324, 328; *McCormack v. State*, 15 South. 438, 440, 102 Ala. 156; *Lovett v. State*, 11 South. 530, 552, 30 Fla. 142, 17 L. R. A. 705; *Bell v. Fernald*, 71 Mich. 267, 269, 38 N. W. 910, 911, 912; *Long v. Tribune Printing Co.*, 107 Mich. 207, 215, 65 N. W. 108, 111; *Zimmerman v. Whiteley* (Mich.) 95 N. W. 989, 991; *Ruffner v. Hooks*, 2 Pa. Super. Ct. 278, 282; *State v. Spivey*, 43 S. E. 475, 476, 132 N. C. 989.

"'Malice' means wickedness of purpose, or a spiteful or malevolent design against another; a purpose to injure another; a design of doing mischief, or any evil design or inclination to do a bad thing, or a reckless disregard of the rights of others, or an intent to do an injury to another, or absence of legal excuse, or any other motive than that of bringing a party to justice." *Shannon v. Jones*, 13 S. W. 477, 478, 76 Tex. 141.

The term "malice" is variously used according to the nature of the litigation in which it is sought to be established. In legal parlance, malice may be actually implied whenever there is a deliberate intention to do a grievous wrong without legal justification or excuse. In civil controversies the very essence of malice is a disposition or willingness to do a wrongful act greatly injurious to another. *Williams v. Williams*, 37 Pac. 614, 619, 20 Colo. 51.

In law, "malice" is a term of art, importing wickedness, and excluding a just cause or excuse. It is implied from an unlawful act, willfully done, until the contrary be proved. *State v. Doig* (S. O.) 2 Rich. Law, 179, 182.

"'Malice' is defined to be that state of mind or act when one willfully does that which he knows will injure another person or property." *Territory v. Egan*, 13 N. W. 568, 571, 3 Dak. 119 (cited in *Carr v. State*, 37 N. W. 630, 633, 23 Neb. 749).

"The term 'malice' denotes a wicked intention of the mind. An act done with a depraved mind, attended with circumstances which indicate a willful disregard of the rights or safety of others or of social duty, indicates malice." *People v. Davis*, 32 Pac. 670, 671, 8 Utah, 412.

"Malice," in the true sense of the law, at least in all cases except willful murder, signifies no more than a willful intent to do a wrongful act. *Commonwealth v. York*, 50 Mass. (9 Metc.) 93, 97, 43 Am. Dec. 373.

Malice is the disposition to injure another without cause from a spirit of revenge, merely, or from personal gratification. *King v. Root* (N. Y.) 4 Wend. 113, 155, 21 Am. Dec. 102.

"Malice" is defined to mean enmity of heart; malevolence; ill will; a spirit desiring harm to another; a disposition to injure others; unprovoked malignity of spirit. *Chandler v. State*, 39 N. E. 444, 447, 141 Ind. 106.

"Malice" means, in its legal sense, exactly what it means in its popular sense, namely, a mischievous design or intent to do an injury to an individual or to the public. *Viele v. Gray* (N. Y.) 18 How. Prac. 550, 564, 565.

The malice referred to in the rule that, where an injury is maliciously inflicted, punitive damages may be recovered, is not merely doing an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations. *Smith v. Philadelphia, W. & B. R. Co.*, 38 Atl. 1072, 1073, 87 Md. 48; *Philadelphia, W. & B. R. Co. v. Hoeflich*, 62 Md. 300, 307, 50 Am. Rep. 223 (citing *Philadelphia, W. & B. R. Co. v. Quigley*, 62 U. S. [21 How.] 202, 16 L. Ed. 73).

A willful wrongful intent is not involved in the legal definition of the term "malice." *Davis v. Standard Nat. Bank*, 63 N. Y. Supp. 764, 766, 50 App. Div. 210.

Malice is implied by law from every deliberate cruel act committed by one person against another, however sudden that act may be. *State v. Warren* (Del.) 41 Atl. 190, 1 Marv. 487.

Malice denotes a wicked intention of the mind; an act done with a depraved mind, attendant with circumstances which indicate the willful disregard of the rights and safety of others. *Thiede v. People of Territory of Utah*, 16 Sup. Ct. 62, 67, 159 U. S. 510, 40 L. Ed. 237.

Malice is a wicked and mischievous purpose which characterizes the perpetration of an injurious act without lawful excuse. *State v. Coella*, 28 Pac. 28, 33, 3 Wash. St. 99.

A man may do a thing willfully, and yet be free of malice, but he cannot do an act maliciously without at the same time doing it willfully. The malicious doing of an act includes the willful doing of it, while malice includes intent and will. *State v. Robbins*, 66 Me. 324, 328.

"Any unlawful act done willfully and purposely to the injury of another is, as against that person, malicious. This wrong motive, when it is shown to exist, coupled with a wrongful act willfully done to the injury of another, constitutes legal malice." *Dempsey v. State*, 11 S. W. 372, 373, 27 Tex. App. 269, 11 Am. St. Rep. 193 (citing *Glasgow v. Owen*, 6 S. W. 527, 69 Tex. 167; *Ramsey v. Arrott*, 64 Tex. 322).

Malice is that state of mind which prompts a conscious violation of law to the prejudice of another. *Abbott v. Commonwealth* (Ky.) 68 S. W. 124, 125.

"Malice," in law, simply means a depraved inclination on the part of a person to disregard the rights of others, which intent is manifested by his injurious acts; and where one, though not actuated by hatred, revenge, or passion, nevertheless acts wantonly against what any man of ordinary intelligence must have known to be contrary to his duty, and purposely injurious to another, the law will imply malice. In re *Freche* (U. S.) 109 Fed. 620, 621.

Malice is an intent of the mind and heart. *Allen v. United States*, 17 Sup. Ct. 154, 155, 164 U. S. 492, 41 L. Ed. 528.

Malice is the expression of a wicked and depraved heart and mind; of a cruel disposition. *State v. Wallace* (Del.) 47 Atl. 621, 622, 2 Pennewill, 402.

The word "malice" imports a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law. *Pen. Code Ariz.* 1901, par. 7, subd. 4; *Pen. Code Cal.* 1903, § 7, subd. 4; *Rev. Codes N. D.* 1899, § 7716; *Pen. Code S. D.* 1903, § 811; *Pen. Code Idaho* 1901, § 4544, subd. 4; *Rev. St. Utah* 1898, § 4053; *Ann. Codes & Sts. Or.* 1901, § 2179; *Pen. Code Mont.* 1895, § 7, subd. 4; *Rev. St. Okl.* 1903, § 2689.

The term "malice," as used in the Penal Code, imports an evil intent or wish or design to vex, annoy or injure, another person, or to maltreat or injure an animal. *Pen. Code N. Y.* 1903, § 718.

Malice may consist in personal spite, or in a general disregard of the right consideration of mankind, directed by chance against the individual injured. *Civ. Code Ga.* 1895, § 3855.

Express or implied.

Malice has always been divided into two kinds—implied malice, or malice in law, and

express malice, or malice in fact. *Gambrill v. Schooley*, 52 Atl. 500, 501, 95 Md. 260, 63 L. R. A. 427; *State v. Mills*, 21 S. E. 106, 107, 116 N. C. 992; *State v. Town* (Ohio) *Wright*, 75, 76; *State v. Harrigan* (Del.) 31 Atl. 1052, 9 Houst. 369.

There is a great deal in the lawbooks, and considerable in the brief of counsel, about express malice and implied malice, but there is in reality no such distinction. They both mean precisely the same condition of mind. The law makes malice a necessary ingredient in both degrees of murder, and it is the same thing whether shown to exist by one set of circumstances or another. Its existence as a fact must be proved in every charge of murder. The law never presumes its existence. The modes of proof may differ widely in individual cases; in some it may be proven by declarations; in others, by acts preceding the homicide; and in others still, by the circumstances of the killing. Its existence in every case must be established by proof either directly or circumstantially, never by presumption. So that to classify it as express malice and implied malice is to recognize a distinction where there is no difference. *Craft v. State*, 3 Kan. 450, 486.

"Malice is essential to every action for libel. It has been sometimes divided into legal malice, or malice in law, and actual malice, or malice in fact. These terms might seem to imply that the two kinds of malice are different in their natures. The true distinction, however, is not in the malice itself, but simply in the evidence by which it is established. In all ordinary cases, if the charge or imputation complained of is injurious, and no justifiable motive for making it is apparent, malice is inferred from the falsity of the charge. The law in such case does not impute malice not existing in fact, but presumes a malicious motive for making a charge which is both false and injurious, when no other motive appears. Where, however, the circumstances show that the defendant may reasonably be supposed to have a just and worthy motive for making the charge, then the law ceases to infer malice from the mere falsity of the charge, and requires from the plaintiff every proof of its existence." *Lewis v. Chapman*, 16 N. Y. 369, 372.

"Malice," in the old definitions, is spoken of as express and implied. That is a distinction which is a delusion and a snare. Practically, jurymen never deal with express malice. There is no express malice given to them. Malice is an intent of the mind and heart. There is never presented to a jury direct evidence of what was the intent of a man's heart at the time. He is the only possible direct witness to that; and, if he meant so to testify, he would plead guilty. The existence or nonexistence of malice is

an evidence to be drawn by the jury from all the facts of the case. *United States v. King* (U. S.) 34 Fed. 302, 311.

Malice aforethought distinguished.

"Malice" alone does not signify the same thing as "malice aforethought." Bishop says that the better use makes a distinction between them, and assigns to malice a meaning somewhat less intense in respect to wickedness than malice aforethought. *State v. Green*, 7 South. 793, 794, 42 La. Ann. 644; *State v. Curtis*, 70 Mo. 594, 598; *Cravey v. State*, 35 S. W. 658, 36 Tex. Cr. R. 90, 61 Am. St. Rep. 833. Contra, see *Harrell v. State*, 45 S. W. 581, 588, 39 Tex. Cr. R. 204.

Negligence distinguished.

"Malice" is distinguished from negligence, in that it arises from an evil purpose, while negligence arises from a failure of purpose. *People v. Camp*, 21 N. Y. Supp. 741, 745, 68 Hun. 531 (citing *Whart. Cr. Law*, 126).

In criminal law.

"Malice," in the law of murder, does not mean mere spite, ill will, or dislike, as it is ordinarily understood, but it means that condition of the mind which prompts one person to take the life of another without just cause or provocation, and it signifies a state of disposition which shows a heart regardless of social duty, and fatally bent on mischief. *State v. Avery*, 21 S. W. 193, 197, 113 Mo. 475; *State v. Howell*, 23 S. W. 263, 267, 117 Mo. 307; *State v. Dickson*, 78 Mo. 438, 441; *State v. Fitzgerald*, 32 S. W. 1113, 1115, 130 Mo. 407; *State v. Musick*, 14 S. W. 212, 213, 101 Mo. 260; *State v. Seaton*, 17 S. W. 169, 106 Mo. 198; *State v. Brooks*, 5 S. W. 257, 261, 92 Mo. 542; *State v. Gatlin*, 70 S. W. 885, 888, 170 Mo. 354; *State v. Ashcraft*, 70 S. W. 898, 900, 170 Mo. 409; *State v. McMullin*, 71 S. W. 221, 224, 170 Mo. 608; *Harris v. State*, 8 Tex. App. 90, 109, 110; *Martinez v. State*, 16 S. W. 767, 768, 30 Tex. App. 129, 28 Am. St. Rep. 895; *Jordan v. State*, 10 Tex. 479, 492; *Harris v. State*, 8 Tex. App. 90, 109 (cited in *Carr v. State*, 37 N. W. 630, 633, 23 Neb. 749); *Logan v. State* (Tex.) 53 S. W. 694, 695; *Cain v. State* (Tex.) 59 S. W. 275, 277, 42 Tex. Cr. R. 210 (quoting *Harris v. State*, 8 Tex. App. 90, 109); *Harrell v. State*, 45 S. W. 581, 588, 39 Tex. Cr. R. 204; *Martinez v. State*, 16 S. W. 767, 30 Tex. App. 129, 28 Am. St. Rep. 895; *Vollmer v. State*, 40 N. W. 420, 423, 24 Neb. 838; *DeArman v. State*, 77 Ala. 10, 16; *Anderson v. Territory*, 13 Pac. 21, 25, 4 N. M. (Johns.) 108; *State v. Turner* (Ohio) *Wright*, 20, 27; *Territory v. Hart*, 17 Pac. 718, 722, 7 Mont. 489; *State v. Dowell*, 31 South. 151, 152, 106 La. 645; *State v. Lodge* (Del.) 33 Atl. 312, 315, 9 Houst. 542; *State v. Jones* (Del.) 47 Atl. 1006, 1007, 2 Pennewill.

573; *State v. Miller* (Del.) 32 Atl. 137, 138, 9 *Houst.* 564; *McCoy v. People*, 51 N. E. 777, 779, 175 Ill. 224; *Harris v. State*, 58 N. E. 75, 77, 155 Ind. 265; *State v. Murray*, 5 Pac. 55, 60, 11 Or. 413; *People v. Borgetto*, 58 N. W. 328, 329, 99 Mich. 336; *United States v. Boyd* (U. S.) 45 Fed. 851, 857; *United States v. Lewis* (U. S.) 111 Fed. 630, 632. And therefore "malice" is implied from any deliberate cruel act against another, however sudden. *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 306, 52 Am. Dec. 711 (quoting *East*, P. C. c. 5, § 12); *State v. Young*, 40 S. E. 334, 50 W. Va. 96, 88 Am. St. Rep. 846.

"Malice," in its common acceptation, signifies ill will, hatred, or revenge toward a particular individual. In a legal sense, as relating to murder, it denotes that condition of one's mind which is manifested by his intentionally doing a wrongful act without just cause or excuse. It means any wicked or mischievous intention of the mind. *State v. Witt*, 8 Pac. 769, 770, 34 Kan. 488; *People v. Ah Toom*, 9 Pac. 311, 312, 68 Cal. 362; *Carr v. State*, 37 N. W. 630, 633, 23 Neb. 749; *United States v. Meagher* (U. S.) 37 Fed. 875, 879; *United States v. Harriman* (U. S.) 26 Fed. Cas. 172, 173; *State v. Schaefer*, 22 S. W. 447, 450, 116 Mo. 96; *State v. Harper*, 51 S. W. 89, 91, 149 Mo. 514; *State v. Hays*, 23 Mo. 287, 325; *Pennsylvania v. Lewis* (Pa.) Add. 279, 282; *Williams v. United States* (Ind. T.) 69 S. W. 871, 872; *Commonwealth v. Wood*, 77 Mass. (11 Gray) 85, 92. Malice, which is essential to murder, is defined by Blackstone to be "any evil design in general, the dictate of a wicked, depraved, and malignant heart, and may exist without any fixed purpose to take the life of the individual." *Ex parte Wray*, 30 Miss. 673; *Gallery v. State*, 17 S. E. 863, 864, 92 Ga. 463; *Revel v. State*, 26 Ga. 275, 281. See, also, *State v. Cole* (Del.) 45 Atl. 391-393, 2 *Pennewill*, 344; *Commonwealth v. Moore*, 2 *Pittsb. R.* 502, 503; *State v. Davis* (Del.) 33 Atl. 55, 56, 9 *Houst.* 407; *Ohio v. Brooks* (Ohio) 9 *West. Law J.* 407, 409; *State v. Cook*, 2 *Ohio Dec.* 36, 39; *State v. Gardner* (Ohio) *Wright*, 392-400; *Adams v. People*, 109 Ill. 444, 450, 50 Am. Rep. 617.

Malice, in the law of homicide, is a deliberate intent to unlawfully take away human life. *Huff v. State*, 11 S. E. 618, 619, 85 Ga. 285; *Beck v. State*, 76 Ga. 452, 472; *Dozier v. State*, 26 Ga. 156, 160; *Hinkle v. State*, 21 S. E. 595, 601, 94 Ga. 595; *Powell v. State*, 20 S. E. 483, 95 Ga. 502.

"Malice," as employed in definition of murder, to the effect that it is the killing of any reasonable creature with malice, means with design and without excuse. *State v. Reed*, 9 N. C. 454, 455.

Any formed design of mischief may be called malice. Malice is a deliberate and

willful attempt, regardless of whether he had an intention of the mischief. This may be collected from previous circumstances, or circumstances attending the manner or fact of the killing. There may be malice, in its legal sense, when there is no actual intention of any mischief, or the killing is the actual consequence of a careless action, as riding a horse or driving a carriage through a crowd. *State v. Bell* (Pa.) Add. 156, 1 Am. Dec. 298.

Malice is a state and condition of the mind or heart which is best understood as "wickedness." Its existence in the case of a homicide is shown by the character of the act done. If there be preconceived purpose to take life, as shown by threats, lying in wait, the selection of a deadly instrument or weapon, likely to produce death, and use of it in pursuance of the threats, etc., it is called "express malice aforethought." *State v. Walker* (Del.) 33 Atl. 227, 228, 9 *Houst.* 464.

"Malice is but a wicked and evil state or frame of mind towards another; a mental emotion aroused and awakened by some motive of real or imagined wrong, or of some personal benefit or advantage to be gained, fostered, and cherished in moments of coolness, sedateness, and deliberation, and which prompts to action, and seeks its gratification in the destruction of its intended victim whenever a favorable conjuncture of circumstances may present itself." *Cotton v. State*, 32 Tex. 614-641.

Reduced to its lowest terms, "malice," in murder, means knowledge of such circumstances that, according to common experience, there is a plain and strong likelihood that death will follow the contemplated act, coupled, perhaps with an implied negation of any excuse or justification. The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct. Of course, we do not mean to imply that such a likelihood would be enough to satisfy the statutory requirement of deliberately premeditated malice aforethought, and to constitute murder in the first degree. *Commonwealth v. Chance*, 54 N. E. 551, 554, 174 Mass. 245, 75 Am. St. Rep. 306.

The term "malice," when used to characterize murder, does not mean mere hatred, spite, or ill will, as ordinarily understood, but means that the killing was wrongfully and intentionally committed. *State v. McKenzie*, 45 S. W. 1117, 1118, 144 Mo. 40.

"Malice" means an evil intent. It may exist in the human heart for years, or it may arise on the instant. But if it is present at the time the fatal blow is given or the fatal shot fired, the killing would be murder. *State v. Symmes*, 19 S. E. 16, 17, 40 S. C. 383.

The malice necessary to the crime of murder cannot coexist with the heat of passion. Malice excludes passion. Passion presupposes the absence of malice. *State v. Sloan*, 56 Pac. 364, 367, 22 Mont. 293; *State v. Johnson*, 23 N. C. 354, 362, 35 Am. Dec. 742.

The malice necessary to be proved to support an indictment under the act of 1835 for beating a member of the crew of a ship with malice is a willful departure from a known duty. If the master knows that his act was unlawful, and does it intending to take the consequences, it is a malicious act, within the meaning of the law. *United States v. Cutler* (U. S.) 25 Fed. Cas. 740.

In extortion.

Under a statute providing that any person who maliciously threatens to accuse another of a crime or offense, with intent to extort money, etc., shall be punished, etc., it is held that the malice required by the statute is not a feeling of ill will towards the person threatened, but the willful doing of the act with illegal intent. If a threat is willfully made with the intent to extort money, it is a malicious act, and the fact that the charge is true would be immaterial. *Commonwealth v. Buckley*, 18 N. E. 577, 148 Mass. 27, 1 L. R. A. 624.

In insolvency law.

In the statute providing that, when malice is not the gist of the action, one held to bail may be released on complying with the provisions of the act, the term "malice" should not be construed in the sense of hate or ill will, but of malus animus, and as denoting that the party is actuated by improper or dishonest motives. It implies a wrong inflicted on another with an evil intent, design, or purpose, requiring intentional perpetration of an injury or wrong to another. The wrong and intention to commit the injury are necessary to a fulfillment of the meaning of the term. *Kitson v. Farwell*, 132 Ill. 338, 23 N. E. 1024, 1025; *First Nat. Bank of Flora v. Burkett*, 101 Ill. 391, 394, 40 Am. Rep. 209. A wrongful act done intentionally without just cause or excuse. *In re Murphy*, 109 Ill. 31, 33. It applies to that class of wrongs which are inflicted with an evil intent, design, or purpose. It implies that the guilty party was actuated by improper or dishonest motives, and requires the intentional perpetration of an injury or a wrong on another. *Jernberg v. Mix*, 65 N. E. 242, 199 Ill. 254 (citing *Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024).

In libel and slander.

"Malice," in the law of libel and slander, is defined to be the doing of a wrongful act intentionally, and with the purpose to wrong and oppress, without any just cause

or excuse. *Hiatt v. Kinkaid*, 58 N. W. 700, 704, 40 Neb. 178; *Smith v. Rodecap*, 81 N. E. 479, 5 Ind. App. 78 (quoting *Branstetter v. Donough*, 81 Ind. 527); *King v. Patterson*, 9 Atl. 705, 706, 49 N. J. Law (20 Vroom) 417, 60 Am. Rep. 622 (citing *Cooley, Torts*, 209); *Jones v. Todd* (Ky.) 51 S. W. 452; *Neeb v. Hope*, 2 Atl. 568, 570, 111 Pa. 145; *Regensperger v. Keifer* (Pa.) 7 Atl. 724, 725; *Buckley v. Knapp*, 48 Mo. 152; *Barbee v. Hereford*, Id. 323; *Viele v. Gray* (N. Y.) 10 Abb. Prac. 1, 5; *McFadden v. Morning Journal Ass'n*, 51 N. Y. Supp. 275, 281, 28 App. Div. 508; *Austin v. Hyndman*, 78 N. W. 663, 664, 119 Mich. 615; *In re Maples* (U. S.) 105 Fed. 919, 921; *Times Pub. Co. v. Carlisle* (U. S.) 94 Fed. 762, 766, 36 C. C. A. 475; *Staub v. Van Benthuyssen*, 38 La. Ann. 467.

Malice, as referring to libel and slander, is an indirect or wicked motive which induces the defendant to defame the plaintiff. *Halstead v. Nelson*, 1 N. Y. Supp. 280, 285; *Moore v. Stevenson*, 27 Conn. 14, 19.

Malice is of the essence of libel, and any definition or any charge of libel which does not embrace this essential characteristic would be defective. In a legal sense, any act done willfully and purposely to the prejudice and injury of another, which is unlawful is, as against that person, malicious. It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill will toward the individual, or that he entertain and pursue any general bad purpose or design. On the trial he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of manners. But if, when pursuing that design, he willfully inflicts a wrong on others which is not warranted by law, such act is malicious. *Commonwealth v. Snelling*, 32 Mass. (15 Pick.) 321, 340.

"Malice," in the sense of the law of libel, means willfulness. *Dexter v. Spear* (U. S.) 7 Fed. Cas. 624; *Austin v. Hyndman*, 78 N. W. 663, 664, 119 Mich. 615.

The malice which is the gist of actions for slander is not malice in its worst sense, but such malice as consists of an intent to deceive or injure. And in order to constitute it, there must be a false statement, and it must be made with full knowledge of its falsity, and for the purpose of injuring plaintiff. *Hopkins v. Drowne*, 41 Atl. 567, 568, 21 R. I. 20.

The word "malice," as used in a criminal prosecution for slander, is that evil mind that intentionally violates the law, without the moral sanction of honest conviction, supported by probable cause, to excuse it. Therefore, when the slanderous words are groundless, malice is implied. *Haley v. State*, 63 Ala. 87, 88.

"Malice," as used in libel, "denotes ill will or intent to injure or to offend, or to wound the feelings of another." *Chaffin v. Lynch*, 1 S. H. 803, 807, 83 Va. 106.

"Malice," in the law of libel, consists in an intentional defamatory publication in violation of a legal duty. *Atwater v. Morning News Co.*, 34 Atl. 865, 866, 67 Conn. 504.

"Malice is the wrongful doing of an act with the intention to do harm, and, where a libel imputes crime, malice is implied. A mere charge of the commission of crime carries with it the element of malice. *State v. Shaffner* (Del.) 44 Atl. 620, 621, 2 Pennewill, 171.

In order to make an act malicious, it is not necessary that the person accused should entertain a feeling of hatred toward the person injured, or that he was actuated by a desire for revenge. In the absence of a lawful excuse, a defamatory publication is presumed to be malicious, and therefore libelous; and, if not privileged, the absence of ill will against the person defamed, or the fact that the matter was published in a spirit of pleasantry, becomes immaterial. *Commonwealth v. Brown* (Pa.) 30 Wkly Notes Cas 320, 321.

In malicious prosecution.

The term "malice," as used in the rules relative to malicious prosecutions, does not mean spite or hatred against an individual, but rather *malus animus*, as denoting that the party is actuated by improper and indirect motives in prosecuting the action. *Harpham v. Whitney*, 77 Ill. 32, 38.

"Malice," as the term is used in reference to an excessive levy of an execution, "is an improper act, injurious to another, proceeding from an improper motive; whether it be done propter odium vel causa lucri; whether the motive be solely to break up the fortunes of a man, or whether it proceeds from oppressive acts under cover of the law and of legal process, by its means, and not permitted by the law, by which the perpetrator is a gainer, and the party acted upon receives a prejudice, as here to coerce the payment of another debt, by levying more on the execution than could be legally levied." *Sommer v. Wilt* (Pa.) 4 Serg. & R. 18, 23; *Messman v. Ihlenfeldt*, 62 N. W. 522, 523, 89 Wis. 585; *Spear v. Hiles*, 30 N. W. 506, 509, 67 Wis. 350; *Mitchell v. Wall*, 111 Mass. 492, 498.

The malice necessary to sustain an action for malicious prosecution is not express malice—a specific desire to vex or injure another from malevolence or motives of ill will—but the willful doing of an unlawful act to the prejudice or injury of another. *Johnson v. Ebberts* (U. S.) 11 Fed. 129, 131; *Lemay v. Williams*, 32 Ark. 166, 176, 177;

Ramsey v. Arrott, 64 Tex. 320, 323, 660, 663; *Carothers v. McIlhenny Co.*, 63 Tex. 138, 141; *Porter v. Martyn* (Tex.) 32 S. W. 731, 733.

By the term "malice," as used in an action for malicious prosecution, is not necessarily meant that state of mind which must proceed from a spiteful, malignant, and revengeful disposition, but it includes, as well, that which proceeds from an ill-regulated mind, not sufficiently cautious, and recklessly bent on the attainment of some desired end, although it may inflict want and injury on another. *Savage v. Davis*, 42 S. E. 571, 572, 131 N. C. 159.

"Malice," as used with reference to a malicious prosecution, means that the prosecution is willful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends that he knows or is bound to know are wrong and against the dictates of public policy. The term is not used with reference to this matter in the sense often ascribed to it. There may be ill will, malevolence, spite, a spirit of revenge, or purpose to injure without cause, but it is not necessary that there should be. Malice may be inferred from want of probable cause, but not conversely. *Hamilton v. Smith*, 39 Mich. 222, 226.

Malice consists in a bad mind; that is, either a direct intention to injure, or that degree of bad motive or ill will which would lead the mind to conclusions not warranted to the understanding of an impartial mind. No degree of malice, however, is sufficient to render a defendant in an action for malicious prosecution liable if he had probable cause. *Bacon v. Towne*, 58 Mass. (4 Cush.) 217, 233.

"The malice in malicious prosecutions is not necessarily, while it may be, ill will to the individual; but it is any evil or unlawful purpose, as distinguished from that of promoting the justice of the law." *Ahrens & Ott Mfg. Co. v. Hoehner*, 51 S. W. 194, 195, 106 Ky. 692.

"Malice," as applied to an action for malicious prosecution, may be defined as such a state of mind as leads to the doing of some act, knowing it to be without just cause or legal excuse. *Noble v. White*, 72 N. W. 556, 558, 103 Iowa, 352.

In malicious prosecutions the term "malice" does not necessarily mean that it must proceed from a specified malignant or revengeful disposition, but it includes conduct injurious to another, though proceeding only from an ill-regulated mind, not sufficiently cautious before it occasions an injury to another, and bent on the attainment of some desired end—such, for example, as the collection of a just debt without due regard to the rights of that other. Juries may infer this kind of malice from facts and circum-

stances proven in the case which show that the party acted with a reckless disregard for the rights of others, and was willing, in order to accomplish the desired end, to inflict a wanton injury. *Brewer v. Jacobs* (U. S.) 22 Fed. 217, 222.

In a malicious prosecution, any improper motive is sufficient to constitute legal malice, and malice will be inferred when the object of the prosecution is to enforce the payment of a debt. *Morgan v. Duffy*, 30 S. W. 735, 94 Tenn. (10 Pickle) 686.

In slander of property.

In order to constitute malice, to authorize a recovery for the publication of a false and malicious statement concerning property, it is not necessary that there should be proof of an intention to injure the value of property. Malice in uttering such statements may consist either in a direct intention to injure another, or a reckless disregard of his rights and the consequences that may result. Therefore an instruction which required plaintiff to prove in defendant "a disposition willfully and purposely to injure the value" of a particular piece of property, as well as "wanton disregard of the interest of the owner," was clearly erroneous. *Gott v. Pulsifer*, 122 Mass. 235, 239, 23 Am. Rep. 322.

MALICE AFORETHOUGHT.

See "Willfully and of Malice Aforethought."

See, also, "Aforethought."

Malice aforethought is nothing more than an unlawful or wicked intention. *State v. White*, 14 Kan. 538, 540; *State v. Fooks*, 29 Kan. 425.

"Malice aforethought" is the term used in law to designate the wicked and mischievous intent with which a man willfully does a wrongful act, and is to be inferred from acts committed or words spoken. *Cain v. State*, 59 S. W. 275, 277, 42 Tex. Cr. R. 210.

"Malice aforethought" is a condition of the mind which shows a heart regardless of serious duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken. *Hayes v. State*, 14 Tex. App. 330, 331.

An intention to kill unlawfully, without sufficient provocation, is a malicious intention; and, if executed, the killing is, in law, from malice aforethought, and is murder. *United States v. McGlue* (U. S.) 26 Fed. Cas. 1093, 1094.

"Malice aforethought" are technical words for which, in an indictment for murder, there can be no equivalents or substitutes. They constitute an essential part of

the definition of murder both at common law and under the statute. *McElroy v. State*, 14 Tex. App. 235, 236 (quoted with approval in *Oravey v. State*, 35 S. W. 658, 659, 36 Tex. Cr. R. 90, 61 Am. St. Rep. 833).

"Malice aforethought," in common parlance, conveys only the idea of express malice, but its meaning has been enlarged by judicial construction so as to include implied malice. *Territory v. Bannigan*, 46 N. W. 597, 598, 1 Dak. 451; *People v. Wright*, 29 Pac. 240, 241, 93 Cal. 564; *Bohannon v. State*, 14 Tex. App. 271, 300; *United States v. Boyd* (U. S.) 45 Fed. 851, 857; *People v. Jefferson*, 52 Cal. 452, 453.

Deliberation or premeditation implied.

"Malice aforethought" means that the act was done with malice and premeditation. *State v. Brooks*, 5 S. W. 257, 261, 92 Mo. 542; *State v. Harper*, 51 S. W. 89, 91, 149 Mo. 514; *State v. McKenzie*, 45 S. W. 1117, 1118, 144 Mo. 40; *State v. Dale*, 18 S. W. 978, 108 Mo. 205; *State v. Reed*, 23 S. W. 886, 889, 117 Mo. 604; *State v. Avery*, 21 S. W. 193, 197, 113 Mo. 475; *State v. Howell*, 23 S. W. 263, 267, 117 Mo. 307.

Malice aforethought is a wicked intention of the mind, previously entertained. *Thiede v. Utah*, 16 Sup. Ct. 62, 67, 159 U. S. 510, 40 L. Ed. 237; *People v. Davis*, 32 Pac. 670, 671, 8 Utah, 412.

"Malice aforethought" is defined in the *Century Dictionary* as actual malice, particularly in cases of homicide; in *Webster*, "malice previously and deliberately entertained." Thus it appears that the adjective "aforethought" describes, not the intent to take life, but the malice, and that malice must be previously and deliberately entertained when the purpose to take life is formed, and must co-operate with the blow in producing death to constitute murder. To understand malice aforethought, malice must not be confounded with the intent to take life. It is the malice that must previously exist or be deliberately entertained. The intent may spring into existence, and be immediately followed by the fatal blow, and that, at common law, is murder. *State v. Fiske*, 28 Atl. 572, 573, 63 Conn. 388.

"Malice aforethought" means with malice thought of beforehand. *State v. Seaton*, 17 S. W. 169, 171, 106 Mo. 198; *State v. Curtis*, 70 Mo. 594, 601.

"Malice aforethought" means that the act done was thought of before its commission. Any length of time, however short, is sufficient. *Anderson v. Territory*, 13 Pac. 21, 25, 4 N. M. (Johns.) 108.

Malice aforethought is a wicked intention to kill, previously and deliberately formed. *State v. McGaffin*, 13 Pac. 560, 562, 36 Kan. 315.

"Malice aforethought" does not mean deliberate and calculated malice, but merely malice existing at any time before the act, so as to be its moving cause or concomitant. *Nye v. People*, 35 Mich. 18, 19.

The term "malice aforethought" is co-extensive with the words "deliberation" and "premeditation," and its primary and popular significance is rather more comprehensive, inasmuch as the latter words do not necessarily imply wickedness of purpose or evil design. *Hill v. People*, 1 Colo. 430; *Redus v. People*, 14 Pac. 323, 325, 10 Colo. 208.

"Malice aforethought" does not imply deliberation or the lapse of considerable time between the formation and execution of the intent to take life, but rather denotes purpose and design. It means malice existing at any time before the act, so as to be its moving cause or concomitant. *People v. Borgetto*, 58 N. W. 328, 329, 99 Mich. 336.

In its legal sense, malice expresses a willingness to injure another, and, when qualified by the word "aforethought," it implies that the act was done on a previous determination. One may shoot at another with malice aforethought, intending to break his pistol arm or disable him, and yet with no design to effect the death of the person he desires to injure. *Jewell v. Territory*, 43 Pac. 1075, 1078, 4 Okl. 53.

"Malice aforethought" does not necessarily imply a premeditated design to kill, but means that the act has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit. *Darry v. People*, 10 N. Y. (6 Seld.) 120, 137, 138; *United States v. Cornell* (U. S.) 25 Fed. Cas. 650.

Malice aforethought means a predetermination to do the act of killing without legal excuse, and it is immaterial how sudden or recently before the killing the determination was formed. *Strutton v. Commonwealth* (Ky.) 62 S. W. 875, 877; *Armstrong v. Commonwealth* (Ky.) 23 S. W. 654, 655; *Clark v. Commonwealth*, 63 S. W. 740, 746, 111 Ky. 443.

Deliberation is necessary to exist in order to create malice aforethought, though it need be only for a moment. *Johnson v. State*, 30 South. 89, 40, 79 Miss. 42.

The intent necessary to constitute malice aforethought need not have existed for any particular time before the act of killing, but it may spring up at the instant, and may be inferred from the act of killing. *Allen v. United States*, 17 Sup. Ct. 154, 155, 164 U. S. 492, 41 L. Ed. 528.

It has never been held that hatred or ill will towards the deceased must exist in

the mind of the slayer for any considerable length of time in order to constitute malice aforethought. *Kota v. People*, 27 N. E. 53, 136 Ill. 655.

"Malice aforethought" has come to have a well-defined and well-understood meaning, and it is well settled that, if malice existed at the time the fatal blow was struck, it constituted malice aforethought. *Ross v. State*, 57 Pac. 924, 932, 8 Wyo. 351.

To constitute malice aforethought, it is only necessary that there be a formed design to kill, and such design may be conceived at the moment the fatal stroke is given, as well as a long time before. "Malice aforethought" means the intention to kill, and, when such means are used as are likely to produce death, the legal presumption is that death was intended. *Beauchamp v. State*, 6 Ind. (6 Blackf.) 300.

Ill will implied.

"Malice aforethought" means more than enmity, ill will, or revenge, and has been extended so as to include all those states of the mind under which the killing of a person takes place without any cause which in law will justify, excuse, or extenuate the homicide. *Tooney v. State*, 5 Tex. App. 163, 100, 188; *State v. Schaefer*, 22 S. W. 447, 450, 116 Mo. 96; *United States v. Boyd* (U. S.) 45 Fed. 851, 857; *State v. Stewart*, 9 Nev. 120-131.

"Malice aforethought" has a technical meaning, and includes not only hatred and revenge, but every other unlawful and wrongful motive. It is not confined to willful acts toward one or more individuals, but is intended to denote an action flowing from any wicked and corrupt motive, and done *mallo animo*, as where the act has been attended with such circumstances as carry in them the plain intentions of a heart regardless of social duty and fatally bent on mischief. *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295-304, 52 Am. Dec. 711.

"Malice aforethought," or "preconceived malice," in the statutory definition of murder in the first degree as any murder committed with "malice aforethought," is not so properly spite or malevolence to the deceased in particular as any evil design in general—the dictate of a wicked, depraved, and malignant heart. *State v. Reidell* (Del.) 14 Atl. 550, 9 Houst. 470.

"When the law maketh use of the term 'malice aforethought,' as descriptive of the crime of murder, it is not to be understood in that narrow, restrained sense to which the modern use of the word 'malice' is apt to lead one, a principle of malevolence to particulars; for the law, by the term 'malice,' in this instance, meaneth that the fact hath been attended with such circumstances as

are the ordinary symptoms of a wicked, depraved, and malignant spirit." Hogan v. State, 36 Wis. 226, 242 (citing Foster, 256).

"Malice aforethought" is not malice in its ordinary sense alone, such as a particular ill will, a spite, or a grudge, but is a legal term implying much more, comprehending not only a particular ill will, but hardness of heart, recklessness of consequences, and a mind regardless of duty, although a particular person may not be intended to be injured. Commonwealth v. Drum, 58 Pa. 9, 23.

"Malice aforethought" is a condition of mind in which one man does an intentional injury to another in the willful disregard of the legal rights of the other, and it is to be inferred from acts committed or words spoken. It exists when one does a cruel act voluntarily, and without excuse, justification, or extenuation, and does not necessarily include hatred towards the person injured. Stevens v. State, 59 S. W. 545, 549, 42 Tex. Cr. R. 154.

"Malice aforethought" does not signify a personal hatred or revenge against the person killed, but means that kind of unlawful purpose which, if persevered in, must produce mischief, and which, if accompanied with those circumstances that show the heart to be perversely wicked, is adjudged to be proof of malice prepenze. State v. Pike, 49 N. H. 399-402, 6 Am. Rep. 533.

Malice distinguished.

See "Malice."

Maliciously synonymous.

"Malice aforethought" is synonymous with "maliciously." Fisher v. State, 78 Tenn. (10 Lea) 151, 156. Contra, see State v. Curtis, 70 Mo. 594, 598.

Premeditated synonymous.

To premeditate is to think, consider, or resolve in the mind beforehand; to have formed in the mind by previous thought or meditation; previously contrived, designed, or intended. "Premeditated" is held to be sufficiently synonymous with "malice aforethought," so that under the statute providing that all deliberate and premeditated killing, etc., is murder in the first degree, an allegation in an indictment that the killing was with malice aforethought was sufficient; "aforethought" being defined as being premeditated, prepenze, or, in other words, that "aforethought" includes premeditated; malice aforethought being malice premeditated, and vice versa. Brannigan v. People, 24 Pac. 767, 769, 3 Utah, 488.

A premeditated design to kill is sufficiently expressed in the term "malice aforethought." People v. Enoch (N. Y.) 13 Wend. 159, 167, 27 Am. Dec. 197.

Willful, deliberate, and premeditated synonymous.

An indictment for murder, charging the homicide to have been with malice aforethought, sufficiently charges that the act was "willful, deliberate, and premeditated." State v. Hing, 16 Nev. 307, 308. Contra, see State v. Wong Fun, 40 Pac. 95, 96, 22 Nev. 336.

MALICE IN FACT.

"Malice in fact" means express malice. Missouri Pac. Ry. Co. v. Behee, 21 S. W. 384, 385, 2 Tex. Civ. App. 107; Smith v. Rodecap, 31 N. E. 479, 5 Ind. App. 78.

Malice in fact is where the malice is not established by legal presumption or proof of certain facts, but is to be found by the jury from the evidence in the case. Pullen v. Glidden, 66 Me. 202, 204.

The term "malice in fact" means the malice which is inferred from the act, or, in cases of slander, from the publication of the false language. Smith v. Rodecap, 31 N. E. 479, 5 Ind. App. 78.

Malice in fact is a deliberate intention to do unlawfully any bodily harm to another. State v. Talley (Del.) 33 Atl. 181, 9 Houst. 417.

Malice in fact, or actual malice, relates to the actual state or condition of the mind of the person who did the act. Gee v. Culver, 11 Pac. 302, 303, 13 Or. 598.

The phrase "malice in fact" is a technical one, and does not mean malignity, spite, or hatred, but implies an unjustifiable motive. Hotchkiss v. Porter, 30 Conn. 414; Wynne v. Parsons, 17 Atl. 362, 364, 57 Conn. 73; Moore v. Stevenson, 27 Conn. 14, 27.

Malice in fact implies a desire and an intention to injure, while malice in law is not necessarily inconsistent with an honest purpose, if the act complained of be done intentionally, without just cause or excuse. Bacon v. Michigan Cent. R. Co., 33 N. W. 181, 185, 66 Mich. 166.

MALICE IN LAW.

"Malice in law" means implied malice. Missouri Pac. Ry. Co. v. Behee, 21 S. W. 384, 385, 2 Tex. Civ. App. 107; Smith v. Rodecap, 31 N. E. 479, 5 Ind. App. 78.

The term "malice in law," as used in reference to libel and slander, is defined as malice, which is inferred from doing a wrongful act without lawful justification or excuse. Smith v. Rodecap, 31 N. E. 479, 5 Ind. App. 78 (citing 1 Starkie, Sland. & L. 218); Pullen v. Glidden, 66 Me. 202, 204.

Malice in fact implies a desire and an intention to injure, while malice in law is

not necessarily inconsistent with an honest purpose, if the act complained of be done intentionally, without just cause or excuse. *Bacon v. Michigan Cent. R. Co.*, 33 N. W. 181, 185, 66 Mich. 166.

"Malice in law" simply means a depraved inclination on the part of a person to disregard the rights of others, which intent is manifested by his injurious acts. *McDonald v. Brown*, 51 Atl. 213, 215, 23 R. I. 546, 58 L. R. A. 768, 91 Am. St. Rep. 659; *Colwell v. Tinker*, 62 N. E. 668, 670, 169 N. Y. 531, 58 L. R. A. 765; *Willard v. Holmes*, 21 N. Y. Supp. 998, 999, 2 Misc. Rep. 303.

"Malice in law" means an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite, or a desire to injure another. *Tucker v. Cannon*, 49 N. W. 435, 32 Neb. 444; *Taylor v. Hearst*, 40 Pac. 392, 393, 107 Cal. 262; *Bacon v. Michigan Cent. R. Co.*, 33 N. W. 181, 185, 66 Mich. 166; *Lewis v. State*, 15 S. E. 647, 698, 90 Ga. 98.

MALICE PREPENSE.

"Malice prepense is when one compasseth to kill, wound, or beat another, and doth it in sedato animo. This is said, in law, to be malice aforethought, prepense, malitia, precogitata." *Hill v. People*, 1 Colo. 436, 444 (citing 3 Coke, Inst. 51); *Redus v. People*, 14 Pac. 323, 325, 10 Colo. 208.

MALICIOUS.

"Evinced malice; done with malice and an evil design; willful." *Ohio Val. Tel. Co. v. Meyer (Ky.)* 56 S. W. 673, 674 (citing *Black*).

"Malicious" means with a fixed hate, or done with intentions or motives; not the result of sudden passion. *Hawes v. State*, 7 South. 302, 304, 88 Ala. 37; *Martin v. State*, 25 South. 255, 257, 119 Ala. 1; *Holley v. State*, 75 Ala. 14, 20; *Mitchell v. State*, 60 Ala. 26, 28.

In a statute punishing the "malicious" killing or disfiguring of domestic animals, the word "malicious" imports a criminal intent, motive, or purpose. *Commonwealth v. McLaughlin*, 105 Mass. 460, 463.

The word "malicious," in a penal statute, must be construed to mean something more than its signification in common parlance. Its accepted legal meaning when so used is a wrongful act intentionally done, without just cause or excuse. *State v. Grassle*, 74 Mo. App. 313, 316.

The term "malicious" imports an evil intent or wish or design to vex, annoy, or injure another person, or to maltreat or injure an animal. *Gen. St. Minn. 1894*, § 6842, subd. 3.

"Malicious" imports nothing more than the wicked and perverse disposition with which the party commits the act. *Commonwealth v. York*, 50 Mass. (9 Metc.) 93, 106, 43 Am. Dec. 373.

In a legal sense, says Mr. Greenleaf in his work on Evidence (volume 2, § 453), any lawful act done willfully and purposely to the injury of another is, as against that person, malicious. *Culbertson v. Cabeen*, 29 Tex. 247, 256.

The word "malicious" is sufficiently identical with the word "willful," so that the use of the former term in an indictment under a statute using the latter does not render the indictment defective. *Glover v. People (Ill.)* 68 N. E. 464, 466.

"Malicious" may in some sort be considered as synonymous with "malice aforethought," although not a perfect synonym. In its larger sense, it is common to many crimes. At all events, it is common to many degrees of murder, when considered as synonymous with "malice aforethought"; but the words "deliberate" and "premeditated" are peculiarly and solely descriptive of murder in the first degree. *Cannon v. State*, 31 S. W. 150, 151, 60 Ark. 564.

"Malicious," as used in connection with libel, does not indicate that ill will or any particular state of mind exists, leading to the defamatory statement, but simply imports a negation that there was any just cause or excuse for its publication; and it is not usual, in pleading, to do anything more than to aver in a general way that the publication was false and malicious. *Andrews v. Deshler*, 43 N. J. Law (14 Vroom) 19, 21.

The word "malicious," in an action for slander, is not to be considered in the sense of spite or hatred against a person, but as meaning that the party is actuated by improper and indirect motives, rather than the mere purpose of protecting the public health or vindicating public justice. *Blumhardt v. Rohr*, 17 Atl. 266, 270, 70 Md. 328.

MALICIOUS ABUSE OF PROCESS.

See, also, "Abuse of Process."

Malicious prosecution distinguished, see "Malicious Prosecution."

There is a distinction between a malicious use and a malicious abuse of legal process. An abuse is where the party employs it for some unlawful object—not the purpose which it is intended by the law to effect; in other words, a perversion of it. On the other hand, legal process, civil or criminal, may be maliciously used so as to give rise to a cause of action where no object is contemplated to be gained by it, other than its proper effect and execution. *Mayer v. Walter*, 64 Pa. 283; *King v. Weed*

(Wis.) 51 N. W. 1011; *Humphreys v. Sutcliffe*, 43 Atl. 954, 956, 192 Pa. 336, 73 Am. St. Rep. 819; *Kline v. Hibbard*, 29 N. Y. Supp. 807, 809, 80 Hun. 50.

A malicious abuse of legal process consists in the malicious misuse or misapplication of process to accomplish a purpose not warranted or commanded by the writ—the malicious perversion of a regularly issued process, whereby a result not lawfully or properly obtained on a writ is secured—and hence it does not include a case where the process was procured maliciously, but in which there was no abuse or misuse after its issuance. *Bartlett v. Christliff* (Md.) 14 Atl. 518, 521 (citing *Grainger v. Hill*, 4 Bing. N. C. 212; *Sommer v. Wilt* [Pa.] 4 Serg. & R. 19).

MALICIOUS ACT.

A malicious act is one done without just cause, or one done with a wrongful purpose. *Morrison v. Press Pub. Co.*, 14 N. Y. Supp. 131, 132, 59 N. Y. Super. Ct. (29 Jones & S.) 216.

Bouvier defines a malicious act as “a wrongful act, intentionally done, without cause or excuse”—the definition of *Bayley, J.*, in *Bromage v. Prosser*, 4 Barn. & C. 247. *Brandt v. Morning Journal Ass'n*, 80 N. Y. Supp. 1002, 1004, 81 App. Div. 183.

A malicious act is one committed in a state of mind which shows a heart regardless of social duty and fatally bent on mischief—a wrongful act intentionally done, without legal justification or excuse. *Bowers v. State*, 7 S. W. 247, 24 Tex. App. 542, 5 Am. St. Rep. 901; *High v. State*, 10 S. W. 238, 241, 26 Tex. App. 545, 8 Am. St. Rep. 488.

A malicious act, in common parlance, is one proceeding from hatred or ill will, or dictated by malice, or done with wicked or mischievous intentions or motives, but, in a legal sense, a malicious act is any unlawful act done willfully or purposely to injure another. *Payne v. Western & A. R. Co.*, 81 Tenn. (13 Lea) 507, 526, 49 Am. Rep. 666; *Stansell v. Cleveland*, 64 Tex. 660, 663 (citing *Greenl. Ev.* § 453).

A “malicious act,” within any definition of the term, necessarily includes that of willfulness, and, within the definition as applied to civil injuries, means nothing more than such acts as go to the destruction of another's legal rights, without any just cause therefor—perhaps, rather, in utter disregard of the legal rights of the injured one. *Leicester v. Hoadley* (Kan.) 71 Pac. 319.

MALICIOUS CONDUCT.

Malicious conduct is willful neglect of a known obligation, with reckless disregard of

the consequences. *United States v. Reed* (U. S.) 86 Fed. 308, 312.

MALICIOUS DESERTION.

See “Willful and Malicious Desertion.”

MALICIOUS INJURY.

A malicious injury is defined to be an injury committed wantonly, willfully, or without cause. *Rounds v. Detroit, L. & W. R. Co.* (N. Y.) 5 Thomp. & C. 475, 481 (citing *Burrill*, Law Dict.).

A malicious injury includes a willful injury without just reason. *MacLean v. Scripps*, 17 N. W. 815, 817, 52 Mich. 214.

A malicious and willful injury is an injury that is not only willful and intentional, but, in order to create the criminal offense, it must have been done out of cruelty, hostility, or revenge. *Wing v. Wing*, 66 Me. 62, 64, 22 Am. Rep. 548 (citing *Commonwealth v. Walden*, 57 Mass. [3 Cush.] 558; *Same v. Williams*, 110 Mass. 401; *State v. Hussey*, 60 Me. 410, 11 Am. Rep. 206).

The term “malicious injury,” as used in *Rev. St.* 1898, § 4466a, providing that if two or more persons, who shall combine, associate, agree, mutually undertake, or counsel together for the purpose of willfully or maliciously injuring another in his reputation, trade, business, or profession, by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, etc., is synonymous with that term at the common law. It refers to the infliction of a wrongful injury intentionally. The term is synonymous with that term in the law of conspiracy, independent of the statute. *State v. Huegin*, 85 N. W. 1046, 1067, 110 Wis. 189.

MALICIOUS INTENTION.

An intention to kill unlawfully, without sufficient provocation, is a malicious intention. *United States v. McGlue* (U. S.) 26 Fed. Cas. 1093, 1094.

“Malicious intention,” as used in *Gen. St. c. 129, § 77*, relating to libels, and providing that the truth of the matter contained in the publication is a sufficient justification, unless malicious intention is proved, means an actual malicious intention, or, in other words, express malice. *Lothrop v. Adams*, 133 Mass. 471, 479, 43 Am. Rep. 528.

It was held in *Brown v. Massachusetts Title Ins. Co.*, 151 Mass. 127, 23 N. E. 733, and *Fay v. Harrington*, 176 Mass. 270, 57 N. E. 369, that by “malicious intention” was meant malice, in the popular sense of hatred or ill will, as used in connection with libel. In consequence of the latter case, the words

"actual malice" have been substituted in the act relating to libel and slander for the original words, "malicious intention." *Rev. Laws, c. 173, § 91. Conner v. Standard Pub. Co., 67 N. E. 596, 598, 183 Mass. 474.*

MALICIOUS MISCHIEF.

"Malicious mischief, or damage amounting to a crime, is defined by Blackstone to be an injury done either out of a spirit of wanton cruelty, or black, diabolical revenge." *Commonwealth v. Williams, 110 Mass. 401, 402 (quoting 4 Bl. Comm. 244); Commonwealth v. Walden, 57 Mass. (3 Cush.) 558, 561; Duncan v. State, 49 Miss. 331, 337; People v. Petheram, 31 N. W. 188, 193, 64 Mich. 252; State v. Beekman, 27 N. J. Law (3 Dutch.) 124, 126, 72 Am. Dec. 352.*

"Malicious mischief, at common law, is the willful destruction of some article of personal property from actual ill will or resentment towards its owner." *People v. Petheram, 31 N. W. 188, 193, 64 Mich. 252.*

Malicious mischief is defined by Wharton to be any malicious or mischievous physical injury to the rights of another or those of the public in general. *State v. Foote, 43 Atl. 488, 490, 71 Conn. 737.*

Malicious mischief is the wanton or reckless destruction of or injury to property. In some cases it implies a wrong inflicted on another with an evil intent or purpose. *First Nat. Bank v. Burkett, 101 Ill. 391, 394, 40 Am. Rep. 209.*

Malicious mischief done to any kind of property is a misdemeanor, and the party doing the injury may be prosecuted criminally. *People v. Upton, 9 N. Y. Supp. 684, 685, 55 Hun, 612.*

It has been generally held that any formed design of doing mischief is called "malicious," whether the mischief be intended to fall upon a particular person, or upon any person who may be within its range. *State v. Dowdell, 31 South. 151, 152, 106 La. 645.*

"Malicious mischief," to be indictable, consists in the willful destruction of some article of personal property from actual ill will or resentment towards its owner or possessor. *State v. Robinson, 20 N. C. 129, 131, 32 Am. Dec. 661.*

The act in the case of malicious mischief must proceed from malice, and, according to the general doctrine, the malice must be against the owner of the property, and not against another person or against the property itself; it not being sufficient when a man kills an animal out of ill will to it. Therefore one who kills stock found trespassing in his enclosure is not guilty of malicious mischief. *Thomas v. State, 30 Ark. 433, 435.*

Malicious mischief does not include the maiming or wounding of an animal either at common law, or under the statutory law of New Jersey. *State v. Beekman, 27 N. J. Law (3 Dutch.) 124, 125, 72 Am. Dec. 352.*

MALICIOUS PROSECUTION.

False imprisonment distinguished, see "False Imprisonment."

A malicious prosecution is a prosecution on some charge of crime which is willful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or is bound to know are wrong and against the dictates of public policy. *Fox v. Smith (R. I.) 55 Atl. 698, 699.*

Malicious prosecution is a judicial proceeding by one person against another from wrongful or improper motives and without probable cause to sustain it. The term "malicious prosecution" imports a causeless, as well as an ill-intended, prosecution. *Hicks v. Brantley, 102 Ga. 264, 268, 29 S. E. 459, 460 (citing Newell, Mal. Pros. § 5).*

A prosecution is malicious when actuated by hostile or vindictive motive, provided there is always a lack of probable cause. A prosecution instituted willfully and purposefully to gain some advantage to the prosecutor, or out of mere wantonness or carelessness, if it be at the same time wrongful and unlawful within the knowledge of the actor, and without probable cause, is in legal contemplation malicious. *Eggett v. Allen, 96 N. W. 803, 805, 119 Wis. 625.*

An action for malicious prosecution is defined by Lord Mansfield as a prosecution of the plaintiff for doing something which, upon the stating of it, is manifestly legal. *Johnson v. Girdwood, 28 N. Y. Supp. 151, 152, 7 Misc. Rep. 651.*

To maintain an action for malicious prosecution, it must appear that there was no probable cause for the prosecution, and also that the defendant was actuated by malice in instituting the prosecution. There must be both want of probable cause and malice. *Harpham v. Whitney, 77 Ill. 32, 38; Dempsey v. State, 11 S. W. 372, 373, 27 Tex. App. 269; Brelet v. Mullen, 44 La. Ann. 194, 10 South. 865 (cited in Enders v. Boisseau, 27 South. 546, 548, 52 La. Ann. 1020); Lewton v. Hower (Fla.) 16 South. 616, 618; Medcalfe v. Brooklyn Life Ins. Co., 45 Md. 198, 205; Culbertson v. Cabeen, 29 Tex. 247, 255.*

In order to entitle plaintiff to recover in an action for malicious prosecution three things must concur: (1) The motive of the party instituting or prosecuting the suit or proceeding must have been malicious; (2) the suit or proceeding complained of must have been instituted without proper cause; (3) the suit or proceeding must have termi-

nated in the plaintiff's favor. *Lauzon v. Charroux*, 28 Atl. 975, 976, 18 R. I. 467; *Collins v. Campbell* (R. I.) 31 Atl. 832; *Swepton v. Davis*, 70 S. W. 65, 67, 109 Tenn. 99, 59 L. R. A. 501.

In malicious prosecution there are two essential elements, namely, that no probable cause existed for instituting the prosecution or suit complained of, and that such prosecution or suit terminated in some way favorably to the defendant therein. *Frisbie v. Morris*, 55 Atl. 9, 75 Conn. 637.

In order to maintain an action for the malicious prosecution of a civil suit, it is not sufficient that the charge made against the person injured by it is false and groundless; but the action must be commenced maliciously and with an intent to injure and oppress defendant. *Brush v. Burt*, 3 N. J. Law (2 Penning.) 979, 981.

Malice is one of the necessary elements to make out a cause for malicious prosecution, and what proof is sufficient to establish malice is a question for the jury. *Moody v. Deutsch*, 85 Mo. 237, 243.

A prosecution is malicious when purposely wrong and without justifiable cause. *Johnson v. Ebberts* (U. S.) 11 Fed. 129, 131.

If the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is "malicious prosecution." In such an action the imprisonment cannot be false, for it is upon lawful process, and hence by lawful authority. *Gelzenleuchter v. Niemeyer*, 25 N. W. 442, 444, 64 Wis. 316, 54 Am. Rep. 616.

Where an imprisonment is under legal process, but the prosecution has been commenced and carried on maliciously and without probable cause, terminating in the discharge of the defendant, it is "malicious prosecution," and not false imprisonment. *Rich v. McNery*, 15 South. 663, 665, 103 Ala. 345, 49 Am. St. Rep. 32.

An action for malicious prosecution, and not an action for assault and false imprisonment, is the proper remedy when an arrest is made by a duly qualified officer, under process fair on its face and issued from a court of competent jurisdiction; the suit being based on a failure to enter the writ in court. *Lisabelle v. Hubert*, 50 Atl. 837, 23 R. I. 456.

Malicious prosecution is not limited to criminal suits. *Hayes v. Union Mercantile Co.*, 70 Pac. 975, 979, 27 Mont. 264.

The term "malicious prosecution," as used in Rev. St. art. 302, limiting the right of a party to bring an action for malicious prosecution, refers only to a criminal proceeding, and not to a prosecution as involved in a civil action. *Bear v. Marks*, 63 Tex. 298, 300.

Malicious abuse of process distinguished.

The authorities upon the question of what in law constitutes a cause of action for abuse of process are certainly in a state of some confusion, and frequently this action seems to have been confounded with actions for malicious prosecution, although they are essentially different actions. The test is whether the process has been used to accomplish some unlawful end, or to compel the defendant to do some collateral thing which he could not legally be compelled to do. *Docter v. Reidel*, 96 Wis. 158, 71 N. W. 119, 120, 37 L. R. A. 580, 65 Am. St. Rep. 40.

As stated in *Hale, Torts*, p. 361, "malicious abuse of process" is distinguished from "malicious prosecution" in at least two respects: First, in that want of probable cause is not an essential element; and, second, that it is not essential that the original proceeding shall have terminated. If a plaintiff bring suit in a justice court on a valid demand, and upon the return day, instead of joining issue, discontinues the action and sues over, and then repeats the performance several times without any excuse, and solely for the purpose of vexing and harassing the defendant, it is unquestioned that the defendant may recover the damages occasioned him by the improper use of the process of the court. *Paul v. Fargo*, 82 N. Y. Supp. 369, 373, 84 App. Div. 9 (citing *Pangburn v. Bull* [N. Y.] 1 Wend. 345).

An action or proceeding instituted against another from wrongful or improper motives and without proper cause is a malicious prosecution. There is a distinction between a malicious prosecution and a malicious abuse of process, and one who, after notice from highway commissioners, refuses to remove an obstruction placed by him in a highway, and resists the commissioners, cannot sue them for malicious prosecution in having him arrested because of such resistance. *Kline v. Hibbard*, 29 N. Y. Supp. 807, 809, 80 Hun. 50.

MALICIOUS PUBLICATION.

A publication, qualified or privileged, is malicious in the law of slander and libel, if it is not in good faith. If not made for the reason which renders it privileged, but from a wrongful, indirect, and ulterior motive, and it is false, it is malicious. *Gattis v. Kilgo*, 38 S. E. 931, 933, 128 N. C. 402.

MALICIOUS TRESPASS.

By a statute of Indiana whoever maliciously or mischievously injures or causes to be injured any property of another, or any public property, is guilty of malicious trespass. *State v. McKee*, 10 N. E. 405, 406, 109 Ind. 497.

If one takes the property of another and converts it to his own use, and the taking is for that purpose, he cannot be convicted of "malicious trespass" ordinarily, because there would be an absence of that malicious injury which is a necessary ingredient in such case. The act of taking a saddle from another's horse and wantonly destroying it constitutes a malicious trespass. *Hannel v. State*, 4 Ind. App. 485, 486, 30 N. E. 1118, 1119.

The injuries against which a statute providing for the punishment of whoever maliciously or mischievously injures the property of another is aimed, are not such as are inflicted with the intention of gaining by another's loss. They are those which arise out of a spirit of wanton cruelty, or malicious or mischievous destructiveness or revenge, and are of a class which have a near relation to the crime of arson. They are such as result in a partial or total destruction of property, or in a specific injury to property, rendering it less valuable for the purpose for which it is designed or used. *State v. Cole*, 90 Ind. 112, 113.

MALICIOUS WRONG.

An intentional action, when done without just cause or excuse, is what the law calls a "malicious wrong." *Continental Ins. Co. v. Board of Fire Underwriters (U. S.)* 67 Fed. 310, 320.

MALICIOUSLY.

An act is, in contemplation of law, done maliciously, where it is wrongful and is done intentionally. *Davis v. Pacific Tel. & Tel. Co. (Cal.)* 57 Pac. 764, 765.

"Maliciously," as used in criminal statutes, means nothing more than that the act should be done voluntarily, unlawfully, and without excuse or justification. *United States v. Gunther*, 38 N. W. 79, 80, 5 Dak. 234.

The word "maliciously," when used in a definition of a statutory crime, the act forbidden being merely *malum prohibitum*, has almost always the effect of making a bad intent or evil mind a constituent of the offense. The whole doctrine of that large class of offenses falling under the general denomination of "malicious mischief" is founded on this theory. *State v. Johnson*, 54 Pac. 502, 503, 7 Wyo. 512.

The word "maliciously," as used in Gen. Laws, c. 279, par. 23, as amended by Pub. Laws, c. 736, punishing the malicious injury of buildings, means the doing of a wrongful act intentionally without just cause or excuse, from a wicked and mischievous purpose, which characterizes the perpetration

of an injurious act without lawful excuse. *State v. Gilligan*, 50 Atl. 844, 847, 23 R. I. 400.

An allegation that defendant maliciously and feloniously incited and procured the principal to commit the felony *ex vi termini* imports that defendant acted with an unlawful intent. *Commonwealth v. Adams*, 127 Mass. 15, 17.

An allegation that a person "willfully, knowingly, maliciously, and falsely" said, deposed, and swore on oath is equivalent to saying that he corruptly swore; for the words used necessarily involve "corruptly." It could not have been willfully, knowingly, maliciously, and falsely, without being corruptly, done. *State v. Bixler*, 62 Md. 354, 356.

The words "willfully, unlawfully, feloniously, and maliciously" are properly used in an information for arson. Such words import only that criminal intent which is a necessary part of every felony or other crime, but they do not necessarily include the specific purpose to destroy the building which is an element of the crime of arson. *People v. Mooney*, 59 Pac. 761, 762, 127 Cal. 339.

As used in a statute providing "that if any person shall unlawfully, willfully, and maliciously kill or disable any horse," etc., "he shall be fined a sum equal to five-fold the value of the property injured or destroyed," the term "maliciously" means malice against the owner of the animal alleged to have been killed. *State v. Pierce*, 7 Ala. 728, 731.

An information alleging that defendant did "willfully and maliciously" make an assault is sufficient, under Cr. Code, § 17, providing for the punishment of any person who shall unlawfully assault another. *Hodgkins v. State*, 54 N. W. 86, 36 Neb. 160.

The word "maliciously" imports a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law. Pen. Code Ariz. 1901, par. 7, subd. 4; Rev. St. Okl. 1903, § 2689; Rev. St. Utah 1898, § 4053; Pen. Code Idaho 1901, § 4544, subd. 4; Rev. Codes N. D. 1899, § 7716; Pen. Code S. D. 1903, § 811; Pen. Code Cal. 1903, § 7, subd. 4; Ann. Codes & St. Or. 1901, § 2179; Pen. Code Mont. 1895, § 7, subd. 4; Pen. Code N. Y. 1903, § 718; Gen. St. Minn. 1894, § 6842, subd. 3.

As felonious.

See "Felonious—Feloniously."

Ill will implied.

"Maliciously means with ill will, malevolence, grudge, spite, or enmity." *Johnson v. State*, 61 Ala. 9, 11.

"Maliciously," as used in an information charging a defendant with unlawfully and maliciously assaulting a certain person, by hitting him with a rock, means with ill will, or with hatred. *Ford v. State*, 35 N. E. 34, 35, 7 Ind. App. 567.

"Maliciously," in its ordinary sense, when used in criminal or otherwise penal statutes, implies the existence of a wicked or revengeful purpose, or an evil disposition, or wanton disregard of the rights of others. In its technical sense, as used in merely formal, though necessary, allegations of an indictment, it generally has a less noxious signification, implying that legal malice which is presumed to exist whenever any unlawful and injurious act is voluntarily committed, rather than the actual existence of malignant feeling and evil purpose. It includes within its meaning "willfully." *United States v. Three Railroad Cars* (U. S.) 28 Fed. Cas. 144, 146.

The word "maliciously," as used in V. S. 5007, 5008, making it a criminal offense willfully and maliciously to injure any fence or other erection on or about a burial ground, means more than the willful doing of an act. An act, to be maliciously done, within the meaning of the statute, must not only be wrong, but it must proceed from an evil design and a deliberate intention to do injury by marring, defacing, or destroying the property enumerated in the statute, or it must consist in the willful destruction or injury of such property, from actual ill will or resentment to the owner, possessor, or persons interested therein. *Town of Fletcher v. Kezer*, 50 Atl. 558, 73 Vt. 70.

The word "maliciously," as used in Cr. Code, § 3888, providing a punishment for any one who should maliciously break the fence of another, involves no more than wantonness or a willful disregard of right and duty. It does not necessarily import ill will, or a grudge against the owner, or a desire to be revenged on him. Such malice, if the cause of the unlawful act, would aggravate the offense, but is not a necessary constituent of it. *Wheeler v. State*, 19 South. 993, 995, 109 Ala. 56.

"Maliciously," as used in Code Tenn. § 3351, providing that if an attachment be sued out maliciously, as well as wrongfully, the jury may on the trial of such action give vindictive damages, means not only that malevolent intention to do injury, commonly called "malice," but also that careless disregard of the rights of others which, without real ill will, the law implies as malice, and it is an implication from want of probable cause. *Jerman v. Stewart* (U. S.) 12 Fed. 266, 269.

"Maliciously," as used with relation to the doing of a criminal act, does not mean "a feeling of ill will, spite, revenge, or malice, but merely signifies the doing of an un-

lawful act without excuse. There are some injuries, however, in the nature of trespasses to property, which are made criminal and punished as malicious mischief, where the malice required to support the prosecution must contain the additional element of cruelty, or hostility, or revenge toward the person. The willful doing of an unlawful act without excuse, when applied as a definition of malicious injuries to property alone, would make many simple trespasses punishable criminally. It is a special depravity or hostility toward the owner which makes a crime of that which would otherwise be a mere trespass to property." *Commonwealth v. Goodwin*, 122 Mass. 19, 35.

"Maliciously," as used in Rev. St. § 4380, as amended by Laws 1887, c. 243, providing that any person who shall by any written or printed communication maliciously threaten to do any injury to the person, business, or trade of another, with intent to compel the person so threatened to do any act against his will, or omit to do any lawful act, shall be punished, etc., does not mean a feeling of ill will toward the person threatened, but the willful doing of the act with the illegal intent. *State v. Compton*, 46 N. W. 535, 537, 77 Wis. 460.

"Maliciously," as used in How. Ann. St. § 9275, providing for the punishment of any two or more persons who shall willfully and maliciously combine or conspire together to obstruct or impede the regular operation and conduct of the business of any railroad company, or any other corporation, firm, or individual of the state, should be construed as meaning only the general malice of the law of crime, and is to be proven in the same way as malice is established in other cases. The acts need not be inspired by any particular wantonness, cruelty, or revenge against the owner of the property, but the act itself may in every case furnish the presumption of malice. *People v. Petheram*, 31 N. W. 188, 193, 64 Mich. 252.

"Maliciously," as used in Act Cong. 1825, c. 276, § 10, punishing by fine any master who, during his being abroad, "maliciously and without justifiable cause" forces any officer or mariner of his ship on shore, does not merely mean a wicked, malignant, and revengeful act, such as in cases of murder constitutes malice, and which flows from a heart regardless of social duty and fatally bent on mischief, but means an act wantonly done; that is, with a willful disregard of right or duty. *United States v. Ruggles* (U. S.) 27 Fed. Cas. 912, 913; *United States v. Coffin* (U. S.) 25 Fed. Cas. 485, 486.

As with malice aforethought.

"Maliciously," as used with reference to homicide, means with malice aforethought. *Anthony v. State*, 19 Tenn. (Meigs) 265, 277, 33 Am. Dec. 143.

As willfully.

"Maliciously" means with deliberate intention to injure; willfully. *May v. Anderson*, 42 N. E. 946, 947, 14 Ind. App. 251; *Tuttle v. Bishop*, 30 Conn. 80, 85.

"Bouvier say that 'maliciously' has been decided to be the equivalent of 'willfully.' This term implies, not merely voluntarily or intentionally, but legal malice; an evil intent without justifiable excuse; with a bad purpose; corruptly." *Mills v. Glennon*, 6 Pac. 116, 118, 2 Idaho (Hasb.) 105.

The term "maliciously" is sufficiently synonymous with "willfully," so that, where the word "willfully" is used in a statute, it will be sufficient if the word "maliciously" is employed in an indictment thereunder. *State v. Robbins*, 66 Me. 324, 325.

"Maliciously" has a somewhat larger meaning than "willfully," which in an indictment would not, therefore, supply the place, it is presumed, of "maliciously" in the statute. *Shotwell v. State*, 43 Ark. 345, 347.

The word "maliciously" includes in it the idea of willfulness, and means even more. Where a statute used the word "willful" only, the court held it enough to charge that the act was malicious, as that meant willful and nothing more. One may do a willful act without malice, but not a malicious act not willful. *Funderburk v. State*, 21 South. 658, 659, 75 Miss. 20.

The word "maliciously," in Rev. Laws, §§ 5007, 5008, enacting that, if any one willfully and maliciously injure any fence or other erection in or about a burial ground, he shall be imprisoned, etc., means more than the willful doing of an act. An act, to be maliciously done, within the meaning of the statute, must not only be wrong, but it must proceed from an evil design and a deliberate intention to do injury by marring, defacing, or destroying the property enumerated in the statute, or consist in the willful destruction or injury of such property, from actual ill will or resentment to the owner, possessor, or persons interested therein. *Town of Fletcher v. Kezer*, 50 Atl. 558, 73 Vt. 70.

MALIGNANT PUSTULE.

"Malignant pustule" is a disease caused by the infliction upon the body of putrid animal matter containing poisonous bacillus anthrax. *Bacon v. United States Mut. Acc. Ass'n*, 25 N. E. 399, 123 N. Y. 304, 9 L. R. A. 617, 20 Am. St. Rep. 748.

MALINGERING.

"Malingering" has been defined as a deception practiced by anybody, from which

they try to make out that they are sick when they are not sick; and the question to a witness whether a party was malingering or not calls for a conclusion, and is properly excluded. *Brown v. Third Ave. R. Co.*, 43 N. Y. Supp. 1094, 1097, 19 Misc. Rep. 504.

MALLEABLE.

"Malleable" means capable of being drawn out and extended by beating; capable of extension by hammering; reducible to laminated form by beating. *Farris v. Magone* (U. S.) 46 Fed. 845, 849.

MALPRACTICE.**Attorney.**

"Malpractice," as to a lawyer, means evil practice in a professional capacity and the resort to methods and practices unsanctioned and prohibited by law. In re *Baum*, 8 N. Y. Supp. 771; In re *Post*, 7 N. Y. Supp. 438.

The word "malpractice" is an appropriate term for a contempt committed by an attorney or solicitor in abusing the practice of the court. In re *Silkman*, 84 N. Y. Supp. 1025, 1029, 88 App. Div. 102.

Proof that an attorney appeared both for plaintiff and defendant in actions involving the same issue, or that he used a legal process in an abusive and oppressive manner, warrants his disbarment for malpractice. *Cowley v. O'Connell*, 54 N. E. 558, 559, 174 Mass. 253.

Physician.

"Malpractice" is mal or bad practice, and it may be defined generally as negligent acts committed by a physician in treating his patient. Malpractice may be defined to be: First, willful acts on the part of a physician or surgeon toward a person under his care, by which such person suffers death or injury; second, acts forbidden by express statute on the part of a physician or surgeon in treating a patient, by means of which such patient suffers death or unnecessary injuries. *Tucker v. Gillette*, 22 Ohio Cir. Ct. R. 664, 669, 12 O. C. D. 401, 405 (citing 1 *Witthaus & Becker's Med. Jur.* 73).

Malpractice is the unskillful treatment by a physician or surgeon, in consequence of which the patient is injured more or less seriously, perhaps permanently; so that the refusal to give an instruction that "malpractice" means bad or unskillful practice in a physician, which may occur from neglect or ignorance, is not erroneous, as it limits the malpractice to a physician, and fails to conclude with the resultant injury to the patient. *Abbott v. Mayfield*, 56 Pac. 327, 8 Kan. App. 387.

A charge that a physician has been guilty of malpractice is not necessarily libelous in its ordinary acceptation. It has several meanings, one of them implying illegal or immoral conduct, and in this sense a charge of malpractice is libelous; but it also means bad or evil practice, practice which is not good, practice which is contrary to established rules, and when used in the latter sense it is not libelous. The sense in which the word is used is for the jury. *Rodgers v. Kline*, 56 Miss. 808, 816, 21 Am. Rep. 339.

MALT.

Malt is barley or other grain steeped in water until it germinates, and then dried in a kiln, thus evolving the saccharine principle. It is used in brewing to make malt drinks, which consists in preparing drinks by the infusion of malt, as beer, ale, and porter. *Hollender v. Magone* (U. S.) 38 Fed. 912, 915.

Webster's International Dictionary defines "malt" to be "Barley or other grain steeped in water and dried in a kiln, thus forcing germination, until the saccharine principle has been evolved. It is used in brewing and the distillation of whisky. *United States v. Cohn*, 52 S. W. 38, 44, 2 Ind. T. 474.

Malt, as sold in Kansas, is an imitation of lager beer, and is made from malted grain, hops, and water slightly fermented, and contains a very slight percentage of alcohol. *City of Lincoln Center v. Linker*, 53 Pac. 787, 788, 7 Kan. App. 282.

MALTHOUSE.

The word "malthouse," in 2 Hill's Code, p. 662, § 46, which defines burglary as an unlawful entry, with intent to commit a felony, of an office, warehouse, malthouse, stillhouse, or any building in which goods, merchandise, or valuable things are kept for use, sale, or deposit, means any "malthouse," without regard whether any valuable things are kept therein or not, as the latter clause of the statute only refers to buildings not specifically designated. *State v. Sufferin*, 32 Pac. 1021, 6 Wash. 107.

MALT LIQUOR.

The common and approved usage of the term "malt liquor" is "an alcoholic liquor, as beer, ale, or porter, prepared by fermenting an infusion of malt." *State v. Gill*, 95 N. W. 449, 450, 89 Minn. 502 (citing *Webst. Dict.*); *Adler v. State*, 55 Ala. 16, 23 (citing *Webst. Dict.*); *United States v. Cohn*, 52 S. W. 38, 44, 2 Ind. T. 474.

"Malt liquor" is a liquor having "neither vinous nor spirituous liquors as an ingredi-

ent. It has alcohol produced by fermentation, through which it must pass before it becomes a beverage." *Tinker v. State*, 8 South. 855, 856, 90 Ala. 647.

"Malt liquor" is a broader term than "lager beer," and includes other beverages, as ale and porter. *Sampton v. State*, 18 South. 207, 208, 107 Ala. 76.

The term "malt liquor," in 28 Stat. 697, prohibiting the manufacture and sale in the Indian Territory of any "vinous, malt, or fermented liquors," or any other intoxicating drinks, includes a malt liquor sold under the name of "Rochester tonic," whether it is intoxicating or not. *United States v. Cohn*, 52 S. W. 38, 44, 2 Ind. T. 474.

Ale.

The court will take judicial notice that ale is a malt liquor. *Wiles v. State*, 33 Ind. 206, 209.

Beer.

"Malt liquor," is defined to be a beverage prepared by infusion of malt, as beer, ale, porter, etc.; and, as beer is a liquor made chiefly of malt, it is included in the term "malt liquor," so that proof of the sale of beer will support an indictment for the sale of malt liquor. *United States v. Ducournau* (U. S.) 54 Fed. 138, 139.

"Malt liquor," as used in Laws Fla. c. 3418, § 11, prohibiting the sale of spirituous, vinous, and malt liquors without having procured a license therefor, should not be construed as synonymous with or to include "beer," as such word is used standing alone, since beer is not included in the term "malt liquors," unless it is a malt beer. *Netso v. State*, 5 South. 8, 9, 24 Fla. 363, 1 L. R. A. 825.

"Malt liquor" is defined by Webster to be a liquor prepared for drink by an infusion of malt, as beer, ale, porter, etc. The word in the liquor act of March 17, 1875, providing that the words "intoxicating liquors" shall apply to any spirituous, vinous, or malt liquor, includes beer, as the court will take judicial notice of the fact that beer is a malt liquor prepared by fermentation. *State v. Stapp*, 29 Iowa, 551, 552.

Malt liquors include lager beer, which is a malt liquor of the lighter sort, and differs from the ordinary beers and ales not so much in its ingredients as in its process of fermentation, and the court will take judicial notice of the fact that it is a malt liquor. *State v. Goyette*, 11 R. I. 592; *Watson v. State*, 55 Ala. 158, 160.

"Malt liquor," is a general term for alcoholic beverages produced merely by the fermentation of malt, as opposed to those obtained by distillation of malt or mash, and includes lager beer. *Sarile v. United*

States, 14 Sup. Ct. 720, 721, 152 U. S. 570, 38 L. Ed. 556.

It is a matter of common knowledge that the word "beer," when used without a prefix, signifies malt liquor, and that whenever malt liquor is not intended to be expressed by the use of this word some prefix is used, such as "root beer," "ginger beer," etc.; but when the word "beer" is used, it means either common, lager, or bock beer. *Locke v. Commonwealth* (Ky.) 74 S. W. 654, 655.

As intoxicating liquor.

The generic term "malt liquor" includes both nonintoxicating and intoxicating malt liquors. *State v. Kauffman* 67 N. E. 1062, 1063, 68 Ohio St. 635.

Under a statute regulating the sale of intoxicating liquors, an indictment charging the sale of a certain "malt liquor," but not alleging that such liquor was intoxicating, is insufficient, as the courts could not, from their general knowledge say that all malt liquors are intoxicating. *Shaw v. State*, 56 Ind. 188, 189.

Spirituuous vinous, and malt liquors are commonly known to contain a considerable portion of alcohol, and alcohol is commonly known to be intoxicating; hence, in an indictment, an allegation of the sale of spirituuous, vinous, and malt liquors contrary to law is equivalent to alleging the sale of intoxicating liquors contrary to law. *State v. Reilly*, 52 Atl. 1005, 1006, 66 N. J. Law, 399.

"Malt liquors," as used in Code, § 629, requiring a license for engaging in the business of selling "malt liquors," is not synonymous with "intoxicating liquors." The term "malt liquors" embraces porter, ale, beer, and the like, which are the result or product of a process by which the grain, usually barley, is steeped in water to the point of germination; the starch of the grain being thus converted into saccharine matter, which is kiln-dried, then mixed with hops, and by a further process made into a beverage. They may be intoxicating, but they do not include all intoxicating liquors, beverages, or bitters. A given liquor may be in a high degree intoxicating, and yet not be a malt liquor within the sense of the statute. Fermented or hard cider is an illustration. Cane beer is another. Malt liquors are also spirituuous liquors, in the sense that they contain spirits of alcohol. *Allred v. State*, 8 South. 56, 57, 89 Ala. 112.

As vinous liquor.

See "Vinous Liquor."

MALUM IN SE.

An offense *malum in se* is one which is naturally evil, as adjudged by the sense of

civilized community, such as murder, arson, theft, and the like. *Bouv. Law Dict.*; *Hanauer v. Doane*, 79 U. S. (12 Wall.) 342, 20 L. Ed. 439. The offense of selling liquor without a license by an innkeeper is not *malum in se*. *Lewin v. Johnson* (N. Y.) 32 Hun, 408, 411.

MALUM PROHIBITUM.

"*Malum prohibitum*" is defined to be an act made wrong by legislation—a forbidden evil. *Hatch v. Hanson*, 46 Me. App. 323, 339.

MAN.

See "Colored Man."

See also, "Men."

"Man" is defined as a male adult of the human race, as distinguished from a woman or a boy; one who has attained manhood, or who is regarded as of manly estate. 4 Cent. Dict. p. 632. And this is in accord with the common understanding of the definition of the term "man," so that proof that defendant was a man was sufficient proof that he was an adult male. *Holliday v. State*, 32 S. W. 538, 35 Tex. Cr. R. 133.

Corporation.

In the provision of the Tennessee Constitution that no "man" shall be deprived of life, liberty, or property, except by law of the land, the word "man" is held to include corporations. *Dayton Coal & Iron Co. v. Barton*, 53 S. W. 970, 971, 103 Tenn. 604.

Minor.

In Laws 1848, c. 111, providing that any man who shall seduce an unmarried female of previous chaste character shall be guilty of a misdemeanor, "man" does not mean a male person 21 years of age, but the apparent spirit of the act and the mischief or vice aimed at by the Legislature clearly show that it means a male person who has arrived at the age of puberty, or is capable of committing rape. "Man," as used in definitions of rape, means a male of the human species of the age of 14 years and upwards. *Kenyon v. People*, 26 N. Y. 203, 211, 84 Am. Dec. 177 (citing 2 *Bouv. Law Dict.* 420).

Man is defined as a human being; a person of the male sex; a male of the human species above the age of puberty. Sometimes held to mean all human beings, or any human being, whether male or female; and as used in Rev. St. 1898, § 4580, as amended by Laws 1899, c. 99, providing that any "man" who commits any fornication, etc., will not be held to mean only a male adult of over the age of 21 years. *State v. Seller*, 82 N. W. 167, 168, 106 Wis. 346, 731 (citing *Kenyon v. People*, 26 N. Y. 203, 211, 84 Am. Dec. 177; *Bouv. Law Dict.*).

The word "man," in the Penal Code, is used to signify a male person of any age. Pen. Code Tex. 1895, art. 21.

Woman.

The use of the term "man," in Code, § 1738, exempting certain property to the children of the deceased man, is used as a generic term, and includes females as well as males. *Turner's Adm'r v. Whitten*, 40 Ala. 530, 532.

Gantt's Dig. § 7, providing that when any man shall die leaving minor children and no widow, and his estate shall not be above a certain value, it shall pass to and vest in his minor children for their support and education, and no administrator of said estate shall be required, includes a woman who dies leaving minor children and no husband. *Smith v. Allen*, 31 Ark. 268, 271.

MAN AND WIFE.

"I find the common acceptance of the term 'man and wife' in everyday life, and even in our best literature, to be the same as 'husband and wife,' and its use is by all odds the most common. Webster gives as one of his definitions of man 'a married man, a husband,' quoting a line of Addison, 'Every wife ought to answer for her man.'" *Clancy v. Clancy*, 33 N. W. 889, 893, 66 Mich. 202.

MANAGE.

"Manage" means to direct, control, govern, administer, or oversee. *Commonwealth v. Johnson*, 22 Atl. 703, 704, 144 Pa. 377 (citing Webster).

A general authority given to manage the defendant's property can hardly be considered as an authority to employ counsel in a case concerning some other person's property, although the case involved the litigation of questions relating to title of real estate, and the defendant had property similarly situated. *Perry v. Jones*, 18 Kan. 552, 555.

In a contract between a bridge company and another party relative to the erecting of a draw bridge, and providing that the operating and managing of the draw should be left to the bridge company, "operating and managing the draw" refers to opening and closing it. *Portage Lake Bridge Co. v. Wright*, 44 N. W. 498, 500, 78 Mich. 426.

As conduct or carry on.

"To manage" is defined by Webster as meaning to have under control and direction, to conduct, to guide, to administer, or to handle. Under a statute providing that any person that shall carry on or conduct any business requiring a license without having first obtained such license shall be guilty of mis-

demeanor, an indictment charging that defendant managed a certain business without having obtained a license was sufficient to charge an offense under the statute; the word "manage" being substantially equivalent to the terms used in the statute. *Roberts v. State*, 7 South. 861, 26 Fla. 360.

In an action by a passenger in a coach against the owner for an injury done, in which it was alleged that the defendant negligently "drove, conducted, and managed" the coach, the words "conducted and managed," as coupled with the word "drove," meant conducting and management ejusdem generis, and not management as respected the providing of a proper coach, and the plaintiff could not recover; for the negligence was in sending out an insufficient coach. *Mayor v. Humphries*, 1 Car. & P. 251.

As control.

The word "manage" is defined to mean to direct, control, govern, administer, or oversee; and the words "manage" and "control" were held to be synonymous. *Youngworth v. Jewell*, 15 Nev. 45, 48; *Ure v. Ure*, 56 N. E. 1087, 185 Ill. 216.

Rev. St. 1874, c. 34, §§ 24, 25, declares that the county boards of the several counties shall have power to manage the county funds and county business, except as otherwise specifically provided. Held, that the term "manage" meant to control according to law, and that the statute therefore could not be understood to give county boards an unlimited power of management of county funds, where there is an absence of any specific provision of law to the contrary, but means nothing more than that they shall have power to manage the county funds and county business according to law. *Cook County v. McCrea*, 93 Ill. 236, 238 (cited and approved *Locke v. Davison*, 111 Ill. 19, 25).

Leasing of estate authorized.

"Manage" is defined by Webster to mean to conduct; to carry on; to direct the concerns of, as to manage a concern, or to manage the affairs of a family. As used in *Laws Conn. 1885, c. 110, § 84*, which provides that conservators shall manage the estates of their wards, it would include the leasing of the estates. *Palmer v. Cheseboro*, 10 Atl. 508, 509, 55 Conn. 114.

Mortgage not authorized.

A power to manage and work a mine will not be held to include power to mortgage it, and is inconsistent with the idea of imposing a personal charge on the principal, except for such expenses as may be incurred in its management. *Golinsky v. Allison*, 46 Pac. 295, 296, 114 Cal. 458.

Sale not authorized.

A will providing that the testator's trustees should retain certain property in their hands and under their control, and should "manage and control" the same to produce an income, etc., does not, unaltered by other considerations, confer a power to sell, and the power to sell cannot be derived from such words. *Blanton v. Mayes*, 58 Tex. 422, 429.

In a decree of distribution distributing property, to be held in trust that the trustees should manage such said property, etc., "manage" implies that the trustees are to retain it under their control, and is inconsistent with the idea that they have authority to sell or otherwise dispose of it. To manage an estate is, in common parlance, as well as legal acceptance, no authority to part with the entire estate. *Goad v. Montgomery*, 51 Pac. 681, 683, 119 Cal. 552, 63 Am. St. Rep. 145 (citing *Roosevelt v. Fulton's Heirs* [N. Y.] 7 Cow. 71, 81).

The word "manage," as used in a will authorizing the executor to take charge of the estate and manage it to the best advantage for the benefit of testator's creditors, includes the power to sell the property for the payment of the debts. *Carlton v. Goebler*, 58 S. W. 829, 831, 94 Tex. 93.

A contract between the owners of mining lands and an agent, by which he agrees to honestly and diligently manage said properties, does not give such agent authority to grant to another the sole right to quarry, take, and sell ganister stone from a certain tract of land for a term of 15 years. *Duncan v. Hartman*, 22 Atl. 1099, 1100, 143 Pa. 595, 24 Am. St. Rep. 570.

Superintend synonymous.

The words "managed" and "superintended," as used in the Compiled Laws, exempting from liability for her husband's debt the property of a married woman engaged in business, except when the same is "managed or superintended by her husband" are synonymous, and mean permitting the husband to exercise his own judgment and discretion, and to direct, conduct, and control the business, or any separate branch of it. *Youngworth v. Jewell*, 15 Nev. 45, 48.

MANAGEMENT.

Management is defined as government, control, superintendence, physical or manual handling or guidance, the act of managing by direction or regulation, or administration; as the management of a family, or of a household, or of servants, or of great enterprises, or of great affairs. In re *Sanders*, 36 Pac. 348, 349, 53 Kan. 191, 23 L. R. A. 603; *Lewis v. Lewelling*, 36 Pac. 351, 352, 53 Kan. 201, 23 L. R. A. 510.

Management usually signifies positive, rather than negative, conduct, so that where directors of a corporation are charged with the duty of knowing something of the management of their company's business, and of exercising reasonable supervision of its management, they cannot escape their liability by failure to do so. *Cameron v. Kenyon-Connell Commercial Co.*, 58 Pac. 358, 360, 22 Mont. 312, 44 L. R. A. 508, 74 Am. St. Rep. 602.

In a plea alleging that plaintiff had the "management, direction, and care" of a ship, which defendant was charged with having neglected to load according to contract, the phrase quoted was construed to mean the actual management, direction, and care, and not merely the legal management, direction, and care. It is equivalent to a charge of actual bad management, direction, and care, which included such conduct on the part of the master and crew. *Taylor v. Clay*, 9 Q. B. 713, 723.

Power of disposal.

The words "control and management," as used in a will devising property to the testator's son, and declaring that he shall have the control and management of the same during life, means that the son should have the use, possession, superintendence, and direction of the property, and the power of exercising a general restraint over the same during the continuance of his estate, or until the happening of the event that will determine the taker of the fee in the same, and manifestly does not include a power of disposal. *Randall v. Josselyn*, 10 Atl. 577, 579, 59 Vt. 557.

As employment or investment.

A statute giving the management of a certain fund to a certain commission implies the power to control the fund. "It allows the exercise of discretion. It could not be managed without the power to do so, and by requiring the one the other was conferred. To manage money is to employ or invest it. It requires no other management. The word 'manage,' when applied to money placed in the hands of another, is a word of trust and confidence." *Commissioners' Sinking Fund v. Walker*, 7 Miss. (6 How.) 143, 186, 38 Am. Dec. 433.

Power to prohibit.

Management means administration, control, etc., and one of the synonyms of "management" is "government," which means control; so that under a power to provide for the management of slaughterhouses a city has power to prohibit the operation of slaughterhouses within the city. *City of St. Louis v. Howard*, 24 S. W. 770, 771, 119 Mo. 41, 41 Am. St. Rep. 630.

Management of engine.

The management of an engine consists in part of the management of the fire which generates the motive force of the engine. An allegation in a declaration against a railroad company that, while using their locomotive engine and other rolling stock, they so carelessly and negligently managed the same that the plaintiff's cotton mill was set on fire by sparks from the engine, stated with sufficient accuracy that the injury was caused by the careless management of the fire in the engine. *Smith v. Old Colony & N. R. Co.*, 10 R. I. 22, 28.

Management of estate.

A will constituting certain persons trustees of the estate given to testator's daughter, and directing that the said trustees "have the entire management of the estate herein given to my said daughter O., at their discretion, for her benefit, during her natural life," etc., means the control of the property to the end that income and profit should be derived from it, such as leasing, investing, securing, collecting, etc., and does not mean that the trustees are to act as guardians over the daughter, and direct her expenditures of the income of the property thus invested and managed for her use, or that the trustees are to substitute their discretion for hers in regard to wants for herself and her family. *Watson v. Cleveland*, 21 Conn. 538, 541.

Management of a road.

To be a "person having the management of a road," as used in St. 9 & 10 Vict. c. 20, relating to the repair of roads, such person must bear a character corresponding to that of trustee, commissioner, or surveyor mentioned in the act; and where a road had been dedicated by a landowner, but the condition had not yet been fulfilled which made it reparable by the parish, the landowner was not liable to repair, not being a "person having the management." *Reg. v. Wilson*, 18 Q. B. 348, 357.

Management of school.

Under 22 Stat. 150, providing for the management of a school district by a board of trustees, giving them authority to provide suitable schoolhouses, capable teachers, and manage and control the school property of the district, they had no authority to charge the pupils incidental fees; the word "management" being limited to the care of the property. *Young v. Trustees of Fountain Inn Graded School*, 41 S. E. 824, 827, 64 S. C. 131.

Management is defined as the act or art of managing; the manner of treating, directing, carrying on, or using for a purpose; conduct; administration; guidance; control—and as used in Const. art. 5, § 25, prohibiting

passage of any special or local laws providing for the management of common schools, will be held to be in conflict with a special law providing the manner in which supplies shall be furnished and the compensation and place of education of teachers to be employed. In re Senate Bill No. 23, 48 Pac. 647, 648, 23 Colo. 499.

Const. 1870, art. 4, § 22, prohibiting the Assembly from passing local acts providing for the management of common schools, relates only to the conduct of the school in imparting instruction, and does not relate to the establishment of schools or providing necessary funds for their support. *Speight v. People*, 87 Ill. 595, 601; *Fuller v. Heath*, 89 Ill. 296, 313.

Same—Reform school.

The title of an act providing for the management of the state reform school is broad enough to include provisions for permitting boys under the age of 16 to be placed in or committed to the school by courts of record. In re *Sanders*, 36 Pac. 348, 349, 53 Kan. 191, 23 L. R. A. 603.

Management of vessel.

The words "navigation and management of a vessel," within the meaning of the third section of the Harter act, providing that if the owner of a vessel transporting merchandise, etc., exercise due diligence to make the vessel seaworthy and properly manned, equipped, and supplied, neither the vessel, nor her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, includes the control during the voyage of everything with which the vessel is equipped, for the purpose of protecting her and her cargo against the inroad of the seas; and if there is any neglect in closing the iron covers of the ports, it is a fault or error in navigation, or in the management of the ship. This view accords with the result of the English decisions upon the meaning of the words. *The Silvia*, 19 Sup. Ct. 7, 8, 171 U. S. 462, 43 L. Ed. 241 (citing *Good v. London S. S. Owners' Mut. Protecting Ass'n*, L. R. 6 C. P. 563; *The Warkworth*, 9 Prob. Div. 20, 145; *Carmichael v. Liverpool Sailing Ship Owners' Mut. Indemnity Ass'n*, 19 Q. B. Div. 242; *Canada Shipping Co. v. British Shipowners' Mut. Protection Ass'n*, 23 Q. B. Div. 342; *The Ferro* [1893] Prob. 38; *The Glenochil* [1896] Prob. 10).

The "management of the vessel," within the meaning of the Harter act (Act Feb. 13, 1893), providing that a shipowner who exercises due diligence to make his vessel seaworthy and properly equipped and supplied shall not be liable for damages resulting from errors in navigation or in the management of said vessel, includes the failure of

the officers of a vessel to close the iron covers over the ports, which results in the glass port lights being broken, thus permitting water to damage the cargo. *The Silvia* (U. S.) 64 Feb. 607, 608.

The "management of the vessel," as the expression is used in the Harter act, might not include stowage of cargo not affecting the fitness of the ship to carry her cargo, but does include at the least the control during the voyage of everything with which the ship is equipped for the purpose of protecting her and her cargo against the inroad of the seas, and a failure to open the sluices on a steamship during 20 days of a storm, if it was a negligent omission, occurred as part of the management of the vessel. *The Sandfield* (U. S.) 92 Fed. 663, 664, 34 C. C. A. 612.

MANAGER.

See "General Business Manager," "General Manager," "Mine Manager."

The word "manager," as used in a verification of a statement by one in behalf of another as manager, denotes agency as clearly as if the term "agent" had been used. *Pierce v. Osborn*, 19 Pac. 656, 658. 40 Kan. 168.

A manager is an agency unknown in general maritime law, and the authority implied from such a position is in that law undefined. *Davidson v. Baldwin* (U. S.) 79 Fed. 95, 100, 24 C. C. A. 453.

The general agent for the owners in respect to the care of the ship and freight is called the "manager." If he is a part owner, he is also called "managing owner." Civ. Code Cal. 1903, § 2070; Rev. Codes N. D. 1899, § 4169; Civ. Code S. D. 1903, § 1522.

"Manager," as used in Act May 24, 1889, § 6 (P. L. 189), prohibiting any one from engaging as manager in the business of an apothecary or pharmacist without having a certificate of competency and qualification from the state pharmaceutical examining board, cannot be construed to include the owner of a drug store who employs a duly certified pharmacist to carry on the store as manager. Ordinarily the word "manager" means one who has the conduct or direction of anything, as the manager of a theater, of a lottery, of a ball, etc. Webster says "manage" means "to direct, control, govern, administer, or oversee." The courts of this country and of England have held that the word "manager" may mean either a person retained generally to represent the principal in his absence, or one who has the superintendence of a particular contract or job, in which latter case he is like a fellow workman. It is often applied to an officer of a corporation chosen to superintend its affairs.

Commonwealth v. Johnson, 22 Atl. 703, 704, 144 Pa. 377.

As employé, laborer, or servant.

See "Employé"; "Laborer"; "Servant."

Power of disposal.

"Managers," as used in Acts 1876, c. 351, § 1, providing that the Governor, by and with the advice and consent of the Senate, shall appoint a "board of managers" of the hospital for the insane, "means what the term imports—managers simply of the property, with no power to pledge, alienate, or incumber it, charged with the duty of its protection and faithful operation for and on behalf of the state, but invested with no absolute ownership of the property." *Baltimore County Com'rs v. Board of Managers of the Baltimore Hospital for the Insane*, 62 Md. 127, 132.

Publisher or foreman synonymous.

"Manager," as used in an affidavit of publication of legal notice, is equivalent to and synonymous with "publisher" or "foreman," and the affidavit complies with Code Civ. Proc. § 444, requiring proof of the publication to be made by the affidavit of the printer or publisher, or his foreman or principal clerk. *Waters v. Waters*, 27 N. Y. Supp. 1004, 1006, 7 Misc. Rep. 519.

Manager of corporation.

As officer of corporation, see "Officer (Of Corporations)."

The manager is the person who really has the most general control over the affairs of a corporation, and who has knowledge of all its business and property, and who can act, in emergencies, on his own responsibility. He may be considered as the principal officer. The very term implies a general supervision of the affairs of the corporation in all its departments. *Oro Mining & Milling Co. v. Kaiser*, 35 Pac. 677, 678, 4 Colo. App. 219 (citing *Spangler v. Butterfield*, 6 Colo. 356; *Wheeler & Wilson Mfg. Co. v. Lawson*, 57 Wis. 400, 404, 15 N. W. 398).

"Manager," as applied to an officer of a corporation, implies the idea that the management of the affairs of the company have been committed to him, so that one dealing with a person so held out, before the company can be held liable for his acts, need not show affirmatively that it had authorized them. *Carrigan v. Port Crescent Imp. Co.*, 34 Pac. 148, 6 Wash. 500.

"Manager," as applied to an officer of a corporation, conveys the idea that to the one thus named has been committed the management of the affairs of the company, and one dealing with a person so held out may assume that his acts are authorized. *Saun-*

ders v. United States Marble Co., 65 Pac. 782, 784, 25 Wash. 475.

MANAGING AGENT.

A "managing agent" must be some person vested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of his duty and the manner of executing it. *Persons v. Buffalo City Mills*, 51 N. Y. Supp. 645, 647, 29 App. Div. 45 (citing *Taylor v. Granite State Provident Ass'n*, 136 N. Y. 343, 346, 32 N. E. 992, 32 Am. St. Rep. 749); *Reddington v. Mariposa Land & Mining Co.* (N. Y.) 19 Hun, 405 (cited and approved *Great West. Min. Co. v. Woodmas of Alston Min. Co.*, 20 Pac. 771, 774, 12 Colo. 46, 13 Am. St. Rep. 204); *Gilnes v. Supreme Sitting Order of Iron Hall*, 20 N. Y. Supp. 275, 276, 22 Civ. Proc. R. 437 (citing *Reddington v. Mariposa Land & Mining Co.* [N. Y.] 19 Hun, 405, 408).

An agent who is invested with the general conduct and control at a particular place of the business of a corporation is a "managing agent," within the meaning of the Code, authorizing service of summons on the managing agent of a foreign corporation. *Brown v. Chicago, M. & St. P. Ry. Co.* (N. D.) 95 N. W. 153, 154 (citing *Porter v. Chicago & N. W. Ry. Co.*, 1 Neb. 14; *American Exp. Co. v. Johnson*, 17 Ohio St. 641; *Foster v. Charles Betcher Lumber Co.*, 5 S. D. 57, 58 N. W. 9, 23 L. R. A. 490, 49 Am. St. Rep. 859).

The managing agent of a corporation is an agent having a general supervision over the affairs of the corporation, or such an agent as has the powers of general manager of the corporation. *Upper Mississippi Transp. Co. v. Whittaker*, 16 Wis. 220; *Carr v. Commercial Bank*, 19 Wis. 272. It is not sufficient that the agent be "a" managing agent within the state, since, if there are many such managing agents, the person in question cannot be a person who has general charge of the business of a corporation, but he must be "the" managing agent, having general control of the entire business of the corporation. *Wheeler & Wilson Mfg. Co. v. Lawson*, 15 N. W. 398, 400, 57 Wis. 400.

The term "managing agent," in Code, § 134, authorizing service in the state of summons upon the managing agent of a foreign corporation, means an agent "whose agency extends to all the transactions of the corporation; one who has or is engaged in the management of the corporation, in distinction from the management of a particular branch or department of its business." *Brewster v. Michigan Cent. R. Co.* (N. Y.) 5 How. Prac. 183, 186.

The term "managing agent," as used in Rev. St. Ohio, § 5046, authorizing service on a foreign corporation by service on a "managing agent" located in the state, "implies the carrying on of the corporate business, or some substantial part thereof, by means of an agent, who maintains and conducts the same within the limits of the state for and on account of the foreign corporation." *United States v. American Bell Telephone Co.* (U. S.) 29 Fed. 17, 33.

The agent having the management and control of the department of the business of a foreign corporation from which the cause of action arose was the "managing agent." *Hat-Sweat Mfg. Co. v. Davis Sewing Mach. Co.* (U. S.) 31 Fed. 294, 296.

One having the entire charge of defendant's business and subagents over a large territory was a "managing agent," within the provision of Code Civ. Proc. § 431, subd. 3; and the fact that he was controlled in the discharge of his duties by the home office does not any the less render him a managing agent. *Ives v. Metropolitan Life Ins. Co.* 78 Hun, 32, 34, 28 N. Y. Supp. 1030.

A person who was in the habit of making the semiannual statements to the bank comptroller, employed attorneys to attend to the bank's business, and was the only person exercising a general supervision over its affairs, was the managing agent of the bank, within the meaning of Rev. St. c. 148, § 1, authorizing service on corporations by serving their "managing agent," although he made affidavit that he was not such managing agent. *Carr v. Commercial Bank of Racine*, 19 Wis. 272, 273.

The president of a street railway, employed by the president of a steam railroad to superintend the running of horse cars on a portion of the steam railroad's track not yet completed, without authority to make contracts, except to purchase horses and feed, and having no control over or knowledge of the affairs of the railroad company or its books, is not a "managing agent," within a statute authorizing service on the managing agent of a corporation. To be a managing agent, within the meaning of the statute, the person must have the same general supervision and control of the general interests of the corporation that are usually associated with the office of cashier or secretary, and he must be one who is engaged in the management of the corporation, in distinction from the management of a particular branch or department. *Emerson v. Auburn & O. L. R. Co.* (N. Y.) 13 Hun, 150, 152.

Attorney in fact.

An attorney in fact, authorized by a corporation to apply for a patent to mining lands claimed by it, and to execute such papers as might be necessary for that pur-

pose, was not, by virtue of such employment, a managing agent, on whom service could be made. *Mars v. Oro Fino Min. Co.*, 65 N. W. 19, 21, 7 S. D. 606.

Baggage master.

The term "managing agent," in a statute authorizing suit to be commenced against a railroad company by the service of a summons upon a managing agent, does not include a baggage master in the employ of the company. *Flynn v. Hudson River R. Co.* (N. Y.) 6 How. Prac. 308, 309.

Business manager.

The business manager of a corporation, on whom service is shown to have been made by the return of a constable, is not a managing agent, though the statute authorizes service of summons on the latter. The courts must know, and constables must be presumed to know, what the Legislature means by "managing agent"; but the court cannot know what the constable means in his return by a distinction unknown to the law. *Scorpion Silver Min. Co. v. Marsano*, 10 Nev. 370, 382.

Captain of steamboat.

The captain of a steamboat belonging to a foreign corporation, but transacting business on the waters of this state, is not a "managing agent" of such corporation, within the meaning of the statute allowing process to be served on the managing agent of a corporation. The term "managing agent," in the statute, refers to an agent having a general supervision over the affairs of the corporation. *Upper Mississippi Transp. Co. v. Whittaker*, 16 Wis. 220, 221.

Division superintendent.

"Managing agent," as used in Code Civ. Proc. § 432, subd. 3, providing that the service of summons on a corporation may be on a managing agent, includes the division superintendent of a railroad, located at a point remote from the general offices of the company. In *Ruland v. Canfield Pub. Co.*, 10 N. Y. Supp. 913, 18 Civ. Proc. R. 282, a managing agent was defined to be "a person having independent discretionary control in the locality where his duties are performed." *Brayton v. New York, L. E. & W. R. Co.*, 25 N. Y. Supp. 264, 72 Hun, 602.

General manager or superintendent.

"Managing agent," as used in the Code of Civil Procedure, providing that service of summons on a domestic corporation must be made by delivering a copy thereof within the state to the president or other head of the corporation, or a director or managing agent, includes the general superintendent of a telegraph and telephone company. *Barrett v. American Telephone & Telegraph Co.*, 34 N. E. 280, 138 N. Y. 491.

"Managing agent," as used in Code Civ. Proc. § 525, subd. 1, providing that service of summons on a corporation may be made on the managing agent thereof, is not synonymous with "general manager." *Thomas S. Meton & Sons v. Isham Wagon Co.*, 4 N. Y. Supp. 215, 217, 15 Civ. Proc. R. 259.

General passenger agent.

Within Code Civ. Proc. § 432, permitting service of process on a foreign corporation having property in the state by leaving a copy of the summons with its managing agent in the state, the term "managing agent" should be construed to include an agent of a railroad company described as its "General Agent, Passenger Dept., 261 Broadway, N. Y."; such office being the general office for the general railroad business of the company. Where a corporation created by the laws of any state does business within the state, the person who, as its agent, does that business, should be considered its managing agent, and more especially should that be so where the foreign corporation has an office or place of business in the state, and when that office is in charge of that person, and he there acts for the corporation, he is there doing business for it, and so manages its business. Such person is in every sense of the word a "managing agent." *Tuchband v. Chicago & A. R. Co.*, 22 N. E. 360, 115 N. Y. 437.

Local agent.

The managing agent of a corporation is an agent having a general supervision over the affairs of the corporation, and must be an officer of the corporation; and hence a person who is only managing agent in a county, state, or other defined district is not a "managing agent of a corporation," having supervision over all its affairs, since the term implies a general supervision of the affairs of the corporation in all its departments, perhaps to a greater extent than is implied by any other single officer, so called, as a president, cashier, secretary, or treasurer. It is usually understood to designate the person who has the most general control over the affairs of the corporation, and who has knowledge of all of its business and property, and who can act in emergencies on his own responsibility. *Upper Mississippi Transp. Co. v. Whittaker*, 16 Wis. 220; *Farmers Loan & Trust Co. v. Warring*, 20 Wis. 290; *Wheeler & Wilson Mfg. Co. v. Lawson*, 15 N. W. 398, 400, 57 Wis. 400.

An agent in charge of a branch store belonging to a corporation, having a manager exercising the general control of the corporate business, including that transacted by such agent, is not a "managing agent," within the meaning of a statute providing that service on a corporation may be made by delivering a copy of the summons to this

managing agent. *Osborne & Co. v. Columbia County Farmers' Alliance Corp.*, 38 Pac. 160, 9 Wash. 666.

Manager.

Comp. Laws, § 4898, declares that, if an action is brought against a private corporation, summons may be served by delivering a copy to the president or other head of the corporation, secretary, cashier, treasurer, director, or managing agent, and that if the corporation be a foreign corporation service may be made by attachment, or by service personally on the president, treasurer, secretary, or duly authorized agent thereof. *Held*, that while the term "managing agent" is a term having no strict legal definition, and is a word of which it is not easy to formulate a definition, or lay a general rule that will govern all cases, yet it should be construed to mean a person who has full charge of the business of the corporation at a particular place within the state, and subject to no authority from any other person or agent within the state, if the corporation be a foreign corporation. An agent is such who corresponds with, accounts to, and receives communications from the main office of such foreign corporation in the foreign state, receives and disburses money, makes contracts with laborers as to the terms of payment of accounts, issues receipts for money, employs all necessary temporary assistance for and in behalf of the corporation, and with the knowledge and under the instructions of the corporation holds himself out and advertises himself as manager. *Foster v. Charles Betcher Lumber Co.*, 58 N. W. 9, 12, 5 S. D. 57, 23 L. R. A. 490, 49 Am. St. Rep. 859.

The term "managing agent," in the statutory provision authorizing service of process directed to a foreign corporation on its managing agent within the state, means a person holding some responsible and representative relation to the company, such as the term "managing agent" would include. A mere showing that such service has been made on the representative of a foreign corporation whose name appears in the directory of the city as its manager is not sufficient to show that the person served is the managing agent of the corporation. *Coler v. Pittsburgh Bridge Co.*, 40 N. E. 779, 780, 146 N. Y. 281.

The term "managing agent," in **Code Civ. Proc.** § 411, providing for the service and summons of corporations by service on the president or other head of the corporation, secretary, cashier, or other managing agent thereof, means "manager"; and hence service of the notice of appeal from a justice to a superior court, which is authorized to be made in the same manner as service of summons on the adverse party, was sufficient when made on the manager of a corporation.

Pacific Coast Ry. Co. v. Superior Court, 21 Pac. 609, 79 Cal. 103.

Soliciting agent.

Where an Illinois corporation, publishing a newspaper in Chicago, had in New York an agent who solicited advertisements and had authority to contract for the publication thereof at regular rates, the agent was a managing agent, within the meaning of **Code Civ. Proc. N. Y.** § 432, providing that service may be had under certain circumstances on the managing agent of a foreign corporation. *Palmer v. Chicago Herald Co.* (U. S.) 70 Fed. 886, 888.

Subordinate employé.

The managing agent of the corporation within the state means the person invested with general power involving the exercise of judgment and discretion, and does not include an ordinary agent or employé, who acts in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of the work and the manner of executing it. *Glines v. Supreme Sitting Order of Iron Hall*, 20 N. Y. Supp. 275, 276, 22 Civ. Proc. R. 437. Nor an employé of a domestic corporation, who attends to the publication of a periodical issued by the corporation, and to its printing, binding, and mailing, under instructions received immediately from the officers of the company. *Ruland v. Canfield Pub. Co.*, 10 N. Y. Supp. 913, 914, 18 Civ. Proc. R. 282. Nor a clerk employed in a store belonging to a mining corporation, though he keeps the accounts and pays the miners. *Blanc v. Paymaster Min. Co.*, 30 Pac. 765, 767, 95 Cal. 524, 29 Am. St. Rep. 149.

Superintendent.

Judicial notice will be taken that a superintendent is a managing agent, and therefore an affidavit in replevin signed by one described as a superintendent is a sufficient compliance with **Rev. St.** 1879, § 288, providing that the statement shall be verified by the affidavit of the plaintiff, his agent, or attorney. *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360, 361.

One who had oversight of all the work of a company at a certain plant, and had general charge of the employés of the company, and acted as a superintendent of construction, is a "managing agent," within **Code**, § 217, subsec. 1, providing that service may be had on a foreign corporation by delivering a copy of the summons to certain officers or the managing or local agent, and service on such person was good; the word "manage" being defined by Webster to mean "to direct; to govern; to control; to wield; to order," etc. *Clinard v. White*, 39 S. E. 960, 129 N. C. 250.

"Managing agent," as used in Pol. Code, §§ 3629, 3630, requiring that a statement of the property of a corporation should be made and given to the assessor by the corporation's president, secretary, cashier, or managing agent, includes the superintendent of a mining company. *Lake County v. Sulphur Bank Quicksilver Mining Co.*, 8 Pac. 593, 68 Cal. 14.

Telegraph operator.

Code Civ. Proc. § 431, providing that process against a corporation may be served on the president or other officer or managing agent, cannot be construed to include a telegraph operator in the employ of a telegraph company. The term "managing agent" is employed to distinguish a person who is invested with general power, involving the exercise of judgment and discretion, from an ordinary agent or employé, who acts in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of the work and the manner of executing the same. *Jepson v. Postal Telegraph Cable Co.*, 20 N. Y. Supp 300, 301, 22 Civ. Proc. R. 434.

MANAGING OFFICER.

Under a statute providing for attachment against foreign corporations and for the service of process on corporations by service upon the "managing officer" thereof, a resident agent of a foreign corporation, when such agent has complied with the provisions of a statute licensing and regulating agents of foreign corporations, is regarded as a managing officer of such corporation for the purposes of service in attachment and garnishment; it being settled that such agents do in fact locally represent the corporation, although in the foreign country, where the corporation has been chartered and its chief place of business is, there is another chief officer of such corporation. *McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214, 217.

MANAGING OWNER.

The general agent for the owners in respect to the care of a ship and freight is called the "manager"; if he is a part owner, he is also called the "managing owner." Rev. Codes N. D. 1899, § 4169; Civ. Code S. D. 1903, § 1522; Civ. Code Cal. 1903, § 2070.

A libel to enforce a lien under Act June 13, 1836, giving to mechanics and materialmen a lien upon vessels, stated that the work for which a lien was sought was done at the request of the master and managing owner of a vessel. Held, that the words "master and managing owner of the vessel," as so used, did not imply that the vessel

was registered and enrolled under the laws of the United States. It is plain that the words "master and managing owner" were not used in any merely technical sense, signifying that the vessel was registered and enrolled and had passed under the jurisdiction and control of the United States government. In a purely technical sense, perhaps, she could have a master and managing owner, properly so called, only by virtue of the laws of the United States; but she had owners, in the general sense of the word, from the time the work of construction and equipment began, and if any one of the owners had the superintendence and the control of the construction, with power to bind his fellows, he might well be considered the "managing owner," or even the "master," in the general sense of these terms. *Th. Odorilla v. Balzley*, 18 Atl. 511, 128 Pa. 283.

A master, who operated a schooner, furnished the supplies to run the vessel and paid a certain part of the net earnings to the owners, was not the "acting and managing owner," within the meaning of Rev. St. § 4141, requiring a vessel to be registered at the usual residence of the "acting and managing owner." *The Jennie B. Gilkey* (U. S.) 19 Fed. 127, 129.

MANDAMUS.

The word "mandamus," as a substitute for the word "order," may properly be used in a petition to the court of quarter sessions, under Act 1836, § 23, giving such court of the county in which a pauper has a settlement power to compel payment by his poor district of money expended on him while he was sick in another poor district, by "making an order and enforcing the same," if the facts set out in such petition show that the word "mandamus" is used in the sense of "command" or "order." In so ruling, the court say that both of the terms "mandamus" and "order," are commands, and although by long legal use the word "mandamus" has acquired a technical signification, restricted to those cases only where there is no other remedy, the facts set out in the complaint show that the petitioners used the word in its ordinary signification, and that they prayed the court to command or order the poor district of M. county to pay the bill. *Commissioners of Rouse's Estate v. Directors of Poor of McKean County*. Poor Dist., 32 Atl. 541, 544, 169 Pa. 116.

MANDAMUS (Writ of).

See "Peremptory Mandamus."

Alternative writ of, see "Alternative Writ."

Mandamus is a writ issued in the name of the state to an inferior tribunal, or a cor-

poration, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. *State v. Carpenter*, 37 N. E. 261, 262, 51 Ohio St. 83, 46 Am. St. Rep. 556; *Fraternal Mystic Circle v. State*, 48 N. E. 940, 941, 61 Ohio St. 628, 76 Am. St. Rep. 446; *Cincinnati Volksblatt Co. v. Hoffmeister*, 56 N. E. 1033, 1034, 62 Ohio St. 189, 48 L. R. A. 732, 78 Am. St. Rep. 707; *Freon v. Carriage Co.*, 42 Ohio St. 30, 37, 51 Am. Rep. 794; *Morrow County v. Hendryx*, 12 Pac. 806, 807, 14 Or. 397; *Sears v. Kincaid*, 53 Pac. 303, 304, 33 Or. 215; *State v. Burdick*, 28 Pac. 146, 3 Wyo. 588; *Lobban v. State*, 64 Pac. 82, 85, 9 Wyo. 377; *Chicago & N. W. Ry. Co. v. Crane*, 5 Sup. Ct. 578, 581, 113 U. S. 424, 28 L. Ed. 1064; *Bates' Ann. St. Ohio 1904*, § 6741; *Rev. St. Wyo. 1899*, § 4194.

Mandamus is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act or omit to do an act, the performance or omission of which is enjoined by law. *Denny v. Bosworth (Ky.)* 68 S. W. 1078, 1080; *School Dist. No. 14 v. School Dist. No. 4*, 43 S. W. 501, 502, 64 Ark. 483; *State v. San Antonio St. Ry. Co.*, 30 S. W. 266, 267, 10 Tex. Civ. App. 12.

Mandamus is defined in Civ. Code Prac. § 477, as an order of a court of competent and original jurisdiction, commanding executive or ministerial officers to perform an act or omit to do an act, performance or omission of which is enjoined by law. *Young v. Beckham (Ky.)* 72 S. W. 1092, 1093.

A writ of mandamus, as defined by Civ. Code, § 477, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act or omit to do an act, the performance or omission of which is enjoined by law. *Furnish v. Satterwhite (Ky.)* 72 S. W. 309, 310.

Mandamus is defined in Civ. Code, § 477, as an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act or omit to do an act, the performance or omission of which is enjoined by law, and is granted on the motion of the party aggrieved, or of the commonwealth when the public interest is affected. *Traynor v. Beckham (Ky.)* 74 S. W. 1105, 1107.

Mandamus is a command issuing from a common-law court of competent jurisdiction, in the name of the state, directed to some corporation, officer, or inferior court, requiring the performance of some particular duty therein specified, which duty results from the official station of the party to whom it is directed, or from operation of law. *Arnold v. Kennebec County Com'rs*, 44 Atl. 364, 368,

93 Me. 117 (citing High, Extr. Rem. § 1); *State v. Parish of St. Bernard (La.)* 2 South. 305, 308; *State ex rel. Laclede Bank v. Lewis*, 76 Mo. 370, 381.

A writ of mandamus is a demand issuing from a court of law of competent jurisdiction, in the name of the state or sovereign, directed to some inferior court, officer, corporation, or person, requiring them to do some particular thing therein specified which appertains to their office or duty. *Placard v. State*, 47 N. E. 623, 148 Ind. 305.

A writ of mandamus is a command issuing from a superior court to some inferior court of judicature, corporation, or public officer, requiring them to do some particular act therein specified, which appertains to their office and duty. *Borough of Ansonia v. Studley*, 34 Atl. 1030, 67 Conn. 170.

A mandamus may be defined to be a command issuing from the superior court, directed to some person, corporation, or inferior court within the jurisdiction of the superior court, requiring them to do some particular thing therein specified, which by law they are bound to do, and which the superior court has previously determined, or at least supposes, to be consonant to right and justice. *Swift v. State (Del.)* 6 Atl. 856, 860.

Mandamus is a writ which issues by the command of the sovereign power, and in the name of the state, and is directed to some subordinate court, judicature, or body within the jurisdiction of the court from which it issues, and it requires the performance by the body to whom it is directed of a specific act, as being the legal duty of the office, character, or situation. *Richardson v. Swift (Del.)* 30 Atl. 781, 783, 7 Houst. 137.

Mandamus is a writ issuing from a court of civil jurisdiction, and directed to a private or municipal corporation, or to an executive, administrative, or judicial officer, or to an inferior court, commanding the performance of a particular act belonging to his or their public or ministerial duty, or directing the restoration to the complainant of rights or privileges of which he has been illegally deprived. *Gruner v. Moore*, 6 Colo. 526, 529.

The writ of mandamus "is a process issued from the judicial branch of the government, which seeks to compel an officer to go forward to do that which is enjoined upon him by the position he holds. When there is a right to execute an office, perform a service, or exercise a function, more especially if it be a matter of public concern, or attended with profit, and a person having such right is wrongfully kept out of possession, or dispossessed of such right, and has no other specific remedy, the court will interfere by mandamus, upon reasons of justice and of public policy, to preserve peace,

order, and good government." *People v. Hallett*, 1 Colo. 352, 354.

Mandamus is a remedy to compel the performance of a duty required by law, where the party seeking relief has no other legal remedy, and the duty sought to be enforced is clear and indisputable. *Territory v. Crum*, 73 Pac. 297, 13 Okl. 9; *Bayard v. United States*, 8 Sup. Ct. 1223, 1225, 127 U. S. 246, 32 L. Ed. 118.

Mandamus is the appropriate remedy to compel public functionaries or tribunals to perform some duty required by law, where the party has no other remedy; but the right or duty sought to be enforced must be certain, or mandamus will not lie. *Board of Police v. Grant*, 16 Miss. (9 Smedes & M.) 77, 90, 47 Am. Dec. 102.

Mandamus is primarily and chiefly a remedy for official inaction. In its inception it was merely a mandate issuing directly from the sovereign to the subject to compel the performance of the royal will. It was in no sense a judicial writ. In process of time, however, the arbitrary issue of this royal mandate fell into disuse, and gave place to the judicial writ of mandamus, by which the court of king's bench at an early date assumed the right to correct and remedy official inaction. *City of Atlanta v. Wright*, 45 S. E. 994, 995, 119 Ga. 207.

In England mandamus was originally a mandate issuing directly from the sovereign to the subject, to compel the performance of the royal will. In its origin it was in no sense a judicial writ, but a royal mandate, used by the king in superintending the police and in preserving the peace of the realm, and as such it brooked no question. In process of time, however, and in the progress of the struggle between Parliament and the crown, the arbitrary use of this royal mandate fell into disuse and gave place to the judicial writ of mandamus, in which the court of king's bench at an early date assumed the right to correct and remedy official inaction, and set in motion the inferior courts, tribunals, and officers. *State ex rel. Laclede Bank v. Lewis*, 76 Mo. 370, 379, 381.

In England the writ of mandamus is defined to be a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring the doing of some particular thing therein specified which appertains to the office and duty, and which the court of king's bench had previously determined, or at least supposes, to be consonant to right and justice; and a mandamus to sign such a bill is warranted by the principles and usages of law within Judiciary Act, § 13, enacting that the Supreme Court of the United States shall have power to issue writs of mandamus in cases warranted by

the principles and usages of law to any court appointed under the authority of the United States. *Ex parte Crane*, 30 U. S. (5 Pet.) 190, 192, 8 L. Ed. 92; *Marbury v. Madison*, 5 U. S. (1 Cranch) 137, 168, 2 L. Ed. 60; *United States v. Kendall* (U. S.) 26 Fed. Cas. 702, 709.

"Mandamus was originally what is termed a prerogative writ, issuing only from the tribunal which represented judicially the king himself, and extended originally to matters of general and public concernment, rather than to such as affected only the rights of a particular subject as to cases of some breach of the peace, disobedience of the law, or neglect of official duty. Later, however, the writ began to be interposed for the benefit of the subject and the advancement of justice." *Judges of Oneida Common Pleas v. People* (N. Y.) 18 Wend. 78, 91.

"The prerogative writ of mandamus is the direct intervention of the state to compel a natural person or artificial one on whom the law imposes a public duty to perform the same." *Fuller v. Trustees of Plainfield Academic School*, 6 Conn. 532, 543; *Norwalk & S. N. Electric Light Co. v. Common Council*, 42 Atl. 82, 85, 71 Conn. 381.

Mandamus will not issue to restrain the commission of a tort or abuse of office. It runs to inferior tribunals, corporations, or persons to compel the performance of the act which the law enjoins as a duty resulting from an office, trust, or situation, but will not lie to prohibit the doing of an act, nor to prevent the institution of criminal proceedings, except where the criminal prosecution will affect property rights and the writ is necessary to preserve such rights and to prevent repeated prosecutions, wrongfully instituted to vex and harass the defendant therein. *Yellowstone Kit v. Wood*, 43 S. W. 1068, 18 Tex. Civ. App. 683.

Mandamus is always to do some act in execution of the law, and not to be in the nature of a writ de non molestando. *People v. Neubrand*, 52 N. Y. Supp. 280, 281, 32 App. Div. 49.

Mandamus is the proceeding employed in the exercise of a sovereign supervisory power over the agencies created and empowered by sovereignty for the promotion of the public welfare, to compel these to fulfill the ends of their creation. *Swift v. Richardson* (Del.) 32 Atl. 143, 145, 7 Houst. 338, 40 Am. St. Rep. 127.

Mandamus is a writ commanding the performance of some act or duty therein specified, in the performance of which the applicant for the writ is interested or by the nonperformance of which he is aggrieved or injured. *Legg v. City of Annapolis*, 42 Md. 203, 226.

The writ of mandamus may be denominated a "writ of mandate." Code Civ. Proc. Cal. 1903, § 1084; Comp. Laws Nev. 1900, § 3541.

As an ancillary proceeding.

Proceedings by mandamus in the federal Circuit Court are described as proceedings ancillary to the judgment which gives jurisdiction, and the writ, when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the same as provided in the contract. *Labette County Com'rs v. United States*, 5 Sup. Ct. 108, 111, 112 U. S. 217, 28 L. Ed. 698.

A writ of mandamus in the federal Circuit Courts is never an independent suit, but is only a proceeding ancillary to the judgment which gives the jurisdiction, and, when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the same as provided in the contract. In the Circuit Court of the United States there must be a judgment for the recovery of money before there can be a mandamus to levy any tax to pay it, and mandamus is only a form of executing the judgment. *Fuller v. Aylesworth* (U. S.) 75 Fed. 694, 699, 21 C. C. A. 505.

As applied to discretionary matters.

The purpose of mandamus is to require public officers to perform their official duties, when by inaction or misconduct they refuse to act. When the duty is purely ministerial, the court may direct how it shall be performed. When, however, the officer has any discretion or judicial power, the court can only direct him to act, but not how he shall act. *Territory v. Mohave County Sup'rs* (Ariz.) 12 Pac. 730, 731; *State v. Town Council of South Kingstown*, 27 Atl. 599, 602, 18 R. I. 258, 22 L. R. A. 65; *People v. Richmond*, 25 N. Y. Supp. 144, 146, 5 Misc. Rep. 26; *People v. Queens County Sup'rs*, 24 N. Y. Supp. 563, 565, 71 Hun, 97; *Arberry v. Beayers*, 6 Tex. 457, 464, 55 Am. Dec. 791.

Mandamus is a prerogative writ to an inferior court, commanding it to do some particular thing appertaining to its office and duty and which the higher court has previously determined or supposes to be consonant to justice; but if the thing sought to be accomplished is one which the inferior court has a discretionary power to do or refuse to do, the remedy is not by mandamus. *Cortleyou v. Ten Eyck*, 22 N. J. Law (2 Zab.) 45, 47.

The primary object of a writ of mandamus is to compel action. It neither creates nor confers power to act, but only commands exercise of powers already existing, when it is the duty of the person or body proceeded against to act without its agency. When the law requires a public officer to do a specified act in a specified way, upon a conceded state of facts, without regard to his own

judgment as to the propriety of the act, and with no power to exercise discretion, the duty is ministerial in character, and performance may be compelled by mandamus, if there is no other remedy. When, however, the law requires a judicial determination to be made, such as the decision of a question of fact, or the exercise of judgment in deciding whether the act should be done or not, the duty is regarded as judicial, and mandamus will not lie to compel performance. *People v. McGuire*, 65 N. Y. Supp. 463, 464, 31 Misc. Rep. 324.

The writ of mandamus issues to compel the performance of a plain duty imposed by law. Where that duty is the exercise of judgment or discretion by an officer in the decision of a question of law, or for both, it may issue to compel a decision; but it may not command him in what particular way that decision shall be rendered. When a question has been decided by the officer or person to whose judgment or discretion the law has intrusted its determination, the writ may not issue to reverse that decision or compel another. It cannot be invoked to compel a court or a judicial officer to reverse a decision already rendered, to correct an erroneous conclusion, or to render another decision, even though there be no other method provided by the law for the review or correction of the error. A writ of mandamus may lawfully issue from a court having jurisdiction to compel an executive officer to perform a mere ministerial act, which does not call for the exercise of his judgment or discretion, but which the law gives him the power and imposes upon him the duty to do. *Marbury v. Madison*, 5 U. S. (1 Cranch) 137, 158, 161, 2 L. Ed. 60; *Kendall v. United States*, 37 U. S. (12 Pet.) 524, 613, 9 L. Ed. 1181; *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167; *Butterworth v. Hoe*, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 556. It may issue to command an executive officer to act and decide, even though his act and decision involve the exercise of his judgment and discretion; but in such a case it may not direct him in what particular way he shall act or decide. It may not lawfully issue to command or control an executive officer in the discharge of those duties which involve the exercise of his judgment or discretion, either in the construction of the law or in determining the existence or effect of the facts. It may not lawfully issue to review, reverse, or correct the erroneous decisions of an executive officer in such cases, even though there may be no other method of review or correction provided by law. *Kimberlin v. Commission to Five Civilized Tribes*, 104 Fed. 653, 655 (citing *Decatur v. Paulding*, 39 U. S. [14 Pet.] 497, 514, 516, 10 L. Ed. 559; *United States v. Black*, 128 U. S. 40, 48, 9 Sup. Ct. 12, 32 L. Ed. 354; *United States v. Guthrie*, 58 U. S. [17 How.] 284, 15 L. Ed. 102; *Holloway v. Whiteley*, 71 U. S. [4 Wall.] 522, 18 L. Ed. 335; *Georgia*

v. Stanton, 73 U. S. [6 Wall.] 50, 18 L. Ed. 721; *Gaines v. Thompson*, 74 U. S. [7 Wall.] 347, 19 L. Ed. 62; *United States v. Windom*, 137 U. S. 630, 644, 11 Sup. Ct. 197, 34 L. Ed. 811; *United States v. Blaine*, 139 U. S. 306, 319, 11 Sup. Ct. 607, 35 L. Ed. 183; *United States v. Lamont*, 155 U. S. 303, 308, 15 Sup. Ct. 97, 39 L. Ed. 183).

It is said that an officer cannot be compelled by a mandamus to do any act involving the exercise of an official discretion. This is very true when properly understood. It means that an officer cannot be compelled by mandamus to do anything which the law gives it a discretion not to do. It does not mean that a writ will not issue to compel the officer to do any act the performance of which requires an exercise of mind or judgment, such, for example, as the identification of an individual. Mandamus lies against the Commissioner of the General Land Office, at the suit of a railroad company, to enforce the issuance of land certificates to which the company has acquired a right under its charter, and the general laws of the state; for under such circumstances the Commissioner had no discretion to withhold or to refuse to issue the certificates. *Houston & G. N. R. Co. v. Kuechler*, 36 Tex. 382, 399.

The remedy by mandamus, while appropriate to compel an officer to proceed in a judicial or quasi judicial matter confided by law to his jurisdiction, cannot be invoked to correct his errors or control his discretion. *State v. Crites*, 28 N. E. 178, 48 Ohio St. 460.

Mandamus is a writ issued to compel the performance of ministerial acts, or is addressed to several judicial tribunals requiring them to exercise their functions and render judgment in causes before them, when otherwise there would be a failure of justice from delay or a refusal to act. But where the tribunal has acted in a judicial capacity upon an account properly submitted to its judgment, a mandamus will not be granted to compel it to reverse its decision. *Chase v. Blackstone Canal Co.*, 27 Mass. (10 Pick.) 244. As was stated by Chief Justice Marshall in *Life & Fire Ins. Co. of New York v. Adams*, 34 U. S. (9 Pet.) 602, on mandamus the superior court will never direct in what manner the discretion of an inferior court shall be exercised, but in a proper case it will require the inferior court to act and decide. *Judges of Oneida Common Pleas v. People* (N. Y.) 18 Wend. 79, 94.

As a discretionary writ.

The writ of mandamus is a discretionary writ. *Detroit Fire & Marine Ins. Co. v. Hartz* (Mich.) 94 N. W. 7, 8.

Mandamus, though a prerogative writ, and demandable of right, is grantable at discretion. 5 Wds. & P.—26

cretion, and it is not exercised in favor of an applicant unless some just and legal purpose may be answered by it. *McManus v. School Controllers* (Pa.) 7 Phila. 23.

Mandamus is a discretionary writ, and will be allowed only in furtherance of justice upon a proper case presented. It will not be allowed where it is apparent that it is applied for to gratify the spite of a private individual, nor where the relator has instigated, authorized, or approved of the act complained of. *Hale v. Risley*, 37 N. W. 570, 571, 69 Mich. 596.

Mandamus is not a mere writ of right, but may issue or not at the discretion of the court, except in case of a clear legal right under the laws of the state, in which case the law and the right is imperative on the court. Mandamus is in the nature of a suit to which the state is not a party. *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210.

A writ of mandamus is not wholly a writ of right, but lies to a considerable extent within the sound judicial discretion of the court where the application is made. But no court should allow a writ of mandamus to compel a technical compliance with the letter of the law, where such compliance will violate the spirit of the law. *Wiedwald v. Dodson*, 30 Pac. 580, 581, 95 Cal. 450.

The writ of mandamus, when put forth in the maintenance of public right, is a high prerogative writ, to be awarded in the discretion of the court, and is not grantable of right, although in *People v. Weber*, 86 Ill. 283, the court said "that the writ of mandamus is not now, as formerly, a prerogative writ. It is nothing more under our statute than an ordinary action at law, in cases where it is the appropriate remedy." The court in such case intended to assert that the writ had ceased to be a prerogative writ, so far as it was a statutory remedy. *People v. Board of Trade of City of Chicago*, 62 N. E. 196-200, 193 Ill. 577.

The writ of mandamus is not in all respects a writ demandable of right, and whether to grant it or refuse it is a matter resting to some extent in the discretion of the court. This discretion is a legal, not an arbitrary, one, and is to be exercised in accordance with the established rules of law. There is no power to deny the writ arbitrarily, where a case comes squarely within such rules. The relator, in mandamus proceedings to compel settlement of a bill of exceptions, must show a clear right to have his proposed bill allowed. *State v. Holmes* (Neb.) 91 N. W. 175, 176.

As an extraordinary remedy.

Mandamus is an extraordinary remedy, to be resorted to only in cases where a legal

right is clearly established. *Lefrois v. Monroe Co.*, 48 N. Y. Supp. 519, 520, 24 App. Div. 421.

Mandamus is an extraordinary remedy, granted only in cases where the usual modes of procedure and forms of remedy are powerless to afford relief. *Storer Post*, No. 1, G. A. R. v. Page, 47 Atl. 264, 70 N. H. 280; *Jones v. McMahan*, 30 Tex. 719, 730; *Wilder v. Kelley*, 13 S. E. 483, 485, 88 Va. 274; *Hume v. Schintz*, 36 S. W. 429, 90 Tex. 72.

The remedy of mandamus is extraordinary, and if the right is doubtful or the duty discretionary, or there be any other adequate specific legal remedy in use, the writ will not be allowed. It was introduced to prevent a failure of justice and defective police, and therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. *Page v. Clopton (Va.)* 30 Grat. 415, 417.

The remedy of mandamus is extraordinary, as distinguished from the usual remedy of the citizen or suitor, and if the right is doubtful or the duty discretionary, or if there be any plain, ordinary, and adequate legal remedy, this writ will not in general be allowed. *Commonwealth v. O'Day (Pa.)* 6 Kulp, 177, 178.

Mandamus is an extraordinary remedy, and is recognized as such. It will not lie to compel the transfer of corporate stock on the books of the company merely because the right is clear: there being an adequate remedy at law, or at least in equity. *Clarke v. Hill (Mich.)* 93 N. W. 1044, 1045.

The writ of mandamus is an extraordinary remedy, to be invoked only upon special occasion and for particular reasons, and is intended to supply a deficiency in the law where, in the case of a clear right, no other remedy is given. *Cochrane v. Feltner*, 60 N. Y. Supp. 614, 44 App. Div. 239.

Mandamus is an extraordinary remedy, and not a writ of right. *Liverpool & L. & G. Ins. Co. v. Kearney*, 37 S. W. 143, 144, 1 Ind. T. 328.

Mandamus is a most valuable and essential remedy in the administration of justice, but it can only be resorted to to supply the want of some more appropriate ordinary remedy. Its office, as generally used, is to compel corporations, inferior tribunals, or public officers to perform their functions, or some particular duty imposed upon them, which, in its nature, is imperative, and to the performance of which the party applying for the writ has a clear legal right. The process is extraordinary, and if the right be doubtful, or the duty discretionary, or of a nature to require the exercise of judgment, or if there be any ordinary adequate legal

remedy to which the party applying could have recourse, this writ will not be granted. *George's Creek Coal & Iron Co. v. Alleghany County Com'rs*, 59 Md. 255, 259 (citing 2 Dill. Mun. Corp. § 827; *State v. Graves*, 19 Md. 351, 374, 81 Am. Dec. 639; *Booze v. Humbird*, 27 Md. 1, 4).

As a prerogative writ.

Mandamus is a prerogative writ, introduced to prevent disorder from a failure of justice or a defect of police, and therefore ought to be used on all occasions where the law has no specific remedy, and where in justice and good government there ought to be one. *Commonwealth v. Sessions of Hampden*, 19 Mass. (2 Pick.) 414, 419.

The theory of the common law is that the writ of mandamus is a prerogative writ, and it is sometimes called one of the flowers of the crown, and is therefore confided only to the king's bench, where the king at one period of the judicial history of England is said to have sat in person and is presumed still to sit. The power of issuing this writ is generally confided to the highest court of original jurisdiction, although the principle may be modified by statute. *Kendall v. United States*, 37 U. S. (12 Pet.) 524, 619, 9 L. Ed. 1181.

Mandamus originally issued only out of the king's bench. It was a prerogative writ, and its scope was exceedingly limited. There is no such thing as a prerogative writ in our judicial system, nor can there be under our form of government; but mandamus is a procedure under our Code. It is a judicial investigation, the object of which is the determination of civil rights, the same as in any ordinary proceeding; not only the determination of rights, but their determination in such a way as to culminate in an effective judgment. *State v. Crauney*, 71 Pac. 50, 51, 30 Wash. 594.

Mandamus is not a writ of right, but a prerogative writ, which issues only in a proper case, clearly proved to the court, and it will not be granted unless the right to have the thing done is clearly established: nor will it be granted unless there is occasion or necessity for its issue. *Bates v. Keith*, 28 Atl. 865, 866, 66 Vt. 163.

It is the settled law in Maine that a writ of mandamus can issue only at the instance of public officers to subserve a public right, and that the writ is a prerogative only, to be granted or withheld at the discretion of the court, and is not a writ of right. *Knight v. Thomas*, 45 Atl. 499, 500, 93 Me. 494.

It is held in Delaware that mandamus, according to the uniform current of adjudication in that state, is a prerogative writ in the supervisory sense, issuable exclusively

by the superior court, not of course, but only in the exercise of a sound judicial discretion. *McCoy v. State* (Del.) 86 Atl. 81, 83, 2 Marv. 543.

The writ of mandamus undoubtedly came into use by virtue of the prerogative power of the English crown, and was subject to regulation and rules which have long since been in disuse; but the right to the writ and the power to issue it have ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. *Ex parte Epley*, 64 Pac. 18, 21, 10 Okl. 631.

Mandamus is a high prerogative and remedial writ, the appropriate functions of which are the enforcement of duties to the public by officers and others, who either neglect or refuse to perform them. *Commonwealth v. Allegheny County Com'rs*, 37 Pa. (1 Wright) 277, 279.

A writ of mandamus is defined as a high prerogative writ, flowing from the king himself, sitting in the court of king's bench, etc.; but it is held in this country that the writ is not confined to cases of a business nature or to business corporations. *American Railway Frog Co. v. Haven*, 101 Mass. 398, 405, 3 Am. Rep. 377.

As a writ of right.

Mandamus was originally a prerogative writ, issuing only in the name of the king; but in modern times it has been treated as a writ of right to enforce a duty, whether public or private. *O'Brien v. Members of Board of Aldermen of City of Pawtucket*, 25 Atl. 914, 18 R. I. 113.

"In this country it is understood generally, if not universally, as a writ of right, issuable as of course on proper cause shown, and it would seem there could be no satisfactory reason why the proceedings should not be conducted as in an ordinary civil action, without introducing the state as a prosecutor." *State v. Pacific Brewing & Malting Co.*, 58 Pac. 584, 585, 21 Wash. 451, 47 L. R. A. 208.

Mandamus is a writ, in England, issuing out of the king's bench, in the name of the king, and is called a "prerogative writ," but considered a writ of right, and is directed to some person, corporation, or inferior court, requiring the doing of some particular thing, therein specified, which appertains to the office or duty, and which is supposed to be consonant to right and justice, and where there is no other adequate, specific remedy. The theory of the British government and of the common law is that the writ of mandamus is a prerogative writ, and it is sometimes called "one of the flowers of the crown," and is therefore confined only to the king's bench, where the king at one period of the judicial history of that country is

said to have sat in person, and is presumed still to sit; and the power to issue this writ is given to the king's bench only, as having the general supervising power over all inferior jurisdictions and officers, and is coextensive with judicial sovereignty. The same theory prevails in our state governments, where the common law is adopted. The power of issuing this writ is generally confined to the highest court of original jurisdiction. *Attorney General v. Taggart*, 29 Atl. 1027, 1030, 66 N. H. 362, 25 L. R. A. 613 (quoting *Kendall v. United States*, 37 U. S. [12 Pet.] 524, 614, 620, 621, 9 L. Ed. 1181).

A writ of mandamus is not wholly a writ of right, but lies to a considerable extent within the sound judicial discretion of the court where the application is made. *Wiedwald v. Dodson*, 30 Pac. 580, 581, 95 Cal. 450.

Mandamus is not a writ of right. *People v. Board of Trade*, 62 N. E. 196, 200, 193 Ill. 577; *Liverpool & L. & G. Ins. Co. v. Kearney*, 37 S. W. 143, 144, 1 Ind. T. 328; *Bates v. Keith*, 28 Atl. 865, 866, 66 Vt. 163; *Knight v. Thomas*, 45 Atl. 499, 500, 93 Me. 494.

As a civil action or proceeding.

In mandamus proceedings, it is found by an examination of the authorities, and it seems to be well settled, that such an action was a common-law action; and in some states of the Union, under Codes similar to ours, it is held that, where an issue of fact is raised on the pleadings, either party may have a trial by jury. The Supreme Court of Kansas, so far as we have been able to determine by an examination of the authorities, has not passed on this question directly. This writ anciently was a high prerogative writ, but in the states of this Union and under the decisions of the Supreme Court of the United States this action has lost to a considerable extent its ancient characteristics. It is not now considered in most of the states of the Union as anything more than a civil action, and in the procedure governing the trial of causes such procedure is assimilated as nearly as possible to the Codes of the several states, and is treated as an ordinary civil action in most of the states. The only features now possessed by this proceeding in common with those originally possessed, are the features which grant the court a discretionary power of issuing the alternative or peremptory writ of mandamus and to bring the parties into court. *Territory v. Chicago, R. I. & P. Ry. Co.*, 39 Pac. 389, 2 Okl. 108.

An action in mandamus is a civil proceeding, but the defendant may be required to answer or show cause why the order should not run against him in much less than the 20 days usually allowed for him to

right is clearly established. *Lefrois v. Monroe Co.*, 48 N. Y. Supp. 519, 520, 24 App. Div. 421.

Mandamus is an extraordinary remedy, granted only in cases where the usual modes of procedure and forms of remedy are powerless to afford relief. *Storer Post*, No. 1, G. A. R. v. Page, 47 Atl. 264, 70 N. H. 280; *Jones v. McMahan*, 30 Tex. 719, 730; *Wilder v. Kelley*, 13 S. E. 483, 485, 88 Va. 274; *Hume v. Schintz*, 36 S. W. 429, 90 Tex. 72.

The remedy of mandamus is extraordinary, and if the right is doubtful or the duty discretionary, or there be any other adequate specific legal remedy in use, the writ will not be allowed. It was introduced to prevent a failure of justice and defective police, and therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. *Page v. Clopton (Va.)* 30 Grat. 415, 417.

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Mandamus originally issued only out of the king's bench. It was a prerogative writ, and its scope was exceedingly limited. There is no such thing as a prerogative writ in our judicial system, nor can there be under our form of government; but mandamus is a procedure under our Code. It is a judicial investigation, the object of which is the determination of civil rights, the same as in any ordinary proceeding; not only the determination of rights, but their determination in such a way as to culminate in an effective judgment. *State v. Cranney*, 71 Pac. 50, 51, 30 Wash. 594.

Mandamus is not a writ of right, but a prerogative writ, which issues only in a proper case, clearly proved to the court, and it will not be granted unless the right to have the thing done is clearly established; nor will it be granted unless there is occasion or necessity for its issue. *Bates v. Keith*, 28 Atl. 865, 866, 66 Vt. 163.

It is the settled law in Maine that a writ of mandamus can issue only at the instance of public officers to subserve a public right, and that the writ is a prerogative only, to be granted or withheld at the discretion of the court, and is not a writ of right. *Knight v. Thomas*, 45 Atl. 499, 500, 93 Me. 494.

It is held in Delaware that mandamus, according to the uniform current of adjudication in that state, is a prerogative writ in the supervisory sense, issuable exclusively

by the superior court, not of course, but only in the exercise of a sound judicial discretion. *McCoy v. State* (Del.) 36 Atl. 81, 83, 2 Marv. 543.

The writ of mandamus undoubtedly came into use by virtue of the prerogative power of the English crown, and was subject to regulation and rules which have long since been in disuse; but the right to the writ and the power to issue it have ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. *Ex parte Epley*, 64 Pac. 18, 21, 10 Okl. 631.

Mandamus is a high prerogative and remedial writ, the appropriate functions of which are the enforcement of duties to the public by officers and others, who either neglect or refuse to perform them. *Commonwealth v. Allegheny County Com'rs*, 37 Pa. (1 Wright) 277, 279.

A writ of mandamus is defined as a high prerogative writ, flowing from the king himself, sitting in the court of king's bench, etc.; but it is held in this country that the writ is not confined to cases of a business nature or to business corporations. *American Railway Frog Co. v. Haven*, 101 Mass. 398, 405, 3 Am. Rep. 377.

As a writ of right.

Mandamus was originally a prerogative writ, issuing only in the name of the king; but in modern times it has been treated as a writ of right to enforce a duty, whether public or private. *O'Brien v. Members of Board of Aldermen of City of Pawtucket*, 25 Atl. 914, 18 R. I. 113.

"In this country it is understood generally, if not universally, as a writ of right, issuable as of course on proper cause shown, and it would seem there could be no satisfactory reason why the proceedings should not be conducted as in an ordinary civil action, without introducing the state as a prosecutor." *State v. Pacific Brewing & Malting Co.*, 58 Pac. 584, 585, 21 Wash. 451, 47 L. R. A. 208.

Mandamus is a writ, in England, issuing out of the king's bench, in the name of the king, and is called a "prerogative writ," but considered a writ of right, and is directed to some person, corporation, or inferior court, requiring the doing of some particular thing, therein specified, which appertains to the office or duty, and which is supposed to be consonant to right and justice, and where there is no other adequate, specific remedy. The theory of the British government and of the common law is that the writ of mandamus is a prerogative writ, and it is sometimes called "one of the flowers of the crown," and is therefore confined only to the king's bench, where the king at one period of the judicial history of that country is

said to have sat in person, and is presumed still to sit; and the power to issue this writ is given to the king's bench only, as having the general supervising power over all inferior jurisdictions and officers, and is coextensive with judicial sovereignty. The same theory prevails in our state governments, where the common law is adopted. The power of issuing this writ is generally confined to the highest court of original jurisdiction. *Attorney General v. Taggart*, 29 Atl. 1027, 1030, 66 N. H. 362, 25 L. R. A. 613 (quoting *Kendall v. United States*, 37 U. S. [12 Pet.] 524, 614, 620, 621, 9 L. Ed. 1181).

A writ of mandamus is not wholly a writ of right, but lies to a considerable extent within the sound judicial discretion of the court where the application is made. *Wiedwald v. Dodson*, 30 Pac. 580, 581, 95 Cal. 450.

Mandamus is not a writ of right. *People v. Board of Trade*, 62 N. E. 196, 200, 193 Ill. 577; *Liverpool & L. & G. Ins. Co. v. Kearney*, 37 S. W. 143, 144, 1 Ind. T. 328; *Bates v. Keith*, 28 Atl. 865, 866, 66 Vt. 163; *Knight v. Thomas*, 45 Atl. 499, 500, 93 Me. 494.

As a civil action or proceeding.

In mandamus proceedings, it is found by an examination of the authorities, and it seems to be well settled, that such an action was a common-law action; and in some states of the Union, under Codes similar to ours, it is held that, where an issue of fact is raised on the pleadings, either party may have a trial by jury. The Supreme Court of Kansas, so far as we have been able to determine by an examination of the authorities, has not passed on this question directly. This writ anciently was a high prerogative writ, but in the states of this Union and under the decisions of the Supreme Court of the United States this action has lost to a considerable extent its ancient characteristics. It is not now considered in most of the states of the Union as anything more than a civil action, and in the procedure governing the trial of causes such procedure is assimilated as nearly as possible to the Codes of the several states, and is treated as an ordinary civil action in most of the states. The only features now possessed by this proceeding in common with those originally possessed, are the features which grant the court a discretionary power of issuing the alternative or peremptory writ of mandamus and to bring the parties into court. *Territory v. Chicago, R. I. & P. Ry. Co.*, 39 Pac. 389, 2 Okl. 108.

An action in mandamus is a civil proceeding, but the defendant may be required to answer or show cause why the order should not run against him in much less than the 20 days usually allowed for him to

put in his defense. From the fact that the proceeding is a civil, and not a criminal, one in its nature, it does not follow that it is in all respects governed by the Code of Civil Procedure. So a defendant in a disbarment proceeding is not entitled to 20 days' time, the time allowed to answer the ordinary summons under the Code, but may be cited to appear and answer within any time that gives him a reasonable opportunity to be heard. In *re Brown*, 39 Pac. 469, 471, 2 Okl. 590.

A proceeding for an original writ of mandamus commenced in a state court is not a suit of a civil nature at law or in equity, within the meaning of Act March 3, 1887, and therefore is not removable under the provisions of that act from a state court into a Circuit Court of the United States. *State v. Lake Erie & W. Ry. Co.* (U. S.) 85 Fed. 1, 2.

Mandamus was originally a prerogative writ, issuing out of the court of king's bench in England, and by construction it was a command from the king himself, who was present in court. It issued alone from that court, for that court alone represented the ideal persons of the sovereignty. In this country it can scarcely be called a prerogative writ, and it is strictly a civil proceeding, and may be called a supplemental remedy when the party has a clear right to no other appropriate redress to prevent a failure of justice. *Leigh v. State*, 69 Ala. 261, 266. See, also, *State v. Jennings*, 14 N. W. 28, 29, 56 Wis. 113; *Brower v. O'Brien*, 2 Ind. (2 Cart.) 423.

As a law action.

Mandamus, in modern practice, is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of prerogative power of the English crown, and was subject to regulations and rules which have long since been disused; but the right to the writ and the power to issue it has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. *Kentucky v. Dennison*, 65 U. S. (24 How.) 66, 97, 16 L. Ed. 717.

A proceeding for mandamus is a suit at law. *City of Roodhouse v. Briggs*, 62 N. E. 778, 194 Ill. 435.

The term "proceedings," as used in Rev. St. §§ 3717, 3718, providing for a stay of proceedings on the filing of a recognizance on appeal, includes a peremptory writ of mandamus. *State ex rel. Laclede Bank v. Lewis*, 78 Mo. 370, 377.

As a personal action.

The office of the writ of mandamus is to compel the performance of a duty resting on

the person to whom it is sent, and if he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he can only be punished for disobedience. The writ does not reach the office; it cannot be directed to it. It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform it has ceased; and, if a successor in office may be substituted, he may be mulcted in costs for the default of his predecessor without any delinquency of his own. *Warner Valley Stock Co. v. Smith*, 17 Sup. Ct. 225, 227, 165 U. S. 28, 41 L. Ed. 621 (cited in *United States v. Boutwell*, 84 U. S. [17 Wall.] 604, 609, 21 L. Ed. 721).

The office of a writ of mandamus is to compel the performance of a duty upon the part of the person to whom the writ is sent. That duty may have originated in one way or in another. But no matter out of what fact or relations the duty has grown, what the law requires, and what it seeks to enforce by a writ of mandamus, is personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, a personal action, and it rests upon an averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. *United States v. Butterworth*, 18 Sup. Ct. 441, 169 U. S. 600, 42 L. Ed. 873.

Mandamus was originally a prerogative writ, commanding the execution of an act where otherwise justice would be obstructed, and issuing only in cases relating to the public and government; but it is now regarded as an action by the party on whose relation it is granted, though subject still to the restriction that it cannot be granted to a party where the law affords him any other adequate means of redress. *Commissioner of the General Land Office v. Smith*, 5 Tex. 471, 478.

As special case.

See "Special Case."

MANDATARIES.

Mandararies are persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordi

nary skill and diligence, but no more. *Briggs v. Spaulding*, 11 Sup. Ct. 924, 929, 141 U. S. 132, 35 L. Ed. 662.

MANDATE.

A mandate is a contract by which a lawful business is committed to the management of another, and by him undertaken to be performed without reward. *Richardson v. Futrell*, 42 Miss. 525, 543.

"A mandate is a bailment of goods, without reward, to be carried from place to place, or to have some act performed on them." *Thompson v. Woodruff*, 47 Tenn. (7 Cold.) 401, 407; *Eddy v. Livingston*, 35 Mo. 487, 492, 88 Am. Dec. 122; *Montgomery v. Evans*, 8 Ga. 178, 180.

"A mandate," says Kent, "is where one undertakes, without recompense, to do some act for another in respect to a thing bailed." *McCauley v. Davidson*, 10 Minn. 418, 421 (Gil. 335, 337).

A "mandate" is defined by the law to be a bailment of personal property in regard to which a bailee engages to do some act without reward. *Bronnenburg v. Charman*, 80 Ind. 475, 477.

Mandate is a consensual contract by which one of the parties confides the carrying on or execution of one or more matters of business to the other, who takes them in his charge. Mandate has also the name of "procurator": but the word "mandate" is more general, and comprehends every power given to another, in whatsoever mode it be, whilst "procurator" supposes a power given by writing. *Williams v. Conger*, 8 Sup. Ct. 933, 946, 125 U. S. 397, 31 L. Ed. 778.

A mandate is a consensual and imperfect synallagmatic contract. Gratuitousness does not appertain to its essence, but to its nature. It is lawful to stipulate a remuneration for services rendered. It differs from the hiring of labor in this: that the hired person is not vested with any representative capacity, and receives a price, and not a stipend or honorarium. *Gurley v. City of New Orleans*, 5 South. 659, 661, 41 La. Ann. 75. See, also, *Waterman v. Gibson*, 5 La. Ann. 672, 673.

A mandate, procurator, or letter of attorney is an act by which one person gives power to another to transact for him, and in his name, one or several affairs. Civ. Code La. 1900, art. 2985.

MANDATE (In Practice).

"A mandate, in practice, is a judicial command or precept issued by a court or magistrate, directing the proper officers to enforce a judgment, sentence, or decree."

Seaman v. Clarke, 69 N. Y. Supp. 1002, 1005, 60 App. Div. 416.

A "mandate" is a writ, process, or other written direction issued pursuant to law out of a court, or made, pursuant to law, by a court or judge thereof, commanding a person to do, or to refrain from doing, an act therein specified. *McKelsey v. Lewis* (N. Y.) 3 Abb. N. C. 61, 63.

The word "mandate," as used in the Probate Code, includes any process or order, issuing from the court, directing or prohibiting the performance of any act. Rev. Codes N. D. 1899, § 6166.

The word "mandate" includes a writ, process, or other written direction issued pursuant to law out of a court, or made, pursuant to law, by a court or a judge, or a person acting as a judicial officer, and commanding a court, board, or other body, or an officer or other person named or otherwise designated therein, to do or to refrain from doing an act therein specified. Code Civ. Proc. N. Y. 1899, § 3343, subd. 2.

Mandate is the official mode of communicating the judgment of the appellate court to the lower court. *Horton v. State*, 88 N. W. 146, 147, 63 Neb. 34.

Commitment order.

Code Civ. Proc. § 3343, subd. 2, defining "mandate" as including a writ, process, or written direction by a court or judge, is not exclusive, and therefore a commitment addressed to the sheriff by name, and delivered to the deputy sheriff to be executed, is a mandate of the court, for failure to execute which the defendant may be punished under Code Civ. Proc. § 8, subd. 3, giving courts of record power to punish as for criminal contempt willful disobedience of its lawful mandates, for the word "mandate," as used in the latter section, is evidently used in the sense of a command, order, or direction. *People v. Court of Oyer and Terminer*, 41 N. Y. Supp. 702, 704, 10 App. Div. 25.

Injunction order.

An injunction order is a "mandate," and therefore included in that expression found in Code Civ. Proc. § 14, relating to punishments for contempt. *Boon v. McGucken*, 22 N. Y. Supp. 424, 426, 67 Hun, 251.

Pleading.

A pleading is not a "mandate" of the court within Code, § 14, subd. 2, denouncing as a contempt any deceit or abuse of a mandate of the court, for a pleading is purely the act of the party, in which he offers to his adversary a statement of his claim or defense, and to which no order or sanction of the court is requisite. *Fronme v. Gray*, 14 Misc. Rep. 592, 593, 36 N. Y. Supp. 1107.

MANDATORY.

A "mandatory" provision in a statute is one which must be observed, as distinguished from a "directory" provision, which is one which leaves it optional with the department or officer to which it is addressed to obey it or not, as he may see fit. *Oakland Paving Co. v. Hilton*, 11 Pac. 3, 18, 69 Cal. 479.

The directions in a statute which are not of the essence of the thing to be done, but which are given with a view to the orderly and prompt conduct of the business, and by a failure to do which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory. *Custer County v. Yellowstone County*, 9 Pac. 586, 593, 6 Mont. 39.

MANDATORY INJUNCTION.

A "mandatory injunction" is one which commands the defendant to do some positive act. *Bailey v. Schnitzius*, 16 Atl. 680, 681, 45 N. J. Eq. (18 Stew.) 178.

A "mandatory injunction" is the counterpart in equity of a "mandamus" at law, and may be used against public officers. It may be in the direct form of a command, or in the direct form of prohibiting the refusal to do an act to which another has a right. *Parsons v. Marye* (U. S.) 23 Fed. 113, 121.

"Mandatory Injunctions" are those which require of a party the performance of some act, and they always to some extent anticipate the judgment of the court. It may ultimately be determined that such an order was erroneous, but it is not less within the power of the court to grant it. *People v. McKane*, 28 N. Y. Supp. 981, 986, 78 Hun, 154.

Where a primary injunction, while purporting simply to restrain a wrong, and while negative in its terms, may be so framed that it restrains the defendant from permitting his previous wrongful act to operate, and therefore virtually compels him to undo it by removing the obstructions or erections, and by restoring the plaintiff to his former condition, it is a "mandatory injunction," and resembles in its effect the "restorative interdict" of the Roman law, and is used where the injury is immediate and pressing and irreparable, and clearly established by the proofs, and not acquiesced in by the plaintiff. The rule is fully established at least by the English decisions, and is not controverted by American authority, that in such cases, where the facts are clearly established and the injury is real, and the plaintiff acted promptly upon his acquiring knowledge of defendant's proceeding, a preliminary mandatory injunction may be granted, although the act complained of was fully completed before the suit was commenced. *Procter v.*

Stuart, 46 Pac. 501, 503, 4 Okl. 679 (citing 3 Pom. Eq. Jur. § 1359).

MANEAT.

"Maneat" means to remain in. *Spinning v. Spinning*, 10 Atl. 270, 271, 43 N. J. Eq. (16 Stew.) 215.

MANHOOD.

In a will leaving property to testator's grandson, and, in case such grandson should live to arrive to "manhood" and beget heirs lawfully, the property should go to him and his heirs lawfully begotten, the term "manhood" cannot be construed to mean 21 years of age. *Felton v. Billups*, 21 N. C. 584, 586.

MANIA.

See "Fanatica Mania"; "Fit of Mania"; "Homicidal Mania"; "Methomania"; "Monomania"; "Oikei Mania."

"Mania is that form of insanity where the mental derangement is accompanied with more or less excitement. Sometimes the excitement amounts to a fury. The individual in such cases is subject to hallucinations and illusions. He is impressed with the reality of events which have never occurred and of things which do not exist, and acts more or less in conformity with his belief in these particulars. The mania may be general and affect all or most of the operations of the mind, or it may be partial and be confined to particular subjects." *Hall v. Unger* (U. S.) 11 Fed. Cas. 261, 263.

Mania is a form of insanity where "the hallucination or delusion is general, extending to all objects." *People v. Lake* (N. Y.) 2 Parker, Cr. R. 215, 218.

"Mania" is a general term, and includes many phases of mental disorder. *Smith v. Smith*, 47 Miss. 211, 216.

Monomania distinguished.

Mania is a condition in which the perversion of the understanding embraces all kinds of objects, and is accompanied with general mental excitement. It is distinguished from monomania, which is the perversion of the understanding in regard to a single object or a small number of objects, with the predominance of mental excitement. In *re Gannon's Will*, 21 N. Y. Supp. 960, 962, 2 Misc. Rep. 329.

MANIA A POTU.

The term "mania a potu" is used to designate a species of temporary insanity resulting as a secondary effect produced by the excessive and protracted indulgence in intoxicating liquors. Proof of the existence of

such a disease at the time of the commission of a homicide is a defense thereto. *State v. Hurley* (Del.) *Houst. Cr. Cas.* 28, 35.

MANIA TRANSITORIA.

The term "emotional insanity," or "mania transitoria," applies to the case of one in the possession of his ordinary reasoning faculties, who allows his passions to convert him into a temporary maniac. *Mutual Life Ins. Co. v. Terry*, 82 U. S. (15 Wall.) 580, 583, 21 L. Ed. 236.

MANIFEST.

"Manifested," as used in Civ. Code Cal. § 57, relating to marriages, and providing that consent and consummation may be "manifested" in any form, and may be proved under the same general rules of evidence as facts in other cases, means manifested for the purpose of proof whenever the fact may come in issue. It is not to be construed so that the facts must be made known; that is, that the consent and consummation cannot be secret. *Sharon v. Sharon*, 16 Pac. 345, 368, 75 Cal. 1.

"Manifest," as used in Act 1869, § 5, providing that the board of supervisors may correct any manifest clerical or other error in any assessment or returns made by any town officer to such board, means something which is apparent by an examination of the assessment roll or return, needing no evidence to make it more clear; "that which is open, palpable, incontrovertible." It is synonymous with "evident," "visible," "plain," "obvious to the understanding" from an examination of the roll or document, or, at the most, only requiring a mathematical calculation to demonstrate it. *Hernance v. Ulster County Sup'rs*, 71 N. Y. 481, 485.

Circuit court rule 112, regulating powers of injunction masters, and giving them no authority to grant injunctions without notice, unless the peculiar exigencies of the cause require it, "for 'manifest' reasons to be shown by affidavit," means, necessarily, reasons based on facts, shown by persons testifying on knowledge, and liable for perjury if they swear falsely. *Toledo, A. A. & N. M. Ry. Co. v. Detroit L. & N. R. Co.*, 61 Mich. 9, 11, 27 N. W. 716.

A "manifest" is a declaration of the entire cargo; a "bill of lading" is a declaration of a specific part of the cargo. A manifest is essentially a summary of all the bills of lading. *New York & Cuba Mail S. S. Co. v. United States* (U. S.) 125 Fed. 320.

MANIFEST MISBEHAVIOR.

"Manifest misbehavior," within the statute providing for the punishment of any

election judge guilty of manifest misbehavior, is included in a charge alleging that a judge acted in the premises "intentionally, wrongfully, and contrary to the statute." To "misbehave," according to lexicographers, is to behave improperly. It is manifest misbehavior on the part of a judge of an election to open the ballot box and count the ballots before the polls are closed and the books are certified, because the law forbids it. *Kirkpatrick v. Stewart*, 19 Ark. 695, 700.

MANIFESTLY IMPROPER TREATMENT.

"Manifestly improper treatment," as used in Code, § 547, which provides that an injury which terminates in death, although not necessarily fatal, is homicide, unless it appears that there has been gross neglect or manifestly improper treatment of the person injured, by some other person than he who inflicted the personal injury, means not only such treatment as will produce the destruction of human life, but also such treatment as allows, suffers, or permits the destruction of life. *Morgan v. State*, 16 Tex. App. 593, 595.

MANIPULATED FERTILIZERS.

The words "commercial manures, artificially manufactured or manipulated fertilizers," shall be taken and construed to include all manures and fertilizers which shall be sold for a greater price than one cent per pound. *Pub. Gen. Laws Md.* 1888, p. 972, art. 61, § 7.

MANKATO FREIGHT.

The term "Mankato freight," in an agreement for hauling freight, held to mean "freight marked or consigned to Mankato." *Lawrence v. Winona & St. P. R. Co.*, 15 Minn. 390, 395 (Gil. 313, 319), 2 Am. Rep. 130.

MANNER.

See "Summary Manner."

Any manner whatsoever, see "Any."

In a proper manner, see "Proper Manner."

In like manner, see "Like Manner."

In likewise manner, see "Likewise."

In 12 & 13 Vict. c. 106, § 136, providing that any warrant of attorney given by a trader to confess judgment in a personal action not filed within 31 days after execution in the manner and form provided by statute (3 Geo. IV, c. 39) shall be deemed fraudulent, null, and void, the expression "manner and form" refers only to the manner of the filing as required by the latter section. *Acraman v. Herniman*, 16 Adol. & E. 998, 1004.

The expression "in the manner," as used in Rev. St. p. 798, § 365, requiring sureties on appeal bonds to testify in the manner prescribed in sections 2704 and 2706, which relate to the justification of bail for persons arrested in civil actions, is synonymous with "as," as used in the similar provisions of Rev. St. 1871, p. 1643, § 36. *Ulrich v. Farrington Mfg. Co.*, 34 N. W. 89, 69 Wis. 213.

As form.

In an act entitled "An act providing for the manner of adopting children," the word "manner" is clearly demonstrative that the purpose of the law was to provide for the form to be used for the adoption of minors, and the forms and proceedings of prior laws which are not referred to in such act were superseded thereby, and the method prescribed in such act substituted therefor. In *re Vollmer*, 4 South. 254, 256, 40 La. Ann. 593.

The expression "in such manner," as used in a corporation by-law providing that shares of stock shall be transferable "in such manner" as the company shall direct, is not synonymous with "in such form." "By the word 'form' is meant the mode, or external appearance, of the thing. The word 'manner,' although it includes the form, is much more comprehensive. It is synonymous with 'method' or 'peculiar way,' and hence he who is authorized to prescribe the 'manner' has authority to direct the peculiar way in which anything is to be done. To illustrate: If the directors of a bank are vested with the power of prescribing the 'form' in which the bills of the bank are to be issued, this authorizes them to direct the phraseology of such bills and how they are to be signed; but if they are clothed with authority to prescribe the 'manner,' although it includes the form, it plainly includes much more." *Northrop v. Curtis*, 5 Conn. 246, 253.

The word "manner," as used in 2 Rev. St. §§ 4, 5, providing that persons desirous of forming a partnership shall make and severally sign a certificate containing the amount of capital which each special partner shall have contributed to the common stock, which certificate shall be acknowledged by the several persons signing the same, which acknowledgment shall be made and certified in the same "manner" as the acknowledgment of conveyances of land, has a larger meaning than "form" has. It includes mode, method, or way, and therefore includes the idea that the documents shall have the same function as was intended for an original formation. If it meant form only, it would be said as to a certificate, as distinguished from the act of signing it, that the form in the original requirement was not particularized, but was a form of any shape that would contain the assertion of the existence of certain facts or intentions. Every form of

speech or of writing has inseparably connected with it its significance. The form of the certificate is to be such as will be sufficient to declare, in reference to the renewal, those things which are to be declared in reference to the original formation. As to the manner of renewal, the documents shall also be true. *Fifth Ave. Bank v. Colgate*, 54 N. Y. Super. Ct. (22 Jones & S.) 188, 191.

As applicable to means used.

The word "manner," as used in the title of an act providing for the manner of locating and recording quartz and placer mining claims, means the method and way of locating and recording claims, and includes the instrumentalities and means to be used in effecting their location and the recording of them. In *re Monk*, 50 Pac. 810, 811, 16 Utah, 100.

The word "manner," in a street improvement contract giving the engineer the power of directing the manner in which the work shall be done, "means the power to control the work, not only as to its character, but also as to the particular means used to accomplish it." *City of Erie v. Caulkins*, 85 Pa. 247, 253, 27 Am. Rep. 642.

As method or way.

In an Indiana statute providing that, in an indictment or information for murder in the second degree or for manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death was caused, etc., the "manner" is the mode of action—the way the killing was accomplished or performed, etc. It means that it is unnecessary to state how the defendant held his gun, or what particular style he had in holding or wielding the knife or other weapon with which the offense was committed, nor need it be stated whether his manner was vicious, cruel, savage, or otherwise. *Littell v. State*, 33 N. E. 417, 418, 133 Ind. 577.

The term "manner," in a statute providing that a railroad may agree with the public authorities as to the manner, terms, and conditions upon which the railroad may occupy a highway, means the method or mode of laying the tracks. *Cleveland, C., C. & St. L. R. R. Co. v. City of Cincinnati*, 1 Ohio Prob. R. 269, 278.

The phrase "manner and upon the same terms," in a statute providing that a railroad company may appropriate so much of a highway as may be necessary for the purpose of its road in the manner and upon the same terms as is provided for the appropriation of the property of individuals, must be construed with reference to the subject in controversy, and, when so construed, means to provide the mode of procedure, the right of trial by jury, to examine and cross-examine witnesses, and give to the parties all

the rights and privileges incident to a proceeding for the condemnation of private property. *Cleveland, C. C. & St. L. R. R. Co. v. City of Cincinnati*, 1 Ohio Prob. R. 269, 279.

The word "manner," in a statute giving the power to make an allowance in the manner as now prescribed by the Code of Civil Procedure in civil actions, means the way of managing. *Noyes v. Children's Aid Soc.*, 70 N. Y. 481, 483; *Noyes v. Children's Aid Soc.* (N. Y.) 3 Abb. N. C. 36, 39.

Under a lease containing a covenant on the part of the lessor, his heirs, etc., that he and they would drain with proper drain tiles, one rod apart, 10 acres of the lands now in rye grass, at his and their costs, except the carriage of the said drain pipes, which is to be borne and paid by the lessee, and will drain the remainder of the lands hereby demised, "in manner aforesaid," on being paid a further yearly rent of a certain amount for every sum of a certain amount so expended, the words "in manner aforesaid" refer only to the mode of performing the work, viz., placing the drain tiles one rod apart; and consequently the tenant was not chargeable with the expense of carriage of the drain pipes beyond the first 10 acres. *Beer v. Santer*, 10 C. B. (N. S.) 434, 442.

St. 1874, c. 376, § 21, relating to meetings for the election of national, state, and county officers, and providing that "such meetings in towns shall be called by the selectmen in the 'manner' ordered by the towns," etc., means that such meetings shall be called in the same manner as town meetings, namely, by a warrant under the hands of the selectmen, directed to the constables or some other persons appointed by the selectmen for that purpose, who shall forthwith give notice of such meeting in the manner prescribed by the by-laws or a vote of the town. *Commonwealth v. Smith*, 132 Mass. 289, 293.

In Act 1868, p. 547, providing for the extension of Fairmount Park, and assessment of damages "in like manner" as prescribed by the act of 1867, the expression "in like manner" has reference merely to the general method. The quarter sessions may appoint six, instead of twelve, viewers. In re *Thirty-Fourth Street*, Philadelphia, 81 Pa. 27.

As relating to substance.

The expression "manner and form," as used in a plea, covers matters of both substance and form, and saves the necessity of repeating at length the allegations sought to be brought within the scope of the traverse. *Bradley v. Barbour*, 65 Ill. 431, 433.

Where, in an action of ejectment, the declaration states that the plaintiff was in possession in fee simple when the defendant

entered and unlawfully withholds the premises, and issue was made on the plea of not guilty, a verdict that "the jury, upon the issue joined, find the defendant is guilty in manner and form as the plaintiff in his declaration hath complained," such verdict is a finding of all the matters thus included in the issue, and includes a finding that plaintiff's estate was such as alleged. *Hawly v. Twyman* (Va.) 24 Grat. 516, 518.

As theory.

A contract for building a bridge provided that the contractor "is to furnish all the materials for building said bridge, and to use in the erection of the same good and substantial timber, iron, bolts, plank, etc., and the whole to be a complete structure, done in good and substantial 'manner,' and to be completed on or before" a certain day. The contractor gave a bond for the faithful performance of such contract. During the progress of the work the contractor received most of the contract price. Within three months after the bridge was completed it fell, and the county sued upon the contractor's bond to recover the money so paid. The court instructed the jury that, if the loss of the bridge resulted from defect either in material, work, or the manner or theory on which the work was done, the plaintiff was entitled to recover, and also charged that defendant was not responsible for any defect in the plan of the bridge. In commenting upon these instructions, the court said: "The words used on this point, namely, the 'manner or theory' on which the work was done, were evidently used as synonymous, meaning the same thing, namely, the manner." For this the contractor was expressly liable by the contract. For the theory on which the bridge was built, he was not, and so the court said. *O'Loughlin v. Jefferson Co.*, 56 Pa. (6 P. F. Smith) 62, 66.

As applicable to time.

In Gen. St. c. 142, § 5, providing that trustee process must be served on the defendant and each of the trustees in the manner prescribed for the service of original summons without an attachment, "manner" includes the time as well as the form of service. *Harris v. Doherty*, 119 Mass. 142, 143.

The "manner" of doing a thing has reference to the way of doing—to the method of procedure—and the element of time is not involved, and hence, as used in Code Civ. Proc. §§ 472, 473, providing that judgments may be revived in the same "manner" as is prescribed for reviving actions before judgment, the limitation of the action for revival of actions does not apply to revival of judgment. *Bankers' Life Ins. Co. v. Robbins*, 80 N. W. 484, 486, 59 Neb. 170.

"Manner," as used in *Sanborn & B. Ann. St.* § 694, providing that the county board

shall fix the salary of the sheriff in the same manner as salaries are fixed for other county officers, and the manner of fixing the other salaries is by resolution of the board, making it the duty to fix their salaries before their election, the word "manner" will be construed to include the element of time, so as to require the fixing of the salary before the election of the sheriff. *State v. McClure*, 64 N. W. 992, 91 Wis. 313.

The term "manner," in a statute requiring the collection of taxes on a certain class of property to be enforced in the same manner in which the tax on any other kind of personal property is enforced and collected, does not necessarily suggest the conclusion that suits for their collection must be brought at the same time. *State v. California Min. Co.*, 13 Nev. 203, 216; *State v. Eureka Consol. Min. Co.*, 8 Nev. 15, 29.

Of appointment or expulsion.

In the Constitution, art. 15, § 1, declaring that certain officers shall be chosen in such manner as now is, or hereafter may be, prescribed by law, "manner" does not mean necessarily a direction to the Governor to appoint, nor is the word intended to permit simply the direction of a particular mental operation in arriving at a choice, nor the qualification of the persons to be chosen, nor the character of commission, nor the duration of the term, nor the duties of the person or position, nor the time nor place of appointing, but should be construed to give the Legislature power to name the person or functionary who should make the appointment. *French v. State*, 41 N. E. 2, 6, 141 Ind. 618, 29 L. R. A. 113.

Under the provision of the Constitution that "the directors of the penitentiary shall be appointed or elected in such manner as the General Assembly may direct," the Assembly is not given power to appoint such directors. The power to direct "the manner," "the mode," "the way" in which an act shall be done, and the power and authority to do the act itself, are not one and the same thing, or equivalent to each other. To prescribe the manner of election or appointment to an office is an ordinary legislative function. To make an appointment to office is an administrative function. *State v. Kenyon*, 7 Ohio St. 546, 560.

Chicago Board of Trade Charter, § 6, declares that said corporation shall have the right to admit or expel such persons as they may see fit, "in manner" to be prescribed by the rules, regulations, and by-laws thereof. It was contended that the word "manner," as used in such provision, had reference to the mere method of expelling members through the majority of all the members of the corporation, and that the term was not sufficiently broad to authorize a delegation

of the power to the board of directors. It was held, however, that the term "manner" had been given by lexicographers a broader meaning than the word "method," the derivation of the word "manner" being from the Latin "manus," the hand. The term "manner" literally means the handling of a thing, and has a wider sense, embracing both "method" and "mode." *Pitcher v. Board of Trade of City of Chicago*, 20 Ill. App. (20 Bradw.) 319, 325, 326 (citing *Webst. Dict.*).

The term "manner," as used in Const. art. 5, § 3, which provides that the judges of the Supreme Court of Errors and the superior and inferior courts and justices of the peace shall be appointed by the General Assembly in such manner as shall by law be prescribed, is a comprehensive one, and refers, in the connection in which it is there used, to the mode of doing the act prescribed—to the proceedings of the two houses of the General Assembly in making the appointment, whether by ballot or resolution, and whether by joint or concurrent action of the two houses—and was not intended to authorize a delegation of the power to appoint any or all the judges to any officer or tribunal to whom the General Assembly might think proper to delegate it, hence a law passed by the General Assembly authorizing the common council of a city to appoint a police judge is unconstitutional. *Brown v. O'Connell*, 36 Conn. 432, 447, 4 Am. Rep. 89.

The word "manner," in Const. art. 4, § 8, providing that the Legislature shall prescribe the "manner" in which public officers shall be elected, includes the agent or person who may appoint, as well as the formality by which the appointment is to be made. *Bridges v. Shallcross*, 6 W. Va. 562, 591.

Of demand.

As used in a statute providing that all notaries are authorized in every protest of bills of exchange to make mention of the demand upon the person on whom such order or bill is drawn or given, and the "manner and circumstance of demand," the words "manner and circumstance" mean the presentment of the bill for either acceptance or payment, the place where the presentment and payment is made, and the person to whom or of whom it is made, and the answer made by such person. *Musson v. Lake*, 45 U. S. (4 How.) 262, 277, 11 L. Ed. 967.

Of sale.

In the provision of Code, § 3656a, that the statutes relating to the time, place, and manner of sale, under execution for taxes, should apply to sales of land for failure to pay assessments for street improvements, the expression "manner of sale" does not refer, either expressly or by implication, to the newspaper in which the sales are to be ad-

vertised. *Bacon v. City of Savannah*, 12 S. E. 580, 583, 96 Ga. 301.

Of voting.

In considering the objection raised to the constitutionality of an act, the subject of which, as stated in the title, was "the 'manner' of voting in Boardman county on questions of tax for subscriptions to railroads," the objection being that it conflicted with the provisions of the Constitution declaring that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be embraced in the title," the court said: "It is contended the subject of the second clause is not embraced in the title. The phrase 'manner of voting,' literally interpreted, applies simply to the act of voting, which is provided for in the Constitution, but by itself signifies nothing. It is therefore plain that a more comprehensive meaning was intended and should be given to it, and if so, why may it not be fairly applied to the counting of the votes and ascertaining the result of the voting? It seems to us there is an actual connection between regulating the manner of voting, and prescribing rules and tests by which to define and declare the result, which was the object of the clause in question. Moreover, anyone reading or hearing read the title would be informed that the act was intended to regulate the manner of voting in a particular county and on a particular question, independent of any other statute, and therefore readily infer that it contained the necessary provision for determining the result of such election." *Kentucky Union Ry. Co. v. Bourbon County*, 2 S. W. 687, 690, 691, 85 Ky. 112, 8 Ky. Law Rep. 881.

The words "manner of conducting elections," as used in Const. art. 2, § 6, giving the General Assembly full power to prescribe the manner of conducting elections, should be construed to include the collecting of votes in convenient and separate places in a town, and the course of proceedings in case of failure to elect. In *re Narragansett Election*, 16 Atl. 907, 909, 16 R. I. 761.

The word "manner" as used in Act 1819, § 3, relating to the holding of general elections in every county throughout the state for the purpose of electing Governor, members to Congress, members of the General Assembly, sheriffs, and clerks, which elections shall be conducted by the sheriff and managers appointed in the same "manner" as heretofore by law directed, cannot be considered as including substance, but form only. The giving a casting vote is clearly not a part of the manner of conducting, but it is effecting, the election. There is certainly a great distinction between the manner of conducting an election and the election itself. By the "manner of conducting" the election is understood the formal part of the election; that

is, the mode of voting, the mode of receiving and registering the votes, of computing them, etc. *State v. Adams (Ala.)* 2 Stew, 231, 242.

The "manner" of election does not go to the question of what body of electors shall elect, and therefore Const. 1894, art. 6, § 18, requiring all judicial officers, except as there-in provided, to be elected or appointed in such manner as the Legislature may direct, does not authorize the Legislature to designate the body of electors which shall be entitled to elect such officers. *People v. Guden*, 75 N. Y. Supp. 347, 349.

"Manner," as used in Const. art. 8, § 5, providing that the time and "manner" of the election of the superintendent of schools shall be prescribed by law, means "the usual, ordinary, or necessary details required for the holding of the election." *People v. English*, 29 N. E. 678, 679, 139 Ill. 622, 15 L. R. A. 131.

Under Const. art. 16, § 1, providing that it shall be the duty of the Legislature to submit proposed amendments to the Constitution to the people in such "manner" and at such time as the Legislature shall prescribe, the requirement of St. 1887, p. 122, that proposed amendments be published, in a daily newspaper of general circulation, for 90 days next preceding the election at which the amendments are to be voted on, and that a copy be mailed to each voter, is a reasonable requirement and proper designation of the manner of submitting such a matter. *State v. Davis*, 19 Pac. 894, 895, 20 Nev. 220.

In St. 1854, c. 77, changing the time of election and tenure of office of county commissioners, the provision that they shall be chosen "in the 'manner' prescribed in revised statutes" means not only for the warrant for a meeting and ballot for a vote in towns, but extends to all the other provisions necessary to give effect to the choice, such as returning, examining, and declaring votes, so as to make a complete election to the office. *Taft v. Adams*, 69 Mass. (3 Gray) 126, 132.

MANSION.

"Mansion" means a dwelling house or place of residence; it being sufficient to use the word "mansion," instead of "dwelling house," in an indictment charging burglary. *Thompson v. People*, 3 Parker, Cr. R. 208, 214; *Commonwealth v. Pennock (Pa.)* 3 Serg. & R. 199.

"The 'mansion' not only includes the dwelling house, but also the outhouses, such as barns, stables, cowhouses, dairy houses, and the like, if they be parcel of the messuage, though they be not under the same roof or contiguous to it. *State v. Brooks*, 4 Conn. 446, 448 (quoting 2 East, P. C. 492, 493).

Under Code, § 4386, in reference to burglary, declaring that all outhouses contiguous or within the curtilage or protection of the "mansion" or dwelling house shall be considered as parts of the same, the breaking and entering a gearhouse, separated from the main yard by a fence and fenced to it, may constitute burglary if there is a gate between it and the main yard always left open at night, so as to constitute one yard under the protection of the yard dog. *Bryant v. State*, 60 Ga. 358, 359.

MANSION HOUSE.

Every house used as a dwelling or habitation is to be taken to be a "mansion house" wherein burglary may be committed. *Armour v. State*, 22 Tenn. (3 Humph.) 379, 385; *Devoe v. Commonwealth*, 44 Mass. (3 Metc.) 316, 325 (quoting 2 East, P. C. 493).

An indictment for burglary, charging the entry of a "mansion house," not only includes the mansion or dwelling house, but also such houses as are appurtenant thereto, as the kitchen, laundry, smokehouse, or dairy. *Fletcher v. State*, 78 Tenn. (10 Lea) 338, 339.

MANSLAUGHTER.

See "Homicide by Misadventure"; "Homicide in Self-Defense"; "Homicide by Negligence"; "Involuntary Manslaughter"; "Voluntary Manslaughter."

As an infamous crime, see "Infamous Crime."

Manslaughter is the unlawful killing of a human being without malice, express or implied. *State v. Faino* (Del.) 41 Atl. 134, 135, 1 Marv. 492; *State v. Trusty* (Del.) 40 Atl. 766, 768, 1 Pennewill, 319; *Stokes v. State*, 18 Ga. 17, 35; *State v. Lodge* (Del.) 33 Atl. 312, 314, 9 Houst. 542; *State v. Cole* (Del.) 45 Atl. 391, 393, 2 Pennewill, 344; *State v. Talley* (Del.) 33 Atl. 181, 9 Houst. 417; *Clarke v. State*, 23 South. 671, 674, 117 Ala. 1, 67 Am. St. Rep. 157; *Hawes v. State*, 7 South. 302, 304, 88 Ala. 37; *Sullivan v. State*, 15 South. 264, 266, 102 Ala. 135, 48 Am. St. Rep. 22; *Commonwealth v. Salyards*, 27 Atl. 993, 995, 158 Pa. 501; *Kilpatrick v. Commonwealth*, 31 Pa. (7 Casey) 198, 201; *Commonwealth v. Sayres* (Pa.) 12 Phila. 553, 555; *Commonwealth v. Martin* (Pa.) 9 Kulp, 69, 71; *Wallace v. United States*, 16 Sup. Ct. 859, 863, 162 U. S. 466, 40 L. Ed. 1039; *Stevenson v. United States*, 16 Sup. Ct. 839, 842, 162 U. S. 313, 40 L. Ed. 980; *North Carolina v. Gosnell* (U. S.) 74 Fed. 734, 737; *United States v. King* (U. S.) 34 Fed. 302, 309; *Hogan v. State*, 36 Wis. 226, 238; *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 304, 52 Am. Dec. 711; *State v. Town* (Ohio) *Wright*, 75, 76; *State*

v. Bowers, 43 S. E. 656, 658, 65 S. C. 207, 95 Am. St. Rep. 795; *State v. Guild*, 10 N. J. Law (5 Halst.) 163, 174, 18 Am. Dec. 404.

Manslaughter is the unlawful killing of a human being, without malice or any mixture of deliberation. *Territory v. Manton*, 19 Pac. 387, 388, 8 Mont. 95; *May v. People*, 6 Pac. 816, 821, 8 Colo. 210; *People v. Langton*, 7 Pac. 843, 844, 67 Cal. 427; *Williams v. United States* (Ind.) 69 S. W. 871, 874.

Manslaughter is unjustifiable and inexcusable homicide, committed under circumstances which do not bring the crime within the definition of first or second degree murder. *People v. Maine*, 64 N. Y. Supp. 579, 580, 51 App. Div. 142.

Manslaughter is a sudden unlawful killing, without the circumstances of malice, cruelty, revenge etc., involved in the technical term "malice." *State v. Bell* (Pa.) Add. 156, 160.

"Manslaughter" is defined by the laws of Hawaii to be the killing of a human being, without malice aforethought, and without authority, justification, or extenuation of law. *Republic of Hawaii v. Hickey*, 11 Hawaii, 314, 318; *Republic of Hawaii v. Yamane*, 12 Hawaii, 189, 203.

To constitute manslaughter, the killing must have been unlawful as well as voluntary. *Smith v. State*, 68 Ala. 424, 430.

Voluntary killing.

"Manslaughter is voluntary homicide, committed under the influence of sudden passion arising from an adequate cause, but neither justified nor excused by law." *High v. State*, 10 S. W. 238, 26 Tex. App. 545, 8 Am. St. Rep. 488 (quoting Pen. Code, art. 593); *Stell v. State* (Tex.) 58 S. W. 75, 76; *Farrar v. State*, 15 S. W. 719, 720, 29 Tex. App. 250; *Boyd v. State*, 12 S. W. 737, 739, 28 Tex. App. 137.

Manslaughter is the intentional killing of a human being in the heat of passion, on a reasonable provocation, without malice and without premeditation, and under circumstances that will not be justifiable or excusable homicide. *State v. Umfried*, 76 Mo. 404, 407.

Manslaughter is the unlawful killing of a human being, without malice, either express or implied, but in the heat of passion, before the passion has had time to cool. *State v. Brown* (Del.) 53 Atl. 354, 355; *McCann v. People* (N. Y.) 6 Parker, Cr. R. 629, 632.

Manslaughter is the killing of a person in sudden heat or passion, upon sufficient legal provocation. *State v. Workman*, 17 S. E. 694, 696, 39 S. C. 151; *State v. Symmes*, 19 S. E. 16, 17, 40 S. C. 383.

Manslaughter is the killing in a sudden heat or passion, caused by provocation sufficient, apparently, to make such passion irresistible. *Ware v. State*, 27 S. W. 485, 488, 59 Ark. 379.

Manslaughter is the unlawful killing of a human being, without malice, expressed or implied, and without deliberation. It must be voluntary, upon a sudden heat of passion, upon a provocation apparently sufficient to make the passion irresistible. *Selden v. State*, 55 Ark. 398, 396, 18 S. W. 459.

Manslaughter is one of the charities of the law. Whereas manslaughter will be unlawful, yet if the party's mind was dethroned by sudden heat and passion, and he killed under such circumstances as that, although unlawfully done, the law comes in, and, appreciating that the man's mind was dethroned by reason of sudden heat and passion, it takes a liberal view, and reduces the crime from murder to manslaughter, it being done in sudden heat and passion, upon sufficient provocation. *State v. Aughtry*, 49 S. C. 285, 289, 26 S. E. 619, 620, 27 S. E. 199.

Manslaughter is the voluntary depriving a human being of life, without malice. *Dennis v. State*, 112 Ala. 64, 67, 20 South. 925.

Although a person unlawfully and purposely kills a human being, yet if it be done in a sudden heat of passion, caused by a sufficient provocation, and in the absence of express malice, then malice will be implied from the act, but the offense will be manslaughter. *Murphy v. State*, 31 Ind. 511, 513.

A killing under the influence of passion, or upon provocation, before the passion had time to subside, would be murder in the second degree, or manslaughter if the provocation was a sufficient one. *Anthony v. State*, 19 Tenn. (Meigs) 265, 269, 275, 33 Am. Dec. 143.

Where a homicide is committed under the influence of passion, or in the heat of blood, produced by an adequate provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition, the offense is manslaughter. *Maher v. People*, 10 Mich. 212, 219, 81 Am. Dec. 781.

Manslaughter is the killing of a human being, without malice, but under such circumstances as cannot render it wholly innocent, or excusable, or justifiable in law. When the killing is done in the sudden transport of passion, in the heat of blood,

the law concedes that the act may be incident to the weakness and infirmity of our natures, and thus negatives implied malice, which is essential to the crime of murder in the second degree. *State v. Brown* (Del.) 36 Atl. 458, 464, 2 Marv. 380; *State v. Warren* (Del.) 41 Atl. 190, 1 Marv. 487.

A killing in a sudden passion excited by sufficient provocation, without malice, is manslaughter, not because the law supposes that this passion made the slayer unconscious of what he was about to do and stripped the act of killing of an intent to do it, but because it is presumed passion disturbed the sway of reason. *Smith v. State*, 3 South. 551, 552, 83 Ala. 26.

Manslaughter is where the homicide is willful and unlawful, but is committed under such circumstances of provocation as to rebut the implication of malice and reduce it below the grade of murder of the second degree, as where one in a mutual altercation, in the heat of blood or in a transport of passion, on sufficient provocation, without malice, inflicts the mortal wound without time for reflection and for the passions to cool. *State v. Wallace* (Del.) 47 Atl. 621, 622, 2 Pennewill, 402.

A killing committed under the immediate influence of sudden passion arising on adequate cause—that is, such cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection—constitutes manslaughter, and not murder. *Boyd v. State*, 12 S. W. 737, 738, 28 Tex. App. 137 (citing Pen. Code, arts. 593, 595; *Morgan v. State*, 16 Tex. App. 593).

Manslaughter is the unlawful killing of a human being, without malice aforethought. "The true nature of manslaughter is that it is homicide, mitigated out of tenderness to the frailty of human nature. Every man, when assailed with violence of great rudeness, is inspired with a sudden impulse of anger which puts him upon resistance before time for cool reflection, and if during that period he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood, or violence or anger, and not through malice, or that cold-blooded desire of revenge which more properly constitutes the feeling, emotion, or passion of malice." *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 307, 52 Am. Dec. 711.

Same—Cooling time.

The criterion whether a sufficiency of cooling time has elapsed so as to reduce a homicide from murder to manslaughter is not alone how many days or hours have elapsed since the provocation was given, al-

though this consideration is of vast significance in ascertaining the main inquiry; what constitutes a sufficiency of cooling time is necessarily a question of law. *Ragland v. State*, 27 South. 983, 985, 125 Ala. 12.

Manslaughter is the unlawful killing of another, without malice, either express or implied. The offense is one that is committed without malice and without premeditation; the result of temporary excitement by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition. The true general rule is that reason should at the time of the act be disturbed or obscured by passion to an extent that it might render ordinary men of fair average disposition liable to act rashly or without due deliberation or reflection and compassion. To reduce the offense of murder to manslaughter, there must be no time for passion to subside, and no evidence of actual malice or of resenting the provocation in a brutal and ferocious manner, evincing a malignant disposition. *People v. Lilley*, 5 N. W. 982, 985, 43 Mich. 521.

Same—Intent.

It is not true, if one party slay another, in the heat of passion and without malice, that the crime cannot be manslaughter, if a dangerous weapon is used. Whether the killing is murder or manslaughter does not depend on whether or not a dangerous weapon was used, but upon the intention with which the act was done. *People v. Crowey*, 56 Cal. 36, 40.

Where any person shall unlawfully kill another without malice, either on a sudden quarrel, or intentionally while the slayer is in the commission of some unlawful act, he is guilty of manslaughter. Intention or purpose to kill may be present where the killing is without malice upon a sudden quarrel, but where death is caused by the use of a deadly weapon, or the circumstances of the killing are shown in detail, some of which tend to disprove the presence of malice or intentional killing, it is for the jury to determine whether a presumption of malice on the part of the accused arises from the fact that he used a deadly weapon. *Erwin v. State*, 29 Ohio St. 186, 190, 23 Am. Rep. 733.

To constitute manslaughter, the act must have been unlawful, without malice, with intent to kill, formed in the heat of a sudden quarrel, or without intent to kill, while the person was engaged in the commission of some unlawful act. Where the act is done maliciously, whether the malice be express or implied, the offense, whatever it is, is not manslaughter; and if there was an intent to kill, and there was not a great provocation or a suddenly excited passion,

the crime, if any, is not manslaughter *State v. Turner* (Ohio) Wright, 20, 30.

A person guilty of manslaughter may have instantaneously formed the design to take life, but to make it manslaughter there must be an absence of malice, deliberation, and premeditation. The design in such case is the result of sudden passion upon sufficient provocation, as distinguished from that formed design which results from malice, deliberation, premeditation. As was said in *Harrington v. State*, 83 Ala. 9, 15, 16, 3 South. 425, and reaffirmed in *Williams v. State*, 83 Ala. 16, 17, 3 South. 616: "In order to constitute manslaughter in the first degree, there must be either a positive intention to kill, or an act of violence from which ordinarily, in the usual course of events, death or great bodily injury may be a consequence." It is difficult to conceive how there can be a "positive intention" to kill without forming the design to kill, and such "positive intention" necessarily precedes the killing. Whether the design or "positive intention" is the offspring of the elements which constitute murder in the first degree—that is, "willful, deliberate, malicious, and premeditated"—or of the facts which constitute murder in the second degree, or of sudden passion upon sufficient provocation, or in self-defense, is always a question of fact for the jury, under proper instructions of the court. *Hornsby v. State*, 10 South. 522, 526, 94 Ala. 55.

The intent to kill may be present in manslaughter, but the law, out of forbearance for the weakness of human nature, will disregard the actual intent. *People v. Kernaghan*, 72 Cal. 609, 619, 620, 14 Pac. 566.

Under the Code, manslaughter is homicide without a design to effect death. *State v. Brown*, 41 Minn. 319, 323, 43 N. W. 69.

Same—Provocation.

Manslaughter is the killing of a human being, without malice, in sudden heat and passion, and upon sufficient legal provocation, which heat and passion amount to uncontrollable impulse, and so inflame the defendant that he hardly knows what he is doing. *State v. Davis*, 27 S. E. 905, 911, 50 S. C. 405, 62 Am. St. Rep. 837.

In determining whether the provocation is sufficient to reduce homicide to manslaughter, ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard, unless the person whose guilt is in question be shown to have some particular weakness of mind or infirmity of temper, not arising from wickedness of heart or cruelty of disposition. *People v. Borgetto*, 58 N. W. 323, 330, 99 Mich. 336.

At the common law, voluntary manslaughter was the unlawful and intentional killing of another, without malice, on a sudden quarrel or in heat of passion. To reduce the killing from murder to manslaughter, the provocation, to be available, must have been reasonable and recent, for no words or slight provocation will be sufficient, and, if a party has had time to cool, malice will be inferred, and the homicide will be murder. *United States v. Lewis* (U. S.) 111 Fed. 630, 632.

In order to reduce a killing from murder in the first or second degree to "manslaughter," passion must be aroused, and the killing must be caused directly by the passion aroused at the present provocation, and the provocation must be one given by the party killed, and not given by some other person. *Cannon v. State*, 56 S. W. 351, 361, 41 Tex. Cr. R. 467 (citing *Weathersby v. State*, 29 Tex. App. 278, 15 S. W. 823).

Death resulting from an assault made without the use of a deadly weapon, instrument, means, or force likely to produce great bodily injury is manslaughter, and not murder. *People v. Munn*, 3 Pac. 650, 651, 65 Cal. 211.

The intentional killing of another, without malice, on sudden quarrel or in heat of passion, is manslaughter. So any assault made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, if it be resented immediately by the death of the aggressor, and it appears that the party acted in heat of blood upon that provocation, will reduce the killing to manslaughter. *State v. Edwards*, 70 Mo. 480, 483.

Where one receives injury, and upon the provocation of the blow, and in the rage and passion produced thereby, kills another, he is guilty of manslaughter. *Abernethy v. Commonwealth*, 101 Pa. 322.

If one thinks another intends to commit a battery upon him, but not such a battery as will result in great bodily harm, and to prevent this he kills such other, the killing will constitute manslaughter. *Grainier v. State*, 13 Tenn. (5 Yerg.) 459, 462, 26 Am. Dec. 278.

Manslaughter is not limited to a killing resulting from an aggravated assault committed by deceased on the accused, and inflicting such pain as to arouse in defendant anger, rage, resentment, or terror sufficient to render the mind incapable of cool reflection, but any condition or circumstance which is capable of creating sudden passion, whether accompanied by bodily pain or not, is sufficient to reduce the killing from murder to manslaughter. The criterion is passion, and not pain. *Williams v. State*, 15 Tex. App. 617, 623.

Manslaughter is where a person kills another upon a sudden transport of passion or heat of blood, upon a reasonable provocation and without malice, as, for instance, such a sudden attack on a man's person that his mind becomes immediately inflamed, and in the fury of his passion he kills the aggressor. But if one kill another merely trespassing against his property, not his dwelling house, it is not a provocation sufficient to warrant the owner in using a deadly weapon, and, if he do, his act in killing the trespasser will be murder, because an act of violence beyond the degree of the provocation. *State v. Zellers*, 7 N. J. Law (2 Halst.) 220, 243.

Mere words, however aggravating, are not sufficient to reduce the crime from murder to manslaughter. *Allen v. United States*, 17 Sup. Ct. 154, 155, 164 U. S. 492, 41 L. Ed. 528.

In order to reduce the killing from murder to manslaughter, it is not enough that the fear was sudden. The act must arise from a provocation legally sufficient, and from a cause which overrules and controls human reason. The cause must be adequate to the effect. Wherever it appears that the crime was at the moment, though in consequence of a sudden quarrel, deliberately and intentionally executed, the killing is murder in the first degree. *Ex parte Tayloe*, 5 Cow. (N. Y.) 39, 41.

Voluntary or involuntary killing.

Manslaughter is either voluntary or involuntary. Voluntary manslaughter is where one kills another in the heat of blood, and this usually arises from fighting or from provocation. Involuntary manslaughter is where one, in doing an unlawful act, not felonious nor tending to great bodily harm, or in doing a particular act without proper caution or requisite skill, undesignedly kills another. *State v. Miller* (Del.) 32 Atl. 137, 188, 9 Houst. 564; *Commonwealth v. Morrison*, 44 Atl. 913, 914, 193 Pa. 613; *People v. Pearne*, 50 Pac. 376, 377, 118 Cal. 154; *Commonwealth v. Drum*, 58 Pa. (8 P. F. Smith) 9, 17; *In re McWhirt's Case* (Va.) 3 Grat. 594, 605, 46 Am. Dec. 196.

Manslaughter is the unlawful killing of another, without malice, express or implied, which may be either voluntary, upon a sudden heat, or involuntary, but in the commission of some unlawful act. *State v. Dorsey*, 20 N. E. 777, 778, 118 Ind. 167, 10 Am. St. Rep. 111 (citing *Blackstone*); *Sutcliffe v. State*, 18 Ohio, 460, 476, 51 Am. Dec. 459 (quoting *Swan & C. Rev. St. p. 229*); *United States v. Carr*, 25 Fed. Cas. 306, 308; *United States v. Meagher* (U. S.) 37 Fed. 875, 881; *Bohanan v. State*, 15 Neb. 209, 18 N. W. 129, 131; *Commonwealth v. Lynch* (Pa.) 3 Pittsb. Leg. J. 412, 418; *State v. Conley*, 39 Me. (22

Pick.) 78, 87; *Reighard v. State*, 12 O. C. D. 382, 393.

Manslaughter is homicide when committed without a design to effect death, first, by a person engaged in committing or attempting to commit a misdemeanor affecting the personal property either of the person killed or of another; second, in the heat of passion, but in a cruel or unusual manner, or by means of a dangerous weapon. *People v. Fitzsimmons*, 34 N. Y. Supp. 1102, 1104 (citing Pen. Code, § 189).

Manslaughter is the unlawful killing of a human being, without malice, either upon a sudden quarrel or a heat of passion, or in the commission of an unlawful act not amounting to a felony, or in the commission of an unlawful act which might produce death in an unlawful manner, or without due caution or circumspection. *State v. Sloan*, 56 Pac. 364, 367, 22 Mont. 293 (citing Pen. Code, § 355).

Any unlawful and willful killing without malice is manslaughter, and so it includes a negligent killing. *United States v. Meagher* (U. S.) 37 Fed. 875, 880.

As the common-law offense of manslaughter has been subdivided by carving out of it the statutory crime of voluntary manslaughter, leaving involuntary manslaughter to be dealt with as at common law, the term "manslaughter" is now a generic term, covering two degrees of homicide; and therefore a verdict, under an indictment for murder, finding defendant guilty of manslaughter, finds him guilty of two offenses included in the charge of murder, and so cannot be construed as an acquittal of all offenses included therein. *Spriggs v. Commonwealth*, 68 S. W. 1087, 1088.

Murder distinguished.

"Manslaughter is principally distinguished from murder in this: that though the act which occasions the death be unlawful or likely to be attended with bodily mischief, yet the malice, either expressed or implied, which is the very essence of murder, is presumed to be wanting, and, the act being imputed to the infirmity of human nature, the correction ordained for it is proportionally lenient." *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 307, 52 Am. Dec. 711; *Ex parte Tayloe* (N. Y.) 5 Cow. 39, 41; *State v. Wieners*, 66 Mo. 13, 21 (quoting 1 East, P. C. 218); *State v. Miller*, 1 Del. Term R. 183, 197.

Manslaughter is the lowest grade of felonious homicide, and differs from murder in this: that voluntary homicide arises from the sudden heat of the passions, and is the unlawful killing of another without malice, either express or implied. It may be either voluntary, upon a sudden heat, or invol-

untary, but in the commission of some unlawful act. Generally it is the result of an actual combat; but the law in recognition of human weakness and infirmity of temper, makes some allowance for a sudden gust of passion or transport of rage caused by an actual assault, or a blow, or other great personal indignity. The act of killing, under such circumstances, is considered to have been done on adequate or sufficient provocation, and will be manslaughter only. *State v. Harrigan* (Del.) 31 Atl. 1052, 1053, 9 Houst. 369.

Homicides that are not malicious are manslaughters, those malicious are murders. *State v. Walker* (Del.) 33 Atl. 227, 9 Houst. 464.

At common law the words "murder" and "manslaughter" appear to have been terms used to designate different grades of the same offense, namely, the felonious killing of a human being. All that distinguished one grade from another were the words "malice aforethought." Whether murder and manslaughter are to be called two crimes or one is matter only of words, and not of ideas. So it is held that manslaughter is but a lower degree of murder, and a count properly framed for the higher offense contains all the essential elements of a count for the minor offense. *In re Garvey*, 3 Pac. 903, 906, 7 Colo. 384, 49 Am. Rep. 358.

MANSLAUGHTER IN FIRST DEGREE.

"Manslaughter in the first degree" is defined by the Penal Code as the killing of one being by the act, procurement, or commission of another. *People v. Webster*, 22 N. Y. Supp. 634, 68 Hun, 11.

MANSLAUGHTER IN SECOND DEGREE.

Such homicide is manslaughter in the second degree when committed without a design to effect death: (1) By a person committing or attempting to commit a trespass or other invasion of a private right, either of the person killed or of another, not amounting to crime; or (2) in the heat of passion, but not by a dangerous weapon, or by the use of means either cruel or unusual; (3) by an act, procurement, or culpable negligence of any person which, according to the provisions of this chapter, does not constitute the crime of murder in the first or second degree or manslaughter in the first degree. *People v. Welch*, 26 N. Y. Supp. 694, 695, 74 Hun, 474 (citing Pen. Code, § 193).

MANUAL DELIVERY.

See "Property Not Capable of Manual Delivery."

MANUAL LABOR.

A Chinese person who, during his residence in the United States, was engaged in business as a member of a firm of dealers in fancy goods, but occasionally, during a year previous to his departure for a temporary visit, worked for short periods as a house servant, in order to accommodate an old employer at times when he was without a servant, was engaged in "manual labor," within the meaning of Act Cong. Nov. 3, 1893, c. 14, § 2, 28 Stat. 8 [U. S. Comp. St. 1901, p. 1322], known as the "McCreary Act." *Lew Jim v. United States* (U. S.) 66 Fed. 953, 954, 14 C. C. A. 281.

As used in *Burns' Rev. St. 1894, § 7058*, making all debts due any "person" for manual or mechanical labor a preferred claim in all cases against an individual, corporation, etc., where the property thereof passes into the hands of an assignee or receiver, applies only to persons working for wages or salary, and not to contractors. *Anderson Driving Park Ass'n v. Thompson*, 48 N. E. 259, 261, 18 Ind. App. 458.

Labor of teams.

"Manual labor," as used in *Gen. St. 1878, c. 32, § 63*, providing that any person who may do or perform any "manual labor" in cutting, banking, driving, etc., any logs or timber in this state shall have a lien thereon for such services, includes the use of all implements or instrumentalities, such as ax, cant hook, team, and the like, actually used in and necessary to the performance of such labor by the lumberman. Hence, where a man and his team are employed, at a gross price for both, to haul or bank logs, his lien on the logs includes the use of the team. *Martin v. Wakefield*, 43 N. W. 966, 967, 42 Minn. 176, 6 L. R. A. 362.

"Manual labor" within the meaning of *Gen. St. 1894, § 2451*, providing that any person who may do or perform any manual labor in cutting, banking, driving, rafting, cribbing, or towing logs shall have a lien thereon, is not limited to the personal labor of the lien claimant, but includes labor performed by his teams and services under a contract for a gross price per month for both. *Breault v. Archambault*, 67 N. W. 348, 64 Minn. 420, 58 Am. St. Rep. 545.

MANUFACTORY.

See, also, "Factory."

A manufactory is "a house or place where anything is manufactured." *Halpin v. Insurance Co. of North America*, 23 N. E. 889, 120 N. Y. 73, 8 L. R. A. 79 (citing *Webst. Dict.*).

The machinery and other implements used in a manufactory, and merchandise
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consisting of raw materials and manufactured articles, do not constitute a manufactory, and hence are not within the provisions of a policy of insurance providing that if the thing insured was a manufacturing establishment and should cease from operation, except during nighttime, Sundays, and legal holidays, the policy should be void. *Phenix Ins. Co. v. Holcombe*, 78 N. W. 800, 302, 57 Neb. 622, 78 Am. St. Rep. 532.

Webster defines a "manufactory" to be a building or collection of buildings appropriated to the manufacture of goods. It is something more than a building. It includes not only the building, but the machinery necessary to produce the particular goods manufactured, and the engines and other power required to propel such machinery. A building with only bare walls and a roof would no more be a "manufactory" than would a hotel. Such a building would be a mere shell. *Schott v. Harvey*, 105 Pa. 222, 227, 51 Am. Rep. 201.

"Manufactory," as used in a fire insurance policy on mill machinery and apparatus apart from the building in which it was contained, providing that if a building covered by the policy should become vacant or unoccupied, or if a mill or manufactory should stand idle, without notice to and without the consent of the company, all liability on the policy should cease, does not include the machinery and apparatus insured. It would not be a natural or ordinary use of language to describe machinery used in manufacturing as a "manufactory." A manufactory is a house or place where anything is manufactured. The term would not be understood or used by the mass of mankind to describe simply machinery and apparatus used in the business of manufacturing leather and morocco. The term "manufactory," as used in the policy, means the building used for manufacturing. *Halpin v. Insurance Co. of North America*, 23 N. E. 889, 120 N. Y. 73, 8 L. R. A. 79.

Broom factory.

"Manufactories," as used in a policy of fire insurance denominating "mills and manufactories" as extrahazardous risks, means something known and recognized, called a "mill," not merely a place where something might be ground, but what common usage recognizes as a mill. A manufactory is not merely a place where something may be made by hand or machinery, but what in common understanding may be known as a "factory." The making of brooms to a small extent does not make the place wherein they are made a mill or manufactory. A manufactory or a factory is a building, the main or principal design or use of which is a place for producing articles as products of labor. When we speak of a "factory" or "manufactory," we mean something more than a

place where things are made. *Franklin Fire Ins. Co. v. Brock*, 57 Pa. (7 P. F. Smith) 74, 82.

Sawmill.

A sawmill which manufactures boards and other lumber products from logs is a manufactory. *State ex rel. Browne v. A. W. Wilbert's Sons Lumber & Shingle Co.*, 26 South. 106, 110, 51 La. Ann. 1223.

Shoe factory.

A manufacturer of boots and shoes for customers, carrying a small stock of ready-made shoes purchased from others, in connection with misfits and work rejected by customers, is carrying on a "manufactory" within Act 1872, and Act June 13, 1883, giving mechanics employed therein a preference for wages on an assignment. *In re Allen's Estate*, 2 Pa. Dist. R. 87, 88.

Smelter.

The words "mill or manufactory," as contained in the Arizona lien law, include a smelter. *McAllister v. Benson Mining & Smelting Co. (Ariz.)* 16 Pac. 271.

Tobacco factory.

"Manufactory," as used in Acts 1877-78, p. 287, c. 3, § 3, providing for the punishment of any person burning a manufactory, should be construed to include a tobacco factory. *Langhorne v. Commonwealth*, 78 Va. 1012, 1025.

MANUFACTURE.

See "New Manufacture"; "Place of Manufacture."

Articles of, see "Article."

As to specific industries which are engaged in manufacture, see subtitle "Manufacturer."

Carry on business of, see "Carry on Business."

"Lexicographers define 'manufacture' to be 'the process of making anything by art, or reducing materials into a form fit for use by the hand or by machinery.' Worcester's Dict. tit. 'Manufacture.' Mr. Brande defines 'manufacture' as a term employed to designate the changes or modifications made by art or industry in the form or substance of material articles with a view of rendering them capable of satisfying some want or desire of man, and 'manufacturing industry' to consist in the application of art, science, or labor to bring about certain changes or modifications of already existing materials. He includes under the term 'manufacture' all branches of industry, with the exceptions of fishing, hunting, mining, and such industries as have for their object to obtain possession of material products in the state in which

they are fashioned by nature. He says that the term is generally applied only to those departments of industry in which the raw materials is fashioned into desirable articles by art or labor without the aid of the soil, but that there is no real good reason for such limitation, and that it is obvious from the slightest consideration that agriculture is nothing but a manufacture, for the business of the agriculturalist is to dispose of the soil, seed, manure, or other materials, that they may supply him with other and more desirable products." *Brande's Enc. tit. "Manufacture." Evening Journal Ass'n v. State Board of Assessors*, 47 N. J. Law (18 Vroom) 36, 38, 54 Am. Rep. 114.

"Manufacture" is defined by Worcester to be "the process of making anything by art, or of reducing materials into form fit for use by hand or by machinery, as an establishment for the manufacture of cloth; anything made or manufactured by hand, or manual dexterity, or by machinery." As a verb it is defined to mean, first, to form by manufacture or workmanship by hand or by machinery; to make by art and labor. *Attorney General v. Lorman*, 26 N. W. 311, 313, 59 Mich. 157, 60 Am. St. Rep. 287; *Louisville & N. R. Co. v. Fulghan*, 8 South. 803, 91 Ala. 555; *Beggs v. Edison Electric Illuminating Co.*, 11 South. 381, 383, 96 Ala. 295, 38 Am. St. Rep. 94; *Lamborn v. Bell*, 18 Colo. 346, 32 Pac. 989, 991, 20 L. R. A. 241.

In the statute providing that grants are to be good on the sole working or making of any new "manufacture" to the first and true inventor of such manufacture, the word "manufacture" must be construed in one of two ways: It may mean the machine when completed, or the mode of constructing the machine. *Morgan v. Seaward*, 2 Mees. & W. 544, 558.

A covenant, in a lease of ground, that it is to be used for manufacturing purposes only, implies the right to use it for all purposes incident to such object, such as the erection of a mill, and a dwelling for the lessee, containing a store thereon. *Appeal of Madore*, 17 Atl. 804, 129 Pa. 15.

"Manufacture" is descriptive either of the practice of making a thing by art, or of the thing when made. The invention, therefore, of any instrument used in the process of making a thing by art, is a manufacture, and the subject of a patent. *Boulton v. Bull*, 2 H. Bl. 463, 471.

As used in a patent claim reciting, "I claim the improvement in the manufacture of coloring matter, consisting," etc., "manufacture" is not the name of a thing, but of an act. The claim indicates the mode and manner of doing certain things, or of making certain combinations in order to pro-

duce certain results, and is for the improved process of obtaining these results, i. e., in manufacturing and producing them. *Durand v. Schulze* (U. S.) 61 Fed. 819, 821, 10 C. C. A. 97; *Durand v. Green* (U. S.) 60 Fed. 392, 396.

Buying and selling.

The term "manufacturing business," in Const. art. 10, § 3, providing that each stockholder in any corporation, except those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock owned by him, characterizes a corporation chartered for the manufacturing of clothing of every description, and the sale of clothing so manufactured, and the transaction of other business necessary and incidental to such manufacture and sale of clothing. The term, however, does not apply to the buying and selling of manufactured clothing, as the latter would be purely a mercantile business, which is not the same as a manufacturing or mechanical business. *Nicollett Nat. Bank v. Frisk-Turner Co.*, 74 N. W. 160, 161, 71 Minn. 413, 70 Am. St. Rep. 334.

Where a corporation was organized for the purpose of manufacturing and selling glass, the term "manufacturing and selling" did not limit the corporation's power to selling only such goods as it manufactured, but the corporation was authorized to purchase glassware for the purpose of keeping up its stock and supplying customers until the appliances which it had bought and were preparing were put in repair, etc. *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 815, 817.

The charter of a corporation, granting it power to "manufacture," implies a power to sell the article thus produced, but not the power to both buy and sell—to buy goods in order to sell them afterwards—and to do this habitually and as a business, thus becoming a merchant or dealer, is not a necessary incident to the business of manufacturing. Manufacturers constitute a separate class from merchants or dealers. *Commonwealth v. Thackara Mfg. Co.*, 27 Atl. 13, 14, 156 Pa. 510.

Commerce distinguished.

No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is the transforming or fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying, selling, and the transportation incidental thereto, constitutes commerce, and the regulation of commerce provided for in the Constitution of the United States embraces the regulation at least of such transportation. If it be held that the term in-

cludes a regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries which contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with a power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining; in short, every branch of human industry. *Kidd v. Pearson*, 9 Sup. Ct. 6, 10, 128 U. S. 1, 32 L. Ed. 346 (cited and approved in *United States v. E. C. Knight Co.*, 15 Sup. Ct. 249, 254, 156 U. S. 1, 39 L. Ed. 325, affirming, 60 Fed. 934, 9 C. C. A. 297, 24 L. R. A. 428).

Cutting and preparing timber.

Under Ballinger's Ann. Codes & St. §§ 5930, 5931, as amended by Sess. Laws 1893, p. 19, and Sess. Laws 1895, p. 175, § 1, giving a lien to one performing labor in manufacturing timber into lumber while under the control of the manufacturer, one who has performed labor in getting out logs for one who has manufactured them into lumber which is still under the manufacturer's control may file a lien thereon. The actual sawing of the timber is no more a part of manufacturing the same than the cutting and preparing of such timber for the saw. *Robins v. Paulson*, 70 Pac. 1113, 1114, 30 Wash. 459.

Furnishing material not implied.

To "manufacture," as used in a contract to manufacture gold watch cases upon the order of another party, means simply and no more than to make up by hand (original definition) or by machinery (derivative definition) any raw material into a form fit for use. It does not include the idea that the manufacturer shall furnish the raw material. *Horowitz v. Weidner*, 31 Atl. 771, 773, 56 N. J. Law (27 Vroom) 715.

Making bone dust.

"Manufacture" is sufficiently broad to include the manufacture of bone dust and bone black, produced by exposing the burning bone to the action of fire, or by grinding the pieces of bone. Among the definitions given by Webster are the operation of reducing raw material of any kind into a form suitable for use, by hand, by art, or by machinery; to work raw materials into suitable forms for use. Worcester has the same definitions in substance. Bone dust and bone black, with the proper definitions, are found in both Webster and Worcester, and in other modern dictionaries. Whether we look to the popular use of the term "manufacture," or to its definition given by our best lexicographers, as the proper guide to the intention of the act of Congress in levying an internal revenue tax on manufactures, persons mak-

ing bone dust and bone black were properly taxed as engaged in manufacture. *Schriefer v. Wood* (U. S.) 21 Fed. Cas. 737.

Mixing fluids.

The word "manufacture," as used in the article relating to illuminating oils, shall mean, besides distillation by the usual process, also any mixing of oils and fluids of different fire tests by which the fire test of the oils or liquids so mixed is changed. Ky. St. 1903, § 2203.

Where the manipulation of fluids and the materials blending with each other form a union, it is as much a manufacture as where materials are mechanically joined together. The various nostrums vended all over the land are manufactures. Beer may well be said to be manufactured from malt and other ingredients, whisky from corn, or cider from apples. The fact that the identity of the original article or articles is lost, and that a new form or a new character is assumed, is not material in determining whether, within the popular idea, the article in question is a "manufacture" from its original elements. Nitrobenzole is a manufacture from benzole and nitric acid. *Murphy v. Arnson*, 96 U. S. 131, 134, 24 L. Ed. 773.

Process synonymous.

In construing a patent specification in which the patentee stated "that, in carrying on my new manufacture of deodorizing heavy oils with this apparatus, I place the oil to be deodorized in the still, and heat it by the fire beneath to the required temperature to commence the operation, the steam being shut off from the coil, and the outlet cock being open to admit of the expulsion of any water from within the coil," it is held that the word "manufacture" is used in the sense of the word "process," a word which could be substituted for it without a shade of change in the meaning. *Merrill v. Yeomans*, 94 U. S. 568, 572, 24 L. Ed. 235.

Producing of coke or coal.

The production of coke from coal is a process of manufacture, but the production of coal by removing it from its bed and bringing it to the surface is a process of mining. *Commonwealth v. Juniata Coke Co.*, 27 Atl. 373, 157 Pa. 507, 22 L. R. A. 232.

Putting together component parts.

"Manufacture," as used in Const. art. 207, exempting from taxation property employed in manufactures, denotes a change in the form or substance of the material used, and does not include the process of putting together the component parts of an article when the form of such parts is not altered. *Brooklyn Cooperage Co. v. City of New Orleans*, 17 South. 804, 47 La. Ann. 1314.

As public use.

See "Public Use."

As trade.

See "Trade."

Traffic distinguished.

To "manufacture" is to make; the operation of making whatever is used by man; anything made from raw material by hand, by machinery, or by art. To "traffic" is to trade, either by barter, or by buying or selling; to trade; to pass goods or commodities from one person to another for an equivalent in goods or money, etc. Dr. Webster. The "manufacture" of an article is one thing, and the "traffic" therein is another and distinct thing. And Act Feb. 11, 1853, entitled "An act prohibiting the manufacture of intoxicating beverages and the traffic therein," expressly and in terms embraces by its title two distinct objects within the meaning of Const. art. 4, § 20, reading, "No law shall embrace more than one object, which shall be expressed in its title." *People v. Collins*, 3 Mich. 343, 385.

MANUFACTURE OF FLOUR.

Const. art. 207, exempting from taxation property employed in the "manufacture of flour," does not include property employed in the business of milling rice. The fact that, as an unavoidable incident of the business of milling rice, a refuse is produced which is utilized and sold under the name of "rice flour" or "rice polish," does not bring it within the latter or particular constitutional exemption. *State ex rel. Ernst v. Board of Assessors*, 36 La. Ann. 347.

MANUFACTURE OF STATIONERY.

Const. art. 207, exempting from taxation property employed in the "manufacture of stationery," does not include the publication of a newspaper. *Nicholson v. Parker*, 10 South. 403, 404, 44 La. Ann. 76.

MANUFACTURED CLOTH.

"Manufactured cloth," within the meaning of the statute which exempts from execution all the spun yarn and manufactured cloth and carpeting manufactured by the family, necessary for the use of the family, is not limited to cloth which is manufactured by the family, but the essential question is whether it is necessary for the use of the family, and, if so, the term includes purchased cloth. *Sims v. Reed* (Ky.) 12 B. Mon. 51, 52.

MANUFACTURER.

As engaged in an occupation, see "Occupation (Vocation)."

A manufacturer is one who is engaged in the business of working raw materials into wares suitable for use. *People v. New*

York Floating Dry Dock Co. (N. Y.) 11 Abb. N. C. 40, 42; Consumers' Brewing Co. v. City of Norfolk (Va.) 43 S. E. 336.

"A 'manufacturer' is defined to be one who is engaged in the business of working raw materials into wares suitable for use; who gives new shapes, new qualities, new combinations, to matter which has already gone through some artificial process. A manufacturer prepares the original substance for use in different forms. He makes to sell, and stands between the original producer and the dealer and first consumer, depending for his profit on the labor which he bestows on the raw materials." State v. Dupre, 7 South. 727, 42 La. Ann. 561 (quoting City of New Orleans v. La Blanc, 34 La. Ann. 596, 597; City of New Orleans v. Ernst, 35 La. Ann. 746, 747); State v. American Sugar Refining Co., 32 South. 965, 973, 108 La. 603.

Under the express provisions of Laws 1893, p. 99, the words "manufacturing establishment," factory, or workshop, wherever used in such act, which declares that no female shall be employed in any manufacturing establishment, factory, or workshop, etc., more than eight hours in any one day, etc., shall be construed to mean any place where goods or products are manufactured, or repaired, cleaned, or sorted, in whole or in part, for sale or for wages. Ritchie v. People, 40 N. E. 454, 455, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315.

Rev. St. § 3425, providing that the commissioner of internal revenue may from time to time deliver to any "manufacturer" of friction matches a suitable quantity of adhesive stamps, such as are required in that business by law, without requiring prepayment therefor, on a credit of 60 days, upon such security as he may deem sufficient, should be construed so as to include a person who is a member of a firm engaged in the manufacture of friction matches, so as to authorize the sale of stamps on the application of one of the copartnership, it being unnecessary that all members of the firm should apply for stamps. United States v. Weedon (U. S.) 3 Fed. 623.

"Establishment," as used in Code, § 541, declaring manufacturing "establishments" taxable, includes all the usual and necessary appliances for storing, manufacturing, weighing, packing, and delivering the manufactured article after the process of manufacture is completed. In order that a particular article or class of articles should constitute a part of an "establishment," it is not essential that they be actually employed in the process of manufacture. Memphis Gaslight Co. v. State, 46 Tenn. (6 Cold.) 310, 312, 98 Am. Dec. 452.

Under Gen. Laws, c. 53, § 10, authorizing towns to exempt from taxation "man-

ufacturing establishments" to be in operation therein, and the capital used in operating the same, the exemption extends to the real estate, previously taxed, which is bought for the purpose of erecting such establishment, it being a part of the establishment. Franklin Needle Co. v. Franklin, 18 Atl. 318, 319, 65 N. H. 177.

A corporation which, by the application of labor and mechanical skill, makes salable articles out of the raw material, and by this means converts them into new and different articles having a distinctive name, character, or use from that of the raw material, is a "manufacturer," within the constitutional provision providing that manufacturers may be rendered liable to a license tax, etc. State ex rel. Browne v. A. W. Willbert's Sons Lumber & Shingle Co., 26 South. 106, 107, 51 La. Ann. 1223.

Every person who purchases, receives, or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, refining, rectifying, or by the combination of different materials, with a view of making a gain or profit by so doing, shall be held to be a "manufacturer" for the purposes of the revenue act. Ann. St. Ind. T. 1899, § 4943; Ballinger's Ann. Codes & St. Wash. 1897, § 1675; Rev. Codes N. D. 1899, § 1197.

Any person who purchases, receives, or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, refining, purifying, or by the combination of different materials, with a view of making gain or profit by so doing, and by selling the same, shall be held to be a "manufacturer" for the purposes of the title relating to taxation and revenue. Rev. St. Wyo. 1899, § 1778.

Every person, company, or corporation who shall hold or purchase personal property for the purpose of adding to the value thereof by any process of manufacturing, refining, or by the combination of different materials, shall be held to be a "manufacturer" for the purpose of the provision relating to the taxation of manufacturers. Rev. St. Mo. 1899, § 8487.

Any person, firm, or corporation who purchases, receives, or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, packing of meats, refining, purifying, or by the combination of different materials, with a view to making gain or profit by so doing, and selling the same, shall be held a "manufacturer" for the purpose of the title relating to the revenue. Code Iowa 1897, § 1319.

The term "manufacturer," as used in an act requiring reports of accidents to be made to inspectors of workshops, means any per-

son who, as owner, manager, lessee, assignee, receiver, contractor or who, as agent of any incorporated company makes or causes to be made or who deals in any kind of goods or merchandise or who owns, controls, or operates any street railway or laundering establishment, or is engaged in the construction of buildings, bridges, or structures, or in loading or unloading vessels or cars, or moving heavy materials, or operating dangerous machinery, or in the manufacture or use of explosives. *Bates' Ann. St. Ohio 1904, § 4238m.*

Dealer distinguished.

See, also, "Dealer."

The charter of a corporation granting it power to "manufacture" implies power to sell the article produced. To buy goods in order to sell them afterwards, and to do this habitually and as a business, thus becoming a merchant or dealer, is not a necessary incident to the business of manufacturing. Manufacturers constitute a separate class from merchants or dealers. *Commonwealth v. Thackara Mfg. Co., 27 Atl. 13, 14, 156 Pa. 510.*

As manufacturer from raw material alone.

In 2 Rev. St. 415, § 33, exempting from jury service any person in the actual employment of any glass, cotton, linen, woolen, or iron manufacturing company by the year, month, or season, "iron manufacturing company" does not include an establishment where castings, farming implements, and machinery are made from melted pig and old iron. "Manufacturing," according to Webster and other lexicographers, is making goods and wares from raw materials, and does not include the making of articles from the manufactured article. *People v. Holdridge (N. Y.) 4 Lans. 511, 512.*

The primary meaning of the word "manufacture" is something made by hand, as distinguished from a natural growth; but as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily the article so manufactured takes a different form, or at least subserves a different purpose, from the original materials, and usually it is given a different name. Raw materials may be, and often are, subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus, logs are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, windows, sashes, trimmings, and the thousand and one articles manufactured wholly or in part of wood.

The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct process of manufacture, and for which the article so manufactured receives a different name. *Tidewater Oil Co. v. United States, 18 Sup. Ct. 837, 839, 171 U. S. 210, 43 L. Ed. 139* (cited and approved in *State v. American Sugar-Refining Co., 25 South. 447, 455, 51 La. Ann. 562*).

One who sets up the component parts prepared for completing barrels is not a "manufacturer." Where the staves, heads, and iron hoops for barrels were manufactured in another state and were shipped to plaintiff in Louisiana, where the component parts were put together, and to it was given proper shape and finish by plaintiff, he was not a manufacturer. *Chickasaw Cooperage Co. v. Police Jury, 19 South. 476, 478, 48 La. Ann. 523.*

As mechanic, merchant, or trader.

See "Mechanic"; "Merchant"; "Trader"—"Tradesman."

Personal operation.

Gen. St. 1894, § 1516, defines a "manufacturer" as every person who purchases and receives or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, refining, rectifying, or by a combination of different materials, with a view of making gain or profit by so doing. It is not necessary that to be a manufacturer one must himself operate or own the manufacturing plant. The manufacturer may carry on the same kind of manufacturing business at several different places at the same time, so that each would be a separate business. *State v. Clarke, 67 N.W. 1144, 1145, 64 Minn. 556.*

To constitute one a "manufacturer," within the meaning of the trade-mark laws giving to a manufacturer the right to a trade-mark, it is not a legal prerequisite that all of the capital and all of the profits shall belong to him. Where one puts his supervising skill and labor into a work and receives a share of resulting profits, he is a "manufacturer." Consumers have the result of his skill and integrity; that is all there is in the word "manufacturer." He determines the kind, form, quality, and value of the ware. It is his creation, the other persons interested in it simply executing his commands. *William Rogers Mfg. Co. v. Simpson, 9 Atl. 395, 400, 54 Conn. 527.*

The term "manufacturers" includes persons who superintend the spoon and fork manufacture of another engaged in making spoons for the first party, who directs the style and quantity of the goods, and has the

general supervision of the manufacture and sale thereof, as the goods are the product of his skill, judgment, and experience; but the term "manufacturers" also applies to the person doing the work, who furnishes all the capital, power, and machinery employed, pays the laborers, and controls the sale and disposition of the goods manufactured. *Meriden Britannia Co. v. Parker*, 89 Conn. 450, 458, 12 Am. Rep. 401.

A corporation which does not own or operate any plant for the printing of a paper published by the corporation, but merely employs an agent to oversee the work done by a contractor, is not a "manufacturing corporation" within the Massachusetts statute exempting such corporations from taxation. *People v. Roberts*, 49 N. E. 248, 155 N. Y. 1.

"Manufacturing company carrying on business in this state," as used in Act April 18, 1884, exempting such companies from taxation, includes a corporation which by contract with another corporation gives to the latter the exclusive right to make certain manufactured articles, and takes all made at the cost of materials, with a percentage for profits and depreciation, and having also an office and a factory where parts of such articles are made. *State v. State Board of Assessors*, 24 Atl. 507, 508, 54 N. J. Law (25 Vroom) 430.

A "manufacturer" is defined by the internal revenue act of 1866 as any person, firm, or corporation who shall manufacture by hand or machinery any goods, wares, or merchandise, not otherwise provided for, exceeding annually the sum of \$1,000, or who shall be engaged in the manufacture or preparation for sale of any article or compound. The term includes the owner of a patent who employs others to manufacture machines for him, and then sells them for profit. *Hendy v. Soule* (U. S.) 11 Fed. Cas. 1097, 1098.

The process of manufacturing is supposed to produce some new article by the application of skill and labor to the raw materials. *People v. Roberts*, 145 N. Y. 375, 377, 40 N. E. 7. So that a corporation which owns patents, and licenses other companies to use them in manufacturing, is not a "manufacturing corporation" within the tax laws. *People v. Campbell*, 34 N. Y. Supp. 713, 714, 88 Hun, 530.

Producer synonymous.

The word "producer," in a statute relative to the sale of intoxicants, and excepting producers from its provisions under certain circumstances, is held to be identical in meaning with "manufacturer." *Hancock v. State*, 40 S. E. 317, 318, 114 Ga. 439.

As not limited to one place.

It is not necessary, in order to be a manufacturer, that one must himself oper-

ate or own the manufacturing plant. The manufacturer may carry on the same kind of manufacturing business at several different places at the same time, so that each would be a separate business. *State v. Clarke*, 67 N. W. 1144, 1145, 64 Minn. 558.

Asphalt company.

The words "manufacturing corporations," in Tax Law, § 183, providing that manufacturing corporations shall be exempt from the corporate franchise tax to the extent of the capital actually employed in the state in manufacturing and sale of the product of such manufacture, are to be given their ordinary meaning, and held to apply to all corporations authorized by charter to do a manufacturing business. Corporations for the purpose of carrying on manufactures were formerly organized under the general manufacturing act of 1848, and other statutes having special reference to the organization of corporations to do a manufacturing business. Such statutes have been repealed, and corporations for the purpose of carrying on any lawful business purpose or purposes, other than a moneyed corporation or a corporation provided for by the banking, the insurance, the railroad, and the transportation laws, are now formed under the business corporation law. There can be no special significance in the words "manufacturing corporations" as they are now used in the tax law. Even prior to the repeal of the statute of 1848 and other statutes having special reference to the organization of corporations for manufacturing purposes, these words were construed to relate to corporations actually engaged in manufacturing, and not to corporations organized under any particular act. A corporation maintaining a plant and appliances for heating an asphalt composition for paving by secret process is a "manufacturing corporation" within the meaning of the act. *People v. Morgan*, 70 N. Y. Supp. 516, 517, 61 App. Div. 373.

Baker and ice-cream maker.

Neither a person engaged in the trade or business of baking bread, nor a person engaged in making and selling ice cream, is a "manufacturer" within Const. c. 206, exempting property used in manufacturing from taxation. *State v. Eckendorf*, 14 South. 518, 46 La. Ann. 131.

A person making and selling ice cream is not a "manufacturer," within the meaning of that term as used in a law exempting a manufacturer from taxation, or in any other sense of the word. *City of New Orleans v. Mannessier*, 32 La. Ann. 1075, 1076.

Boiler maker.

"Whoever creates a useful thing by mechanical labor is entitled usually to be called a 'manufacturer.' The fact that he pur-

chases, rather than makes, some of the parts, does not destroy that character. A boiler maker is a manufacturer, although he purchases the boiler plates rolled into form, and purchases also the tubes and rivets. So with a cabinetmaker, who buys the wood he uses in polished form or carved, and buys the cloth, hair, and leather he uses. No manufacturer of the finished product in this age works up the raw material. The practical manufacturer assembles the material he needs from all quarters in its most finished condition, and does the rest himself. A corporation making fountain pens is a manufacturing corporation, and exempt from taxation on its capital stock, under a statute exempting manufacturing corporations, though it purchases from different sources the rubber holders and gold pens which it manufactures into fountain pens." *People v. Morgan*, 63 N. Y. Supp. 76, 79, 48 App. Div. 395.

Brewing company.

A corporation, the general nature of whose business was "the buying of grain, and the manufacturing and distilling of the same into liquor, and the manufacturing, distilling, buying and selling, and dealing in liquor, and the conducting of one or more distilleries for that purpose," is not one for manufacturing purposes exclusively, within the constitutional provision making each stockholder in any corporation, except those organized for the purpose of carrying on any kind of manufacturing or mechanical business, liable to the amount of stock held or owned by him. *St. Paul Barrel Co. v. Minneapolis Distilling Co.*, 64 N. W. 1143, 1144, 62 Minn. 448.

A corporation, the general nature of the business of which, as declared by its articles of incorporation, is the manufacture or brewing of lager beer, and selling and disposing of the same, together with such other business as may be incidental thereto, is exclusively a "manufacturing corporation" within the constitutional provision exempting such corporations from stockholders' double liability. *Hastings Malting Co. v. Iron Range Brewing Co.*, 67 N. W. 652, 653, 65 Minn. 28.

Bridge-building company.

Act 1889 (P. L. 429, § 21), exempting corporations exclusively for "manufacturing" purposes from taxation on their capital stock, should be construed to include the building of bridges, as well as manufacturing their constituent parts. *Commonwealth v. Pittsburgh Bridge Co.*, 27 Atl. 4, 156 Pa. 507.

A bridge company, whose only business is to buy in a rough and unfinished condition all the necessary lumber, iron, and other materials, and at its own shops finish, shape, design, and make such materials suitable for use, and put the same together in the erec-

tion of bridges, roofs, and other structures and machinery, is a corporation exclusively for "manufacturing" purposes, within Act 1889 (P. L. 429, § 21), exempting such corporation from taxation on their capital stock. *Commonwealth v. Keystone Bridge Co.*, 27 Atl. 1, 2, 156 Pa. 500.

Cane grower.

"Manufacture" is ordinarily used to denote an article upon the material of which labor has been expended to make the finished product, though such product is often the result of several processes, each one of which is a separate and distinct manufacture and usually receives a separate name, so that the producer of cane is not a manufacturer of sugar. *Allen v. Smith*, 19 Sup. Ct. 446, 449, 173 U. S. 389, 43 L. Ed. 741.

Clothing maker.

"Manufacturing," as used in Act June 29, 1885, providing that all buildings more than two stories in height, used for "manufacturing" purposes, should have at least one fire escape for every 50 persons for which working accommodations were provided above the second story of such buildings, should be construed to include the making of articles of wearing apparel by using machines driven by electric power. "Manufacture" has been defined as the process of making anything by art, or of reducing materials into form fit for use by hand or by machinery. While the original meaning of the word "manufacture" is to make with the hand, the definition of the term is not confined to this original signification. Manufacturing generally consists in giving new combinations to matter which has already gone through artificial process. *Norris v. Commonwealth*, 27 Pa. (3 Casey) 494. *Bouvier*, in his Law Dictionary, in defining the word "manufacture," says "it includes any new combination of old materials constituting a new result or production in the form of a vendible article, not being machinery." *Landgraf v. Kuh*, 59 N. E. 501, 504, 188 Ill. 484.

Cooper.

A "manufacturer," as the term is used in Const. art. 207, exempting a manufacturer from taxation, is not one who creates out of nothing, for that surpasses human power. Neither is he one who produces a new article out of materials entirely raw. He is one who gives new shapes, new qualities, new combinations, to matter which has already gone through some artificial process. A shoemaker is none the less a manufacturer because he does not also tan the leather. The tanner is none the less a manufacturer of leather because he does not breed and raise the bullocks from which the raw hides are made. The tanner makes leather to sell, but does not buy hides to sell again. He produces the article of leather, and depends for

his profit upon the labor which he bestows on the raw materials. Manufacturers are the suppliers of dealers or consumers, and in so far as they make barrels, hogsheads, and similar articles of wood, such as coopers make, they are manufacturers and exempt from the license tax. But the case is different where they deal in articles of wood not manufactured by themselves, as when they buy and sell hoop poles. *City of New Orleans v. Le Blanc*, 34 La. Ann. 596, 597.

Dry-dock company.

A corporation created for the purpose of constructing, using, and providing one or more dry docks or wet docks or other conveniences and structures for building, raising, repairing, and coppering vessels and steamers of every description, is not a "manufacturing corporation" within the exemption laws. *People v. New York Floating Dry-Dock Co.* (N. Y.) 11 Abb. N. C. 40, 42.

Electric company.

"Manufacturing corporation," as used in Act May 25, 1878 (P. L. 145), providing that whenever the property and franchises of a manufacturing corporation shall be sold under process of court the purchasers may reorganize the company, should be construed to include electric light, heat, and power companies. *Commonwealth v. Keystone Electric Light, Heat & Power Co.*, 44 Atl. 326, 327, 193 Pa. 245.

Where an electric light company paid a tax on its capital and income for supplying electric lights to the city of Philadelphia, it could not be taxed on its property used in manufacturing such electricity. The distinction which is urged between the "manufacturing" of electricity and the supplying of it is without force. The power to supply includes the power to manufacture it. *Southern Electric Light & Power Co. v. City of Philadelphia*, 43 Atl. 123, 191 Pa. 170.

An electric light plant was held to be a "manufacturing establishment" under Const. art. 16, § 7, providing that all persons should have the right of way across private lands for ditches, etc., for manufacturing purposes. *Lamborn v. Bell*, 32 Pac. 989, 991, 18 Colo. 346, 20 L. R. A. 241.

Laws 1881, c. 361, § 3, exempting from taxation "manufacturing corporations" is not necessarily confined in meaning to corporations engaged in some manufacturing process, which produce something in some form which did not exist before, but includes a corporation engaged in the business of generating and supplying electric currents for illuminating and other purposes. The application of labor and skill to materials that exist in a natural state gives to them a new quality or characteristic and adapts them to new uses, and the process by which this re-

sult is brought about is called "manufacturing," whether the change is accomplished by manual labor or by means of machinery. These considerations are by no means conclusive in determining the true scope and meaning of the term "manufacturing corporations" as it is used in the statute. The true inquiry would seem to be whether a corporation, such as the one spoken of, would not be considered in common language as engaged in some manufacturing process or carrying on some manufacturing business, though granting all that is said by experts and others about electricity as a natural element or force. *People v. Wemple*, 129 N. Y. 543, 553, 29 N. E. 808, 810, 14 L. R. A. 708 (reversing 15 N. Y. Supp. 711, 61 Hun, 53).

Code, § 1565, authorizing the consolidation of manufacturing corporations, includes electric light companies, as "the electric currents that produce these results cannot be said to be the free gifts of nature gathered from the air or clouds." *Beggs v. Edison Electric Light & Illuminating Co.*, 11 South. 381, 383, 96 Ala. 295, 38 Am. St. Rep. 94.

The generating of electricity is "manufacturing," within the manufacturing and mining companies act. *Burke v. Mead*, 64 N. E. 880, 883, 159 Ind. 252.

There is no definition of the terms "manufacture" or "manufacturing" that does not limit them to the production of material substances. Whatever electricity may be, it is manifestly and admittedly not a material substance; and, whatever electric light companies do, they do not, in generating and evolving electricity, make changes or modifications by art or industry in the form or substance of material articles. They do not make wares of any kind, nor reduce raw materials to a form fit for use. The production, or generation or evolution, of electricity for power, illuminating, or heating purposes does not come within the authoritative, lexicographical, scientific, or legal definition of the terms "manufacture" and "manufacturing," and it cannot be said that a person "manufactures" electricity. *Commonwealth v. Northern Electric Light & Power Co.*, 22 Atl. 839, 840, 145 Pa. 105, 14 L. R. A. 107, 110, 28 Wkly. Notes Cas. 520, 525; *Commonwealth v. Edison Electric Light Co.*, 22 Atl. 845, 846, 145 Pa. 131, 27 Am. St. Rep. 683; *Id.*, 32 Atl. 419, 170 Pa. 231.

A city ordinance exempting from municipal taxation the machinery and manufacturing apparatus of all "manufacturing industries" located in the city within a certain time cannot be construed to include an electric light plant. *Electric Light and Power Co. v. Frederick City*, 36 Atl. 362, 364, 84 Md. 599, 36 L. R. A. 130.

Rev. St. c. 120, § 3, providing that "corporations for purely manufacturing purposes"

shall be assessed by local assessors, does not include a corporation organized to furnish light, heat, and power for public and private uses. *Evanston Electric Illuminating Co. v. Kochersperger*, 51 N. E. 719, 720, 175 Ill. 26.

Fertilizer company.

"Manufacturing," as used in the Constitution, exempting from taxation property used in manufactures, includes a process by which, through the use of suitable machinery in vaporizing moisture, disposing of gases, and separating grease or oils of garbage from the other materials, so as to produce oleaginous products and fertilizers; though the process might technically be defined to be a work of conversion or reduction. *Southern Chemical & Fertilizing Co. v. Board of Assessors*, 21 South. 31, 32, 48 La. Ann. 1475.

Under Const. art. 10, § 3, exempting stockholders in manufacturing corporations from double liability, a corporation organized, according to its articles, to manufacture and deal in azotine, and other fertilizing materials, grease, and stearin, was not one organized for the purpose of carrying on a manufacturing business exclusively. *Commercial Bank v. Azotine Mfg. Co.*, 69 N. W. 217, 68 Minn. 412.

Gas company.

Act 1880, c. 542, declares that manufacturing corporations carrying on manufactures within the state shall be exempt from certain taxation. Held, that the term "manufacturing corporations" as there used was not intended to be limited to such corporations as were organized under the general manufacturing and corporation act (Laws 1848, c. 40) and its amendments, but included as well other corporations organized under special act, as a gas company organized for the purpose of manufacturing and supplying gas under Laws 1848, c. 37. *Nassau Gaslight Co. v. City of Brooklyn* (N. Y.) 25 Hun, 567.

"Manufacturing corporation," as used in Laws 1880, c. 542, § 3, exempting manufacturing corporations from taxation, is used in its ordinary sense as relating to all companies whose chief and principal business is the manufacture and sale of artificial products, and a company engaged in the manufacturing and supplying of illuminating gas is a manufacturing corporation. *Nassau Gaslight Co. v. City of Brooklyn*, 89 N. Y. 409, 410.

Ice company.

The term "manufactured article" includes anything which is changed by process of manufacture from its natural form. It is not necessary, in order to constitute an article a manufactured article, that a chemical change should be wrought in it. Hence

the term includes iron manufactured from iron ore; timber and lumber manufactured from logs; bone dust produced by the grinding of bones; staves, etc., manufactured from logs; and ice formed by natural process, and changed by manual labor or machinery to a form adapted for sale and use. *Attorney General v. Lorman*, 28 N. W. 311, 313, 59 Mich. 157, 60 Am. Rep. 287.

The cutting of ice produced by the agencies of nature on the surface of a pond into pieces of a size convenient for handling, and storing the pieces in a building, cannot in any proper sense be called a manufacture, within the meaning of Gen. St. c. 11, § 12, which provides that all machinery employed in any branch of manufactures shall be assessed where such machinery is situated or employed. The material is in no way changed or adapted to any new or different use. It still remains ice to be used simply as ice. It is no more a manufacture than putting up the water from the pond into casks for transportation and use would be a manufacture, or the mining of coal, which has been decided not to be a manufacture. It is like the harvesting of hay or grain or other agricultural crops. *Hittinger v. Inhabitants of Westford*, 135 Mass. 258, 262.

A corporation whose business consists of "collecting ice from the Hudson river and Rockland Lake, storing, preserving, and preparing it for sale, transporting it to the city of New York, and vending the same," is not a manufacturing company, within the contemplation of the act exempting manufacturing companies from taxation. Such company is dealing in ice as an existing article, not the manufacture or production of ice by combination of materials, application of force, or otherwise. It collects, stores, and preserves that which nature causes create, and which other natural causes would destroy and waste. It seeks only to hold this last in check. Similar operations would equally apply to water, fruit, sand, gravel, coal, and other natural productions. Water might be improved by filtration; fruit, by judicious pruning of the tree or vine or protection by glass, sand and gravel, by screening; cobbles, by selection; and coal, by breaking; and each, by various processes, stored until the season of demand, when, having been collected, stored, and preserved, and prepared for sale, the natural article, and no other, would be put upon the market. No doubt, ice may be manufactured and frigorific effects produced by artificial means. Corporations exist for that purpose, and come literally within our manufacturing laws. Their methods in no respect resemble those of the defendant. *People v. Knickerbocker Ice Co.*, 99 N. Y. 181, 1 N. E. 669. See, also, *People v. Knickerbocker Ice Co.* (N. Y.) 32 Hun, 475, 476.

Importer of umbrella parts.

The word "manufacture" has a more comprehensive meaning than the processes employed in combining, fitting, and adjusting the several pieces of an umbrella. The work in Louisiana in combining, fitting, and adjusting the several pieces is infinitesimal, as compared with the work elsewhere on the different pieces. Therefore the importer of the several pieces of the umbrella already in a state of preparation, save certain work on some of the pieces of minor importance, is not a manufacturer. *Lake v. Guillotte*, 19 South. 924, 925, 48 La. Ann. 870.

Laundry.

St. § 2487, providing that when the property or effects of any mine, rolling mill, foundry, or other manufacturing establishment shall come into the hands of a receiver of the court, or in any wise come to be distributed among creditors, whether by operation of law, or by the act of such company, owner, or operator, the employees of such company shall have a lien upon so much of the property as may have been involved in such business, does not include a laundry, although a large portion of the business of the establishment is carried on by means of machinery. *Muir v. Samuels*, 62 S. W. 481, 483, 110 Ky. 605.

A corporation incorporated for the purpose of cleansing, bleaching, starching and smoothing textile fabrics by the use of machinery and mechanical appliances, and the application of skilled manual operations, the principal business of which was washing and ironing, in carrying on which it needed soaps and dyes, is not a manufacturing corporation, even if it does manufacture these articles for its own use, instead of buying them. Such manufacturing does not make the washing and ironing concern a manufacturing corporation, within the exemption laws. *Commonwealth v. Keystone Laundry Co.*, 52 Atl. 326, 203 Pa. 289.

Merchant tailor.

Merchant tailors carrying on the usual business of manufacturing clothing from its raw materials, charging for both the cloth and the work, are not manufacturers, but merchants, within the meaning of a statute requiring merchants to take out a license. *Murray v. State*, 79 Tenn. (11 Lea) 218, 220.

"Manufacturer," in its broadest sense means one who makes or fabricates anything for use, but, as used in Pol. Code, § 4082, requiring every manufacturer doing business to pay license, includes those who produce goods from a raw state by manual skill and labor, and goods which are commonly turned out of factories, and hence a tailor would be included. *State v. Johnson*, 51 Pac. 820, 20 Mont. 367.

The term "manufacturer," within the meaning of a statute in reference to licensing manufacturers, includes a nonresident merchant tailor exhibiting samples of cloth, and taking orders for suits of clothing to be made and delivered afterward. One need not manufacture every portion of the material used, and construct from the original material, in order to be a manufacturer. *Radehaugh v. Plain City*, 11 Ohio Dec. 612, 613.

Milling company.

"To manufacture" means to make anything by hand or artificial device, so that the making of corn into meal is manufacturing. *Louisville & N. R. Co. v. Fulgham*, 8 South. 803, 804, 91 Ala. 555.

While, from its derivation, the primary meaning of the word "manufacture" is making with the hand, this definition is too narrow for its present use. Its meaning has extended as workmanship and art have advanced, so that now nearly all artificial products of human industry—nearly all such materials as have acquired changed conditions or new and specific combinations, whether from the direct action of the human hand, from chemical processes devised and directed by human skill, or by the employment of machinery, which, after all, is but a higher form of the small implements with which the human hand fashioned its creations in ruder ages—are now commonly designated as manufactures. Thus a flourmill driven by steam, and furnished with the necessary machinery, is a manufacturing establishment. *Carlin v. Western Assur. Co. of Toronto*, 57 Md. 515, 526, 40 Am. Rep. 440.

Const. art. 206, exempts from a license all manufacturers, except those engaged in the manufacture of alcoholic or malt liquors, tobacco, cigars, and cotton seed oil, and shields from taxation all property employed in the manufacture of specified articles, among which is mentioned flour. Held, that persons engaged in rice milling are manufacturers, within the meaning of the statute. "A manufacturer is defined to be one who is engaged in the business of working raw materials into wares suitable for use, who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process. The Constitution apparently considers that one who has property employed in the manufacture of flour is a manufacturer, for it exempts property thus used from taxation and license. If one who transforms wheat into flour be a manufacturer, there is no reason perceptible to us why one who transforms a like grain (rice) into flour and in various other shapes should not likewise be deemed a manufacturer, and, as such, embraced within the exemption." *City of New Orleans v. Ernst*, 35 La. Ann. 746, 747.

A fire insurance policy conditioned that if it be a manufacturing establishment running in whole or in part over or extra time, or running at night, or if certain materials were kept therein, the policy should become void, should be construed to include a flour-mill driven by steam, and furnished with a middlings purifier, bran duster, belting, and other machinery, and is applied to the building or premises in which the articles of machinery were contained, and not to the machinery itself. The primary meaning of the word "manufacture," as making with the hand, is too narrow a sense in which to apply it to the policy. The meaning of the term "manufacture" has expanded as workmanship and art have advanced, so that now nearly all artificial products of human industry—nearly all such materials as have acquired changed conditions or new and specific combinations, whether from the direct action of the human hand, from chemical processes devised and directed by human skill, or by the employment of machinery, which, after all, is but a higher form of the simple implements with which the human hand fashioned its creations in ruder ages—are now commonly designated as manufactures. *Carlin v. Western Assur. Co. of Toronto*, 57 Md. 515, 523, 40 Am. Rep. 440.

Mining company.

A mining corporation is not a manufacturing corporation, within the meaning of St. 1862, c. 218, defining and regulating the enforcement of the liabilities of officers and stockholders of manufacturing corporations. *Byers v. Franklin Coal Co.*, 106 Mass. 131, 134.

Mining is not a manufacturing business, in any proper sense of the word, so as to render a stockholder of a mining corporation liable under Gen. St. 1894, c. 76, imposing double liabilities on stockholders of manufacturing companies. *Cowling v. Zenith Iron Co.*, 68 N. W. 48, 49, 65 Minn. 263, 33 L. R. A. 508, 60 Am. St. Rep. 471.

A corporation organized not only for the purpose of mining, but also for the purpose of "buying and selling and dealing in mineral lands," is not within the constitutional exemption from double liability of stockholders in corporations organized exclusively for manufacturing or mechanical business. *Holland v. Duluth Iron Mining & Development Co.*, 68 N. W. 50, 53, 65 Minn. 324, 60 Am. St. Rep. 480. See, also, *Commonwealth v. Pottville Iron & Steel Co.*, 27 Atl. 371, 372, 157 Pa. 500, 22 L. R. A. 228.

Laws 1880, c. 542, § 3, imposed a tax on corporations organized under the laws of other states, and doing business in New York. Manufacturing companies carrying on manufacture within the state were excepted from the operation of the statute. Defendant, a mining corporation, was engaged in the re-

duction of ore to bullion, as well as in extracting the ore from the earth; the former business engaging far the larger part of its business, capital, and expenditure. Held, that the words "manufacturing companies," as used in the statute, did not include defendant, since the reduction of ore to bullion is incidental to mining, and is not manufacturing. *People v. Horn Silver Min. Co.*, 11 N. E. 155, 157, 105 N. Y. 76.

Corporations principally engaged in mining are not manufacturing corporations, nor engaged in trading or mercantile pursuits, within the meaning of the bankruptcy act. *In re White Star Laundry Co. (U. S.)* 117 Fed. 570, 571.

A corporation whose sole business is the mining of coal, and preparing and shipping the same to market, is not engaged in manufacturing, trading, or mercantile pursuits, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4, cl. b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], and cannot be adjudged a bankrupt. *In re Woodside Coal Co. (U. S.)* 105 Fed. 56, 57.

A mining corporation is not a trading or manufacturing corporation, or one engaged in mercantile pursuits, within the meaning of Bankr. Act 1898, § 4b, providing that a petition in involuntary bankruptcy may be maintained against corporations engaged principally in manufacturing, trading, or mercantile pursuits. *In re Elk Park Min. & Mill. Co. (U. S.)* 101 Fed. 422, 423; *In re Rollins Gold & Silver Min. Co. (U. S.)* 102 Fed. 982, 984.

A corporation which leased and operated a mine and smelter at a point remote from a railroad, and incidentally conducted a store and boarding house for the accommodation of its operators, and which employed 2 or 3 men in the mine, and 12 or 14 in smelting the ore so mined—its chief profit being derived from operating the smelter—is "incorporated principally for manufacture," within the meaning of Bankr. Act 1898, § 4, and hence may be adjudged an involuntary bankrupt. *In re Tecopa Mining & Smelting Co. (U. S.)* 110 Fed. 120, 121 (criticising *In re Rollins Gold & Silver Min. Co. [U. S.]* 102 Fed. 982).

Natural gas company.

The mere appropriation of an article which is furnished by nature is not a manufacture. Thus the liberation of natural gas or oil from the earth, and its transportation to consumers, is not a manufacture, but the production of illuminating gas is. *Commonwealth v. Northern Electric Light & Power Co.*, 22 Atl. 839, 840, 145 Pa. 105, 14 L. R. A. 107, 110.

A manufacturer is defined by Webster as one who works raw materials into wares suitable for use. *In Nassau Gaslight Co. v.*

City of Brooklyn, 89 N. Y. 411, Judge Finch says: "We can see no just reason for interpreting the words 'manufacturing corporation' in any other than their usual and ordinary sense, and as relating to all companies, under whatever law incorporated, and by whatever general name, whose chief and principal business is the manufacture and sale of artificial products." A manufacturing corporation must have for its object the manufacture of some article or thing from raw material. Natural gas is not a manufactured article, and therefore Laws 1890, c. 566, §§ 60, 65, 66, authorizing the formation of corporations for manufacturing and supplying gas, does not apply to a natural gas company. *Wilson v. Tennent*, 65 N. Y. Supp. 852, 854, 32 Misc. Rep. 273.

Packing company.

A person who purchases and slaughters hogs for the purpose of adding to the value thereof by certain processes and combination with other materials, whereby they are converted into bacon, lard, and cured meats, with a view of making a gain or profit thereby, is a manufacturer. The original substance, though not destroyed, was so transformed through art and labor that without previous knowledge it could not have been recognized in the new shape it assumed, or in the new uses to which it was applied. One who produces such results may as correctly be designated a manufacturer as he who buys lumber, and planes, tongues, grooves, or otherwise dresses the same, or as he who buys fruit, and preserves the same by canning. The term "manufacture" has been extended to include every object on which art or skill can be exercised so as to afford products fabricated by the hand of man, or by the labor which he directs. *Engle v. Sohn*, 41 Ohio St. 691, 695, 52 Am. Rep. 103.

A corporation whose principal business is the purchasing of sheep and lambs, slaughtering them, pulling the wool from the hides, selling it and the hides, converting the offal to a fertilizer, reducing the carcasses to a temperature which will retard decomposition, and shipping them to places of delivery, is not "carrying on manufacture," within the meaning of the statutes exempting such corporations from taxation. *People v. Roberts*, 50 N. E. 53, 54, 155 N. Y. 408, 41 L. R. A. 228 (reversing 20 App. Div. 521, 47 N. Y. Supp. 123).

Paint company.

A corporation incorporated exclusively as a manufacturing corporation, and making mixed paint, some of which is made from colors or pigments of its own manufacture, and some from an admixture of ingredients, none of which are made by it, but the proportions of which, as used in the manufacture of its paint, are known only to itself, and

result in a new commercial article of value, recognized by a distinct name, different from any of its ingredients, and produced by the use of capital, labor, and machinery, is a manufacturing corporation wholly engaged in carrying on manufactures within the state, though a small part of its business conducted in another state is that of an importer of merchandise. *People v. Roberts*, 64 N. Y. Supp. 494, 495, 51 App. Div. 77.

Printers and publishers.

"Manufacture," in its ordinary sense, means the changing of raw material into some new and useful form. Its natural import is to produce an article, so that a thing is not usually said to be manufactured unless its form is materially changed. A change or addition in or to the mode of use of an article already manufactured cannot be considered a manufacture, so that, under a statute exempting from taxation property employed in manufactures, printing machinery by which letter and bill heads are printed on blank paper is not exempt. *Patterson v. City of New Orleans*, 16 South. 815, 47 La. Ann. 275.

Tax Law April 18, 1884, exempting manufacturing companies from taxation, means only a company engaged in the production of articles which are made, and, in popular language, are called "manufactures." The publisher of a newspaper can hardly be regarded as a "manufacturer," in the ordinary sense of the word. It is true that in the production of his papers he employs manual labor and mechanical skill, and so does the sculptor who produces, as the result of his handiwork and genius, the statue. So does the painter who executes his painting with his palette and his brush, or the author who writes a book. But no definition of the word "manufacturer" has ever included the publisher of a newspaper, and the common understanding of mankind excludes it. A newspaper has no intrinsic value above that of the unprinted sheet. Indeed, it has less, construed as a mere article of merchandise. Its value to its subscribers arises from the information it contains. Neither in the nature of things, nor in the ordinary signification of language, would a newspaper be called a manufactured article, or its publisher a manufacturer. *Evening Journal Ass'n v. State Board of Assessors*, 47 N. J. Law (18 Vroom) 36, 38, 54 Am. Rep. 114.

A company incorporated for the purpose of printing and publishing books and general job printing and publishing a newspaper is a manufacturing company with respect to its business of printing books and job printing, and is exempt from taxation on so much of its capital as is invested in that branch of its business; but, with respect to its business of printing and publishing a newspaper, it is not a manufacturing company. *Press*

Printing Co. v. State Board of Assessors, 16 Atl. 173, 174, 51 N. J. Law (22 Vroom) 75.

A corporation engaged in printing and publishing a weekly newspaper was held not to be a manufacturer, under the bankrupt law. In *re Capital Pub. Co.*, 10 D. C. (3 McArthur) 405, 412.

"Manufacturer," as used in the bankrupt act, relating to assignments by manufacturers and traders, should be construed to include the publishers and conductors of a daily newspaper and a job printing office connected therewith, in which are made cards, bill heads, show bills, etc. A newspaper publication is as much the result of manufacture as that of books or cards or bill heads. The term "manufacturer," under the bankrupt act, has a legal meaning, and this legal meaning must be governed by legal rules. It is true that every one who manufactures is not to be embraced within the legal phrase. A farmer is not to be considered a manufacturer, in the commercial sense, when he confines his business to the manufacture of the milk of his cows into butter and cheese, nor when he converts the products of his farm into beef and pork. But it does not follow that when he makes it a part of his business to buy milk and manufacture the same into butter and cheese, or to purchase the products of other farmers, and other stock than those of his own, and manufacture the same into beef and pork, he is not a manufacturer, within the meaning of the act. When manufacturing becomes the principal part of even a farmer's business, which requires him to buy articles or products to manufacture them for sale, he thereby becomes a manufacturer and trader, within the meaning of the act. In *re Kenyon*, 1 Utah, 47, 49.

The publisher of a newspaper was held to be a manufacturer in *State v. Dupre*, 7 South. 727, 42 La. Ann. 561.

The business of publishing an ordinary daily or weekly newspaper is, at most, only partly a manufacturing business; and that part is merely incidental to the main or principal part of the business, which is collecting and selling news, preparing and selling literary work, and other editorial work. Hence it is not an exclusively manufacturing corporation, within the constitutional provision exempting stockholders of such corporations from double liability. *Oswald v. St. Paul Globe Pub. Co.*, 61 N. W. 902, 903, 60 Minn. 82.

Railroad contractor.

In order to constitute manufacturing, the original materials on which labor is expended must thereby be changed or brought into new combinations, so as to adapt them to new and different uses. The mere taking away, piling up, and leveling of earth and

stone for the construction of the roadbed of a railway is not manufacturing, within the meaning of Act May 20, 1891, requiring the semimonthly payment of wages to employes engaged in the business of manufacturing. *Commonwealth v. Marsh*, 3 Pa. Dist. R. 489, 491.

Repairer of vessels.

The term "manufacturer," within the meaning of Laws 1880, c. 542, § 3, exempting manufacturers from certain taxes, does not include a builder and repairer of vessels. Undoubtedly, using the word in its broadest sense, the builder and repairer of a vessel or a house, even, might be called a manufacturer. In either case such builder takes the raw material, and by the hand, or by machinery and tools, fashions it into form and shape for use. But this is not the ordinary and general meaning to be given to the word, and it is such general and ordinary meaning which words are to receive in the construction of statutes. *People v. New York Floating Dry Dock Co.* (N. Y.) 63 How. Prac. 451, 453.

Roaster of coffees, etc.

A corporation claiming to own a secret process, by which, without the use of any chemical, it is enabled to make selections of green coffees, which, through careful and cleanly roasting, and a secret process of cooling, produce brands of unground roasted coffees, each having a recognizable taste, is not a manufacturer, within Const. art. 206, exempting machinery and property used in manufacturing from taxation. *City of New Orleans v. New Orleans Coffee Co.*, 14 South. 502, 503, 46 La. Ann. 86.

The process of manufacture is supposed to produce some new article by the application of skill and labor to the raw material, and does not apply to the mixing of teas, and in roasting, mixing, and grinding coffee; and hence a corporation engaged in such business is not a manufacturing corporation, and exempt as such from taxation, under Laws 1880, c. 542, as amended by Laws 1881, c. 361. *People v. Roberts*, 40 N. E. 7, 8, 145 N. Y. 375.

Sawmill operators.

Pub. St. c. 11, § 20, cl. 2, providing that all "machinery employed in any branch of manufacture" shall be assessed where such machinery is situated or employed, cannot be construed to include a sawmill, which was portable personal property, frequently moved from place to place for sawing logs into boards, for it is not a branch of manufacture. Something more of a transformation of the raw material is necessary to constitute it a branch of manufacture. *Ingram v. Cowles*, 23 N. E. 48, 49, 150 Mass. 155.

Under St. § 2487, giving to employes and materialmen a lien upon the property or ef-

fects of any owner or operator of any rolling mill, foundry, or other manufacturing establishment, when such property or effects shall come into the hands of any executor, etc., a portable sawmill, engaged in manufacturing lumber, is a manufacturing establishment. *Bogard v. Tyler's Adm'r* (Ky.) 55 S. W. 709, 710.

"Manufacturer," as used in the bankrupt act as amended by the act of July 14, 1870 (16 Stat. 276), includes one who prepares for market and sells lumber which is the growth of his land. *In re Chandler* (U. S.) 5 Fed. Cas. 447.

A manufacturer is not necessarily one who produces a new article out of materials entirely raw, but may be one who gives new shapes, new qualities, and new combinations to matter which has already gone through some artificial change. *City of New Orleans v. La Blanc*, 34 La. Ann. 597. "Manufacturer" is further defined to be one who is engaged in the business of working raw materials into wares suitable for use; who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process. A manufacturer prepares the original substances for use in different forms. He makes to sell, and stands between the original producer and dealer or first consumers, depending for his profit on the labor which he bestows on the raw material. *City of New Orleans v. Ernst*, 35 La. Ann. 746. Under these definitions, it is held that a sawmill which manufactures boards and other lumber products from logs is a manufactory, and its proprietor a manufacturer. *State ex rel. Browne v. A. Wilbert's Sons Lumber & Shingle Co.*, 26 South. 106, 110, 51 La. Ann. 1223.

A corporate power of manufacturing and selling lumber does not authorize the corporation to furnish lumber in the construction of buildings for others, and therefore the corporation cannot have a mechanic's lien for labor so furnished. *Dalles Lumber & Mfg. Co. v. Wasco Woolen Mfg. Co.*, 3 Or. 527, 530.

The words "works, mines, and manufactory," in the statute preferring claims of laborers against the owners, etc., of any works, mines, or manufactory, import, *ex vi termini*, complete and independent branches of business, and of a fixed and permanent character, as opposed to a temporary employment that is merely incidental to any particular branch of business. The business of cutting saw logs and driving them to the place of manufacture is not such as contemplated by the act. *Appeal of Pardee*, 100 Pa. 408, 412.

Shoemaker.

"Manufacturing" is the making of a thing, and to make, in the mechanical sense,

does not signify to create out of nothing, for that surpasses all human power. It does not often mean the production of a new article out of materials entirely raw. It generally consists in giving new shapes, new qualities, or new combinations to the matter which has already gone through some other artificial process. Thus a cunning worker in metals is the maker of the ware he fashions, though he did not dig the ore from the earth, or carry it through every subsequent stage of refinement. A shoemaker is none the less a manufacturer of shoes because he does not also tan the leather. *Norris v. Commonwealth*, 27 Pa. (3 Casey) 494, 496.

Steam power company.

A corporation engaged in supplying its tenants with steam power to enable it the more readily to rent its buildings and rooms is not a manufacturer, and has no claim to exemption from taxation as a manufacturing corporation. *Commonwealth v. Arrott Steam Power Mills Co.*, 22 Atl. 243, 145 Pa. 60.

Sugar refiner.

A manufacturer is one who is engaged in the business of working raw materials into wares suitable for use; who gives new shapes, new qualities, new combinations to matter which has already gone through some process. A manufacturer prepares original substances for use in different forms. He makes to sell, and depends on the labor which he bestows on the raw material for his profit. A sugar refiner is not a manufacturer, where he purchases the sugar in a completely manufactured state. *State v. American Sugar Refining Co.*, 25 South. 447, 453, 51 La. Ann. 562.

Within the term "manufacturing," there is no question but that chewing and smoking tobacco and snuff are manufactured products. The manufacturer of raw materials converts the raw material—leaf tobacco—into a manufactured article, by removing stems and dirt, improving the color, drying or moistening, perhaps sweetening some kinds, and compressing, granulating, fine-cutting, or pulverizing, according to the use for which it is intended. The parallel with sugar refining is complete. The process of manufacturing tobacco accomplishes the same result as the refining of sugar, though it is more simple and requires less machinery, and the raw material never loses its original identity. Hence the refining of sugar is a manufacture. *State v. American Sugar Refining Co.*, 32 South. 965, 973, 108 La. 603.

The business of refining sugar is a manufacture, and not an operation of commerce, and therefore not within the commerce clause of the federal Constitution. *United*

States v. E. C. Knight Co., 15 Sup. Ct. 249, 254, 156 U. S. 1, 39 L. Ed. 325.

Waterworks company.

Gen. St. c. 11, § 12, cl. 2, exempting the machinery of manufacturing corporations from certain taxation, will not exempt an aqueduct company which supplies water to a city. "Neither in a popular nor a legal sense is there any such use of the term 'manufacturing company' as would include the functions of an aqueduct company, or describe the distribution of pure water as a branch of manufacture. *Dudley v. Jamaica Pond Aqueduct Corp.*, 100 Mass. 183, 184.

The term "manufacturing corporation," in 1 Rev. St. 1876, p. 619, authorizing the incorporation of such companies, does not include a waterworks company. *Kentucky Lead & Oil Co. v. New Albany Waterworks*, 62 Ind. 63, 70.

MANUFACTURER'S LIEN.

A mechanics' or manufacturers' lien is a simple right of retainer personal to the party in whom it exists, and not assignable or attachable as personal property or as a chose in action of the person entitled to it. *Lovett v. Brown*, 40 N. H. 511.

MANUFACTURES — MANUFACTURED ARTICLES.

See "Domestic Manufactures."

"Manufactures" has been generally understood to denote either a thing made, which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope, and many others, or to mean an engine or instrument to be employed either in the making of some previously known article or in some other useful purpose, as a stocking frame, or a steam engine for raising water from mines. Or it may, perhaps, extend also to a new process to be carried on by known implements or elements acting on known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better and more useful kind. But no mere philosophical or abstract principle can answer to the word "manufactures." Something of a corporeal and substantial nature—something that can be made by man from the matters subjected to his art and skill, or at the least some new mode of employing his art and skill—is requisite to satisfy this word. *Rex v. Wheeler*, 2 Barn. & Ald. 345, 349.

"Manufactured goods," as used in an act authorizing a railroad company to charge certain rates "for all cotton and other wools, drugs, and manufactured goods," means those articles made in what are in popular language called "manufactories," and not

all goods on which human skill was employed. *Parker v. Great Western Ry. Co.*, 6 El. & Bl. 77, 107.

The application of labor to an article, either by hand or mechanism, does not make the article necessarily a "manufactured article," within the meaning of that term as used in the tariff laws. They are not manufactured articles until they have been manufactured into new or different articles, having a distinctive name, character, or use. *Hartranft v. Wiegmann*, 7 Sup. Ct. 1240, 1243, 121 U. S. 609, 30 L. Ed. 1012; *United States v. Semmer* (U. S.) 41 Fed. 324, 328; *Baumgardner v. Magone* (U. S.) 50 Fed. 69, 71.

To constitute a manufacture, within the customs duty acts, there must be a transformation. Mere labor bestowed on an article, even if the labor is applied through machinery, will not make it a manufacture, unless it has progressed so far that a transformation ensues, and the article becomes commercially known as another and different article from that as which it began its existence. *Foppes v. Magone* (U. S.) 40 Fed. 570, 572.

Every alteration in an article does not confer on it a new character as a manufacture. To constitute a new and different article and a manufactured article, it must be so changed as to have a positive and specific use in its new state. *United States v. Sarchet* (U. S.) 27 Fed. Cas. 958, 963.

In patents.

An article may be patented as a manufacture, irrespective of the process employed to make it. *United Nickel Co. v. Pendleton*, 15 Fed. 739.

The term "manufactured articles" is used to designate any article made from other articles which by application of skill and labor have been so transformed as to become a different article of increased value. *Radebaugh v. Plaine City*, 11 Ohio Dec. 612, 613.

The term "manufacture," as used in the patent law, has a very comprehensive sense, embracing whatever is made by the art or industry of man; not being a machine, a composition of matter, or a design. *Johnson v. Johnston* (U. S.) 60 Fed. 618, 620 (citing *Curt. Pat. § 27*; 1 Rob. Pat. § 183).

Where the thing produced is new, in and of itself, it is patentable as a new manufacture. If it be capable of being produced by various different processes—as, for instance, by the use of hand tools or by machines—yet, when the product is independent of the process, the patent is infringed by the unlicensed manufacture of the new product by any mode of manufacture, the process being wholly unimportant.

Merrill v. Yeomans (U. S.) 17 Fed. Cas. 113, 116.

Brewery slops.

"Manufacture" is defined as the process of making anything by art of reducing materials into a form fit for use, by the hand or by machinery; and it seems to imply a proceeding wherein the object or intention of the process is to produce the article in question, so that an article designated in a contract as slops from a brewery does not constitute a manufactured article, within the meaning of the rule which implies a warranty that the article, when delivered, shall be of merchantable quality. The residuum or refuse of various kinds of manufactures is more or less valuable for certain purposes, and may be, and often is, the subject of sale, but it is not expected that the skill and attention of the manufacturer is to be devoted to the quality of the refuse material. *Holden v. Clancy* (N. Y.) 58 Barb. 590, 597.

Design for arrangement of manufacture.

Rev. St. § 4929, which authorizes the grant of a patent to a person who has invented and produced any new and original design for a manufacture, bust, statute, etc., does not include a design for a card of buttons divided into spaces covered with foil by narrow bands, and with a dozen pearl buttons in rows of three by four to each space, as the design does not apply to the manufacture proper, but only to the arrangement of it for sale. *Pratt v. Rosenfeld* (U. S.) 8 Fed. 335, 336.

Dredgeboat.

A dredgeboat, without power of self-propulsion, and capable of use as a dredging machine only, is a "manufacture or machine," within the meaning of Rev. St. § 2505, entitling a manufacture or machine, after exportation from the United States, to be reimported without duty, if returned in the same condition as exported. *United States v. Dunbar* (U. S.) 67 Fed. 783, 784, 14 C. C. A. 639.

Firewood.

Firewood has been held not to be a "manufactured article," within the meaning of a statute providing that, where manufactured articles are sold for a specific purpose, the manufacturer, by the sale, warrants that such article is fit for the purpose for which it is sold. *Correlo v. Lynch*, 3 Pac. 889, 65 Cal. 273.

Jail.

"Manufacture," as used in Patent Act 1836, authorizing the granting of patents for any new and useful art, machine, manufacture, etc., construed not to include a jail,

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though the latter is made with hands. *Jacobs v. Baker*, 74 U. S. (7 Wall.) 295, 297, 19 L. Ed. 200.

Logs and lumber.

"Manufactured articles," as used in a taxbook, showing an assessment on materials and manufactured articles connected with a sawmill business, means logs and lumber and articles made therefrom, and not the mills and machinery. *Bemis v. First Nat. Bank*, 40 S. W. 127, 129, 63 Ark. 625.

Pleasure yacht.

A pleasure yacht, though constructed of manufactured articles, which, if imported separately, would be subject to duty, is nevertheless not a manufacture dutiable when brought into port in this country in a finished state. *The Conqueror*, 17 Sup. Ct. 510, 512, 166 U. S. 110, 41 L. Ed. 937.

Rock.

The word "manufacture," as used in a contract wherein a party agreed to blast certain rocks, and manufacture them ready for the masons, means breaking the stones into proper sizes and shapes, and making them sufficiently smooth to be submitted to the masons before being dressed by them so as to be fit to go into the wall. *Tone v. Doelger*, 29 N. Y. Super. Ct. (6 Rob.) 251, 257.

Of bone.

The internal revenue act taxing manufactures of bone should be construed to include bone black produced by the process of burning bone, or exposing it to the action of fire, in the same manner that wood is exposed to the action of fire to produce vegetable charcoal, and also bone dust produced by the process of pulverizing or grinding bone, or pieces of bone, whereby they were reduced to small fragments, of no regular or uniform shape or size. "The definitions of the term 'manufacture,' both as a noun and as a verb, given in our standard dictionaries, are broad enough to include the manufacture of bone dust and bone black, when produced in the modes adopted by the plaintiffs." *Schriefer v. Wood* (U. S.) 21 Fed. Cas. 737, 738.

Of chalk.

Precipitated chalk, dried and bolted, and imported to be used for making tooth powder, is taxable as manufacture of chalk, not specially provided for, under Act July 24, 1897, par 13. *I. W. Lyon & Son v. United States* (U. S.) 121 Fed. 204.

Of chenille.

"Manufactures of chenille," as used in Tariff Act Oct. 1, 1890, par. 351, include so-called fascinators made of cotton chenille.

Chenille is a variety of cotton—a species of the genus cotton. *Oppenheimer v. United States* (U. S.) 66 Fed. 740.

Of cotton.

Tariff Act Aug. 30, 1842 (5 Stat. 565), Schedule D, providing a rate of duty on "manufactures composed wholly of cotton," not otherwise provided for, should be construed to include linen lusters, camlet lusters, *tolle du nord*, and lusters composed of linen and cotton; they not being elsewhere enumerated. *Morlot v. Lawrence* (U. S.) 17 Fed. Cas. 770, 771.

"Manufactures of cotton and paper," as used in Tariff Act Oct. 1, 1890, pars. 355, 425, include artificial leaves, made to resemble leaves of oak, ivy, currant, etc., and manufactured of colored cotton cloth, metal, and wax; cotton being the component material of chief value. *In re Zelmer* (U. S.) 66 Fed. 740, 741.

13 Stat. 209, levying a duty on certain enumerated articles, and all other "manufactures of cotton" not specified, means articles made exclusively of cotton or manufactures of which cotton is one of the components only, providing that the cotton is the component of chief value. *Arthur v. Herman*, 96 U. S. 141, 142, 24 L. Ed. 812.

Patterns made of cotton canvas, cut into strips of the size and shape of slippers, more or less embroidered with silk, are dutiable as manufactures of cotton not otherwise provided for. *Kohlsaat v. Murphy*, 96 U. S. 153, 159, 24 L. Ed. 844.

Act March 3, 1865, c. 80, 13 Stat. 491, providing a tariff on manufactures of cotton, included manufactured shirting not made up, composed of linen and cotton; cotton being the material of chief value, and largely predominating in the fabric. *Fisk v. Arthur*, 103 U. S. 431, 433, 26 L. Ed. 520.

Tariff Act Oct. 1, 1890, prescribing a certain duty on manufactures of cotton, includes cotton hemstitched lawns, imported in pieces of from 28 to 30 yards in length and 45 inches in width, having a broad hem, about 5 inches wide, turned over and sewed down on one side of the fabric, the body of the goods being a homogeneous cotton cloth, containing from 150 to 200 threads to the square inch, counting the warp and filling; but open-worked patterns or figures made by drawing out threads appearing continuously on certain parts of the goods, the merchandise being chiefly used for women's and girls' dresses, skirts, and aprons, the broad hem constituting a part of such garments when made up, but the material being also sold for sash curtains. Such goods are not dutiable as "partly made cotton wearing apparel," under another section of the act. *In re Mills* (U. S.) 56 Fed. 820, 821.

Paragraph 322 of the act of 1897 fixing the import duty on manufactures of cotton means manufactures composed chiefly of cotton—that is, of which cotton is the component material of chief value—and hence includes merchandise known as "union crash," composed of flax, jute, and cotton, of which the component material of chief value is cotton. *United States v. Churchill* (U. S.) 106 Fed. 672.

Hemstitched cotton lawns, made by subjecting cotton cloth to the process of turning over the edges, drawing certain threads, and other manipulations, but not appropriated by such process to any particular ultimate use, are dutiable as manufactures of cotton, under Tariff Act Aug. 27, 1894, c. 349, § 1, Schedule I, par. 264, 28 Stat. 529. *Meyer v. United States* (U. S.) 124 Fed. 296.

Of ebony and rosewood.

Tariff Act July 30, 1846 (9 Stat. 44), Schedule B, providing for a certain rate of duty on manufactures of ebony and rosewood, should be construed to include fancy boxes made of common wood and veneered with rosewood or ebony, invoiced as rosewood boxes, and known to the trade by those names, and also as fancy boxes and furnished boxes; it not appearing that there are any articles known as ebony boxes or rosewood boxes made wholly out of those woods. *Sill v. Lawrence* (U. S.) 22 Fed. Cas. 115, 116.

Of flax.

"Manufactures of flax," as used in Tariff Act Oct. 1, 1890, par. 371, include articles woven of flax, and of jute and flax, less than 60 inches in width, used chiefly in the manufacture of clothing, for the particular purposes of stiffening collars and fronts of coats and other garments; the goods being known commercially as canvas, paddings, ducks, coatings, etc. *White v. United States* (U. S.) 65 Fed. 788, 790.

Of glass.

Tariff Act March 3, 1883 (Tariff Index, New, 143) Schedule B, providing that the rate of duties on porcelain and Bohemian glass, chemical glassware, painted glassware, stained glass, and all other manufactures of glass, should be construed to include plate glass which has passed through the various processes of manufacture, up to and including the process of grinding and smoothing on both sides, in which state it is an unfinished product in the manufacture of polished plate glass, which was an article known to the trade and commerce of the United States as ground glass, and used, though to a very limited extent as such. Goods, to be a manufacture of glass, must be made in shape for use as a finished product, without being afterwards materially changed in form, and not merely an unfinished product of partially

manufactured plate glass, suitable only to be used in the nature of raw material in a convenient form for finishing into a complete article. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff act. *United States v. Semmer* (U. S.) 41 Fed. 324, 328.

"Manufactures of glass," as used in *Tariff Act* Oct. 1, 1890, par. 108, includes glass beads, threaded on strings. In *re Steiner* (U. S.) 66 Fed. 726, 727.

Act Cong. June 30, 1864 (13 Stat. 205) § 9, imposing a certain duty on pebbles for spectacles, and all manufactures of glass, should be construed to include spectacles made of glass and steel. The colorless crystals in spectacles termed "pebbles," and the manufactures of glass used in spectacles, embrace the same idea, to wit, pebbles or glass for spectacles. *Arthur v. Sussfield*, 96 U. S. 128, 130, 24 L. Ed. 772.

Of goat hair.

"Manufactures of goat hair and cotton as trimmings," as used in *Tariff Act* Oct. 1, 1890, par. 398, includes articles commercially known as Astrachan trimmings, woven on a loom, and consisting of a foundation of cotton and a long curled pile, composed of goat hair, which was of chief value, the material being woven in strips, which were afterwards cut apart, and the sides stitched under, suitable to be made up into dress trimmings. *Lowenthal v. United States* (U. S.) 65 Fed. 420, 421.

Tariff Act Aug. 30, 1842 (5 Stat. 549), imposing a tax of 20 per cent. ad valorem on camlets, blankets, coatings, and all other manufactures of goat hair, or mohair, includes goat hair plush or mohair plush. *Thorp v. Lawrence* (U. S.) 23 Fed. Cas. 1159, 1160.

Of hair.

Act Cong. June 6, 1872 (17 Stat. 231), imposing a duty of 30 per cent. ad valorem on haircloth known as crinoline cloth, and on all other manufactures of hair not otherwise provided for, would include what are known as goat hair goods; they not being otherwise provided for in the statute. *Arthur's Ex'rs v. Butterfield*, 8 Sup. Ct. 714, 716, 125 U. S. 70, 31 L. Ed. 643.

Of hemp.

A tariff act prescribing a certain duty on a manufacture of hemp cannot properly include an article generally known in commerce as hemp carpeting, but in the manufacture of which no material has been used which in its raw state, or in the state in which it existed before its introduction into

the particular manufacture, is in fact or in commercial parlance embraced within the generic term "hemp." *Baxter v. Maxwell* (U. S.) 2 Fed. Cas. 1054, 1056.

Of india rubber.

"Manufactures of india rubber," as used in *Tariff Act* Oct. 1, 1890, par. 460, include dress shields made of cotton and india rubber, india rubber being the component material of chief value. *Riley v. United States* (U. S.) 66 Fed. 741, 742.

Act Cong. Aug. 30, 1842 (5 Stat. 549), providing that the levy of a duty of 30 per cent. on india rubber oilcloth, felt shoes, braces, or suspenders, or other fabrics or manufactured articles composed wholly or any part of india rubber, means articles made in a shape for use as a manufacture, without being afterward changed in form, and designed to be so used. Where the india rubber has been changed by fire and labor, in its color, consistency, and form, from its natural state, as the milk of the india rubber tree had been fashioned into an article of clothing, suitable and customary to be worn in its then present shape, in the form of a water-proof shoe, it is a manufactured article. To manufacture is to make an article, either by hand or machinery, into a form capable of being used, and designed to be used, in ordinary life. The juice or sap of the india rubber tree, which has been hardened and changed, merely to render it into a more portable, useful, and convenient form for other manufactures, is not a manufactured article. *Lawrence v. Allen*, 48 U. S. (7 How.) 785, 791, 12 L. Ed. 914.

Of iron and steel.

The manufactures, articles, or wares not specifically enumerated, composed wholly or in part of iron and steel, etc., in *Tariff Act* 1883, fixing a duty thereon, include iron and steel wire hairpins, which are not dutiable as pins, solid head and others, as the latter class of pins have been distinguished in former tariff acts from hairpins. *Robertson v. Rosenthal*, 10 Sup. Ct. 120, 121, 132 U. S. 460, 33 L. Ed. 392.

Of jet.

"Manufactures of jet," as used in *Act* Oct. 1, 1890, par. 459, relating to the duties on manufactures of jet, does not include hat trimmings and ornaments composed of black glass and wire; the glass being the component of chief value, and made in imitation of jet. *Goldberg v. United States* (U. S.) 61 Fed. 91, 92, 9 C. C. A. 380.

Of jute.

"Manufacture of jute, not otherwise specially provided for," as used in *Tariff Act* 1890, par. 374, do not include jute bagging

which is commercially fit for bagging cotton. *White v. United States* (U. S.) 69 Fed. 93.

Of marble.

"Manufactured," as used in the tariff act imposing a duty on manufactured marble, does not apply to marble which has been cut into blocks simply for convenience in transportation. *United States v. Willson* (U. S.) 28 Fed. Cas. 724, 725.

Of metal.

"Manufacture of metal," as used in Tariff Act Oct. 1, 1890, par. 215, did not include knives which are shown to be either cook's knives, kitchen knives, or butcher's knives. *United States v. Curley* (U. S.) 66 Fed. 720.

"Manufactures of metal," as used in Tariff Act Oct. 1, 1890, par. 215, include traveling clocks, which consist of a case of brass and plate glass, which contains the watch or clock movement, the whole being surrounded by an outer case of leather, and which are intended to be carried by travelers, and when in use are placed upon the table, mantel, etc. They are never carried upon the person, and are not suitable for such use. *Tiffany v. United States* (U. S.) 66 Fed. 737, 738.

"Manufactures of metal," as used in Act Cong. June 6, 1872 (17 Stat. 230), providing for the collection of a certain import duty on all "manufactures of metals" of which either of them is the component part of chief value, means manufactured articles in which metals form a component part. When we speak of manufactures of wood, of leather, or of iron, we refer to articles that have those substances, respectively, for their component parts, and not to articles in which they have lost their form entirely, and have become the chemical ingredients of new forms. *Meyer v. Arthur*, 91 U. S. 570, 576, 23 L. Ed. 455.

"Manufactures of metal," as used in Tariff Act Oct. 1, 1890, par. 215, do not include hat and lace pins having heads of glass or similar material (metal being of chief value in the hatpins, and glass or glue in the lace pins), but such pins are dutiable as metallic bonnet and lace or belt pins, under paragraph 206. *United States v. Wolff* (U. S.) 69 Fed. 327, 328.

"Manufactures of metal," as used in Rev. St. § 2503, which imposes a certain duty on all iron, steel, and all manufactures of iron and steel, of which such metals, or either of them, shall be the component part of chief value, excepting cotton machinery, and all metals not herein otherwise provided for, and all manufactures of metals of which either of them is the component part of chief value, except, etc., does not include tin plates. *May v. Simmons* (U. S.) 4 Fed. 499, 502.

Old cannon, composed of copper, 91.09 per cent., and tin, 7.06 per cent, though practically worthless for use against modern implements of war, are nevertheless dutiable as manufactures of metal, within paragraph 193, Act July 24, 1897. *Downing v. United States* (U. S.) 116 Fed. 779.

Of mother-of-pearl.

Tariff Act 1890, par. 673, placing on the free list mother-of-pearl "not sawed, cut, polished or otherwise manufactured," does not exempt mother-of-pearl cut into slabs and designed for use in the manufacture of knife handles as the same will be deemed a manufacture. In re *John Russell Cutlery Co.* (U. S.) 56 Fed. 221, 222.

Of paper.

"Manufactures of paper," as used in Rev. St. § 2503, reducing the duties on all paper and manufactures of paper, excepting unsized printing paper, books, and other printed matter, cannot be construed to include books. No man of literary culture would call a book paper, or a manufacture of paper, any more than he would designate a masterpiece of Raphael as canvas or a manufacture of canvas. By a license of speech, it is true, he might say that a particular book was mere waste paper or rubbish, or that a particular picture was nothing but a piece of spoiled canvas; but, speaking seriously and in accordance with good usage, he would not make such an application of terms. *Pott v. Arthur*, 104 U. S. 735, 26 L. Ed. 909.

Of silk.

Tariff Act 1833 provides that there shall be admitted to entry, free of duty, worsted stuff, goods, shawls, and other manufactures of silk and worsted, manufactures of silk, or of which silk shall be the component part, except sewing silk. Tariff Act 1832, c. 224, imposes a certain duty on mitts, gloves, bindings, hosiery, etc. Held, that the words, "manufactures of silk," as used in the tariff act of 1833, should be construed to include silk gloves, and that such articles were not dutiable under Act 1832, as gloves. *Adams v. Bancroft* (U. S.) 1 Fed. 84, 85.

"Manufactures of silk, not specially provided for," as used in Tariff Act Oct. 1, 1890, par. 414, does not include silk vells or veillings in the piece, with borders upon them, and clearly defined lines between the borders, indicating where they were to be cut off. *Oppenheimer v. United States* (U. S.) 66 Fed. 52, 53.

"Manufactures of silk," as used in Tariff Act Oct. 1, 1890, par. 414, do not include fans, composed of silk and bone, upon which are executed artistic paintings in water colors, of high value and merit, and which are displayed as ornaments, and not used as fans

ordinarily are. *Tiffany v. United States* (U. S.) 66 Fed. 736, 737.

Garnitures and hussar sets in designs of silk cord and braid stitched in place for the fronts of dress waists and for dress skirts, and bought and sold by the piece, are dutiable as manufactures of silk not specially provided for, under 30 Stat. 187, par. 391. *Garrison, Wright & Co. v. United States* (U. S.) 121 Fed. 149.

Of textile fabrics.

The term "manufacture of textile fabrics," in Const. art. 207, exempting the capital and machinery employed in textile manufactures, does not include the business of cutting and making coats and pants out of jean cloth which has been already manufactured by another. *Cohn v. Parker*, 6 South. 718, 41 La. Ann. 894.

Of wood.

Const. 1879, art. 207, exempting from taxation for a period of ten years capital or other property employed in the manufacture of agricultural implements, furniture, and other articles of wood, does not include the owner of a saw-mill, since the connection of the words "other articles of wood" with the word "furniture" by the conjunction "and" shows that the articles contemplated were such as furniture or other like articles. *Jones v. Raines*, 35 La. Ann. 996, 998.

"Manufactures of wood," as used in Acts 1894, par. 181, relating to duties on manufactures of wood, are articles made of wood, and completed into things different from what the wood of which they are made was before. *Dudley v. United States* (U. S.) 74 Fed. 548, 549 (citing *Hartman v. Wiegmann*, 121 U. S. 606, 7 Sup. Ct. 1240, 30 L. Ed. 1012).

Tariff Act July 27, 1897, c. 11, § 1, Schedule D, par. 208, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], authorizing a duty on manufactures of wood not specially provided for, construed not to include ceilings, painted on wood, taken from a palace in Italy; but it was held that such painting should be classified under paragraph 454, as "manufactures of wood not specially provided for." *White v. United States* (U. S.) 113 Fed. 855.

Of wool.

All Manufactures of Wool, see "All."

The term "manufactures of wool," in Tariff Act July 30, 1846, does not include pulverized waste, flock, or shoddy, which is the refuse thrown in shearing or finishing woolen cloths, as such goods fall within the meaning of the words "waste or shoddy" in the close of the act fixing a duty of 5 per cent. thereon. *Lennig v. Maxwell* (U. S.) 15 Fed. Cas. 312, 313.

"Manufacture of wool," as employed in tariff acts imposing a specific duty on the

"manufacture of wool," does not include wool tops, consisting of wool which has been prepared for spinning. *United States v. Patton* (U. S.) 46 Fed. 461, 464.

"Manufactures of every description, made wholly or in part of wool," as used in Tariff Act Oct. 1, 1890, par. 392, includes thick-woven endless woolen belts or blankets for paper or printing machines. *Bredt v. United States* (U. S.) 65 Fed. 496.

Worsted dress goods are not manufactures of wool, within the meaning of the tariff act of 1894, but of worsted. *Murphy v. United States* (U. S.) 68 Fed. 908, 909.

Worsted shawls, with cotton borders, and worsted suspenders, with cotton straps or ends, are not wool manufactures, or of which wool is a component part, within Act Cong. July 14, 1832, imposing a duty on such manufactures. *Elliott v. Swartwout*, 35 U. S. (10 Pet.) 137, 151, 9 L. Ed. 373.

Diagonal cloths, used mainly for the manufacture of men's wearing apparel, and known to the trade as "worsted," being composed mainly of worsted mixed with about 10 per cent. of shoddy, made from wool and cotton, are subject to duty as manufactures of worsted, under Act March 3, 1883, Schedule K, par. 363, fixing the rate of tariff on all manufactures composed wholly or in part of worsted, and are not subject to duty as manufactures of wool, under paragraph 362. "Though worsted is undoubtedly a product of wool, and might in some aspects be considered a manufacture of wool, yet, manufactures of worsted being subjected by the second paragraph to different duties from those imposed by the first paragraph on manufactures of wool, it necessarily follows that a manufacture of worsted cannot be considered as a manufacture of wool, within the meaning of this statute." *Seeberger v. Cahn*, 11 Sup. Ct. 28, 29, 137 U. S. 95, 34 L. Ed. 599.

By the tariff acts of 1890 and 1894, the distinction made in the previous tariff laws between woolens and worsteds was no longer recognized, and, as worsteds are in fact made of wool, the provision in paragraph 297 of the act of 1894 declaring that the reduction of rates therein provided for on manufactures of wool should not take effect until January 1, 1895, included worsted goods. *United States v. Klumpp*, 169 U. S. 209, 212, 18 Sup. Ct. 311, 42 L. Ed. 720.

Cotton quilts having a fringe of wool are assessable under Act July 24, 1897, c. 11, § 1, Schedule K, par. 366, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1666], as "manufactures made wholly or in part of wool," and are not covered by paragraph 322, Schedule J, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661], governing manufactures of cotton not specially provided for. *United States v. Rouss* (U. S.) 113 Fed. 816.

Lap robes made in part of wool, but of which cotton is the component of chief value, are assessable under Act July 24, 1897, c. 11, § 1, Schedule K, par. 366, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1666], as manufactures made wholly or in part of wool, and are not classifiable under paragraph 322, Schedule J, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661], as manufactures of cotton not specially provided for. *Vandegrift v. United States* (U. S.) 113 Fed. 816.

The term, "manufactures of wool," in Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 366, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1666], fixing a duty on such manufactures, includes woollen bands intended for the use of veterinary surgeons, to be applied to lame legs, and they are not properly taxable under paragraph 447, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1677], which provides for harness, saddles, and saddlery. *Vell v. United States* (U. S.) 113 Fed. 856.

Manufactures of wool, ornamented, assessable under Act July 4, 1897, c. 11, § 1, Schedule K, par. 371, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1667], are fabrics so complete in themselves as to be capable of ornamentation in addition to their structure; and spangled horsehair braids, in very loose braids of very long hair from the mains and tails of horses, are not assessable as wool. *Velt, Son & Co. v. United States* (U. S.) 121 Fed. 205, 206.

Of worsted.

Diagonal cloths, used mainly for the manufacture of men's wearing apparel, and known to the trade as worsteds, being composed mainly of worsted mixed with about 10 per cent. of shoddy made from wool and cotton, are subject to duty as manufactures of worsted, under Act March 3, 1883, Schedule K, par. 363, fixing the rate of tariff on all manufactures composed wholly or in part of worsted, and are not subject to duty as manufactures of wool, under paragraph 362. "Though worsted is undoubtedly a product of wool, and might in some aspects be considered a manufacture of wool, yet, manufactures of worsted being subjected by the second paragraph to different duties from those imposed by the first paragraph on manufactures of wool, it necessarily follows that a manufacture of worsted cannot be considered as a manufacture of wool, within the meaning of this statute." *Seeberger v. Cahn*, 11 Sup. Ct. 28, 29, 137 U. S. 95, 34 L. Ed. 599.

MANUFACTURING COMPANY.

See "Manufacturer."

MANUFACTURING CORPORATION.

See "Manufacturer."

Business of, see "Business."

MANUFACTURING ESTABLISHMENT.

See "Manufacturer."

MANUFACTURING INDUSTRY.

See "Manufacturer."

MANUFACTURING PURPOSES.

See "Purely Manufacturing Purposes."

MANUMISSION.

Manumission is the giving of liberty to one who has been in just servitude. with the power of acting except as restrained by law; and when this liberty is given by will in absolute terms, under the law of the state, it can only be defeated by the person conferring it having done it in prejudice of creditors, or by the slave standing in the other predicament of the law, of being over 45 years of age, and being unable to work and gain a livelihood at the time freedom given shall commence. *Fenwick v. Chapman*, 34 U. S. (9 Pet.) 461, 472, 9 L. Ed. 193.

A manumission must be by some definite and formal act between the master and the slave, and is not to be inferred from casual expressions, however precise and frequent, addressed to uninterested persons, and looking forward to a future act of performance. *State v. Prall's Adm'rs*, 1 N. J. Law (Coxe) 4, 5.

A manumitted person is one who, having been a slave, has been made free. Opinion of Judge Appleton on a Question Submitted by the Senate, 44 Me. 521, 527.

MANURE.

Uncrushed bones, taken through a turnpike to a farm, to be there crushed and used as manure, were exempt from toll, as such, under 3 Geo. IV, c. 126, § 32. *Pratt v. Brown*, 8 Car. & P. 244.

The word "manure," as used in Tariff Act March 3, 1883 (22 U. S. 488), providing that guano manure and all substances expressly used for manure shall be free of duty, means all imported substances which subserve the purpose of enriching the soil, and thus increasing the crops upon it. An article, though in fact sulphate of potash, and at and prior to the passage of the tariff act, generally bought and sold in trade and commerce under the name of "sulphate of potash," is, in cases of the importations thereof which are actually used in the manufacture of fertilizers not dutiable under the provisions for "sulphate of potash," but is free under the provision for "manure and all substances expressly used for manure" contained in the free list, are within the act of 1883. The word "fertilizer" is a mere syn-

onym for "manure." *Heller v. Magone* (U. S.) 38 Fed. 908, 911.

As part of realty.

Manure made on a farm in the usual course of husbandry is so far regarded as an incident of the realty, or appurtenant to it, that, in the absence of any agreement concerning it, it will pass under a deed of the farm. The rule is one of policy, designed to promote the interests of agriculture. There is no reason for its application when the sale is not of the farm, but only of a small parcel of land off the farm, on which the manure happens to be piled. There is nothing in the nature of manure, prior to actual incorporation with the soil, which makes it necessary to regard it as a part of the realty. It may be sold by the owner of the farm separate from the land. Such a sale amounts to a severance of it from the land, and constitutes it personal estate. *Collier v. Jenks*, 32 Atl. 208, 19 R. I. 137, 61 Am. St. Rep. 741 (citing *French v. Freeman*, 43 Vt. 93, 94).

Manure made in the course of husbandry on a farm constitutes a part of the realty passing to the heir, though it is in piles, and not in fit condition to incorporate with the soil. *Fay v. Muzzey*, 79 Mass. (13 Gray) 53, 55, 74 Am. Dec. 619.

The manure made on a farm is a part of the realty, which cannot be removed by the tenant. *Daniels v. Pond*, 38 Mass. (21 Pick.) 367, 371, 32 Am. Dec. 269.

Manure, regarded as a part of the annual produce of a farm, differs essentially from crops generally and other productions of a farm. They are raised for the purpose of removal; they are designed, perhaps with the exception of hay and fodder, to be sold and disposed of as a part of the income and profits of the land; while the manure is never, unless by the most thriftless husbandman, sold or disposed of off the farm, nor used for any purpose but the improvement of the land. It is not liable to be attached for the debts of the owner of the land, as personal property, separately from the farm itself. *Sawyer v. Twiss*, 26 N. H. (6 Fost.) 345, 349.

MANUSCRIPT.

See "Original Manuscript."

The word "manuscript," in section 9 of the copyright act (4 Stat. 438), does not include a picture. "Webster treats the word 'picture' as derived from Latin 'pingere,' 'pictum,' to paint, and as synonymous with 'pictura,' and defines the word as meaning that which is painted; a likeness drawn in colors; hence any graphic representation, as of a person, a landscape, or a building; and

he adopts the language of Bacon, in which he says that pictures and shapes are but secondary objects, showing that, in his view, the picture presents the objects to the observer as a whole, whereas the manuscript only describes the parts or elements of the object, leaving the mind of the reader to aggregate those parts or elements into an entire figure or whole. Webster treats the word 'manuscript' as derived from the Latin words 'manus,' the hand, and 'scribere' 'scriptum,' to write; and as synonymous with 'manuscriptur'; 'scriptum' meaning something written with the hand; a book or paper written with the hand, or a writing of any kind, in contradistinction to a printed document." *Parton v. Prang* (U. S.) 18 Fed. Cas. 1273, 1275.

Abstract books, containing abstracts of the title of lands within a county or district, which have an actual market value, and are usable by any one of ordinary intelligence as a means of profit, are personal property, and taxable. Though they answer the definition of "manuscript," being books written with the hand, the law which applies in cases of manuscript designed for publication has no application. In the latter case the value of the manuscript, in a general property sense, is the published work, or the right of publication, for it is then only that it becomes of interest to others than the authors. It is when the manuscript is by the author put in condition for use that it takes to itself value, in a commercial sense. Before a publication or a transfer of the right of publication for the author, the manuscript is a private memorandum or writing, without significance, except to the author, like other private memoranda. *Leon Loan & Abstract Co. v. Equalization Board of Leon*, 86 Iowa, 127, 134, 53 N. W. 94, 17 L. R. A. 199, 41 Am. St. Rep. 486.

MANY.

"Many" is a word of very indefinite meaning, and, though it is defined to mean "numerous" and "multitudinous," it is also recognized as synonymous with "several," "sundry," "various," and "divers." It has also been defined as being of a certain number, large or small, and, as used in Code Civ. Proc. § 448, authorizing one person to sue for a number where the action is one of common or general interest to many persons, will be held to authorize a suit by one where only three persons are interested. *Hilton Bridge Const. Co. v. Foster*, 57 N. Y. Supp. 140, 141, 26 Misc. Rep. 338 (citing *McKenzie v. L'Amoureux* [N. Y.] 11 Barb. 516; *Kerr v. Blodgett*, 48 N. Y. 62; *Havemeyer v. Brooklyn Sugar Refining Co.*, 13 N. Y. Supp. 873, 26 Abb. N. C. 157; *Clarke v. Clarke*, 29 N. Y. Supp. 338, 8 Misc. Rep. 339; *Prouty v. Michigan Southern & N. J. R. Co.* [N. Y.]

- 1 Hun, 665, 667; *Farnam v. Barnum* [N. Y.]
2 How. Prac. [N. S.] 396, 404).

Compared with majority.

"Many," as used in reference to many well-regulated railroads abstaining from the use of certain warning signals, as absolving from all duty to resort to them, means a mere excess above the adjective "few." "Many" denotes multiplex, and, while it is not the synonym of the word "majority," its meaning is that if a relatively large number, as compared with a whole number, have abstained from the use of the warning signals, then to omit them is not of itself negligence. *Louisville & N. R. Co. v. Hall*, 6 South. 277, 282, 87 Ala. 708, 4 L. R. A. 710, 13 Am. St. Rep. 84.

MAP.

A map is a drawing upon a plane surface representing a part of the earth's surface, and the relative position of objects thereon. It may also be so drawn as to show the geological structure and other physical facts necessary to a complete understanding of the matter at issue. *Montana Ore Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co.*, 70 Pac. 1114, 1126, 27 Mont. 288.

A map is but a transcript of the region which it portrays, narrowed in compass, so as to facilitate an understanding of the original. It may be said to be an abstract of the original in the only way that the subject is susceptible of being condensed and abridged. Citing *Banker v. Caldwell*, 3 Minn. 94, 103 (Gil. 46); *Jackson v. Freer* (N. Y.) 17 Johns. 29, 31. So that the making of a map of an addition implies that the addition had been surveyed, and that such survey was marked on the ground so that the streets, blocks, and lots can be identified. *Burke v. McCowen*, 47 Pac. 367, 368, 115 Cal. 481.

"Map and survey," as used in reference to the location of a railroad, means not only a delineation on paper or other material giving a general or approximate idea of the situation of the road, but also such full and accurate notes and data as are necessary to furnish complete means for identifying and ascertaining the precise position of every part of the line, with courses and distances throughout, so that there can be no doubt where any portion of it is to be found. *Convers v. Railroad Co.*, 18 Mich. 459, 466; *San Francisco & S. J. V. Ry. Co. v. Gould*, 55 Pac. 411, 412, 122 Cal. 601.

MARAUDER.

A marauder is one who, while employed in the army as a soldier, commits larceny or robbery in the neighborhood of the camp,

or while wandering away from the army. 2 Bouv. Law Dict. 133. But in the modern and metaphorical sense of the word, as now sometimes used in common speech, the word seems to be applied to a class of persons who are not a part of any regular army, and are not answerable to any military discipline, but who are mere lawless banditti, engaged in robbery, murder, and all conceivable crimes. The word has not yet received any such fixed, definite, and generally received sense in the popular mind—much less in any critical use of the language—that it can be declared, as a matter of law, by its own force to convey a direct imputation of any specific indictable offense, so as to constitute libel. *Curry v. Collins*, 37 Mo. 324, 328.

MARBLE.

The term "marble," as used in a deed granting to the grantee the right of procuring marble from the grantor's land, free and unmolested, but not to the exclusion of other grantees, is generic, and, whether in the quarry, raised in large or small fragments, or wrought into statues, the material is known by that name. When the grantee only disengaged a portion from the general mass, whether in large or small pieces, it was reducing it to his possession as personal property; and, although the lesser pieces were not as valuable as the larger, no man had a right to dispossess him of them against his will. Hence the grantor had no right to the small pieces of marble necessarily broken off by the grantee in blasting, and in reducing the blocks to suitable shape for sawing. *Rice v. Ferris*, 2 Vt. 62, 64.

"Marble," as used in Tariff Act Oct. 1, 1890, par. 123, Schedule B, includes so-called Mexican onyx, a mineral consisting chiefly of carbonate of lime and certain impurities, principally ferrous oxides, imparting to the material its beautiful and variegated colors, crystalline in structure, and belonging scientifically to the group of calcites, recognized by the leading dictionaries and encyclopedias as belonging to the general class of marble, used for the same general purposes in ornamental and interior decoration as marble, and being worked and finished by the same processes. *Mexican Onyx & Trading Co. v. United States* (U. S.) 66 Fed. 732.

MARE.

The word "mare," when used without a word of qualification, is understood to mean a female of the horse species. *Teal v. State*, 45 S. E. 964, 965, 119 Ga. 102.

A "mare" is the female of the horse or equine genus of quadrupeds (Webster's Dict.) so that an indictment charging the offense

of sodomy as committed with a mare sufficiently charged the genus. *Cross v. State*, 17 Tex. App. 476, 478.

The term "mares, horses, or geldings" in Act March 15, 1821, providing for the payment of a reward to any person who shall pursue and apprehend any person who shall have stolen any mare, horse, or gelding, etc., does not include a mule. *Commonwealth v. Davidson*, 4 Pa. Dist. R. 172.

The term "mare," as used in Paschal's Dig. art. 2409, providing a punishment for any person who steals a mare, does not include a filly. *Lunsford v. State*, 1 Tex. App. 448, 450, 28 Am. Rep. 414.

Horse synonymous.

A mare is included in the term "horse," and therefore an indictment for stealing a horse is satisfied by proof of stealing a mare. *People v. Butler*, 2 Utah, 504; *State v. Gooch*, 29 S. W. 640, 60 Ark. 618 (citing 1 Tayl. Ev. § 290; 1 Bish. Cr. Proc. § 620; *Rex v. Aldridge*, 4 Cox, Cr. Cas. 143; *People v. Monteth*, 73 Cal. 7, 14 Pac. 373); *People v. Pico*, 62 Cal. 50, 52; *Baldwin v. People*, 2 Ill. (1 Scam.) 304; *Davis v. State*, 4 S. W. 590, 23 Tex. App. 210; *Collins v. State*, 16 Tex. App. 274, 281; *State v. Duunavant* (S. C.) 3 Brev. 9, 10, 5 Am. Dec. 530.

"Mare," as used in an Indiana statute providing that any person who shall knowingly suffer his horse "mare," or gelding to be run in a horse race, etc., shall be fined, etc., should be construed in its ordinary meaning as a female horse; and hence an indictment under the statute, charging that the defendant suffered his "mare" to be run in a certain race, is not supported by evidence that the animal run was a horse, since the word "horse," as used in the statute, means a stallion. *Thrasher v. State* (Ind.) 6 Blackf. 460.

Act 1870, p. 121, exempts to every family from forced sale, among other things, two "horses," etc. Held, that the word "horses" should be construed to include geldings, mares, or mules, all being used for the same purpose. The object of the Legislature in passing the exemption law was manifestly to secure to each family a sure means of support, and the exemption of two horses was evidently intended to protect family animals used to cultivate the soil, and it would not be a liberal construction of the legislative intent to say that the use of the word "horses" in that connection excluded geldings, mares, or mules, since all are used for the purpose. *Allison v. Brookshire*, 38 Tex. 199, 201.

"Horse" is a generic term, and includes ordinarily the different species of the animal, however diversified by age, sex, or artificial means; and hence a finding that two "horses"

were released from a chattel mortgage is a sufficient finding that two "mares" were released. *Troxler v. Buckner*, 58 Pac. 691, 692, 126 Cal. 288.

The word "horse" is a generic term, and includes mare, and hence the substitution of the word "mare" for "horse," in an amended complaint in an action against a railroad company for killing a horse, is not the substitution of a new cause of action. *South & N. A. R. Co. v. Bees*, 2 South. 752, 753, 82 Ala. 340.

The term "horse," in a bill of sale of one grey horse, one black horse, and one grey mare, does not include a black or bay mare. *Miller v. Hahn*, 84 N. C. 226, 229.

Code, § 4328, declares "horse" stealing shall include a mule and ass, and each animal of both sexes, and without regard to the alterations which may be made by artificial means. Held, that the word "horse" as used in the statute excludes mares, if used in an indictment, since Code, § 4249, requires an indictment to designate the nature, character, and sex of the animal, and give some description by which its identity shall be ascertained. *Taylor v. State* 44 Ga. 263, 264.

MARGARINE.

In *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279, the court said: "It was discovered by Chevreul, an eminent French chemist, as early as 1813, that ordinary fat, tallow, and oil are chemical compounds consisting of a base, which has been termed 'glycerine,' and of different acids, termed generally 'fat acids,' but specifically stearic, margaric, and oleic acids. These acids, in combination severally with glycerine, form stearine, margarine, and oleine. They are found in different proportions in the various neutral fats and oils; stearine predominating in some, margarine in others, and oleine in others. When separated from their base (glycerine), they take up an equivalent of water, and are called 'free fat acids.'" *Tilghman v. Proctor*, 8 Sup. Ct. 894, 895, 125 U. S. 136, 31 L. Ed. 664.

MARGIN.

Of bay or lake.

Where the words of a grant carry the land granted to the margin, shore, or waters of a natural pond or lake, the word "margin" or "edge" cannot be construed to mean the middle; but a different rule seems to prevail in respect to the construction of grants bounding land on a lake or pond created by artificial means, as by damming back the water of a natural stream, and thus creating a pond or lake. The following is the rule of construction given by Angell: "Where land

is conveyed bounding upon a lake or pond, if it is a natural pond, the grant extends only to the water's edge; but if it is an artificial pond, like a mill pond, caused by the flowing back of the water of the river, the grant extends to the middle of the stream in its natural state." *Fowler v. Vreeland*, 14 Atl. 116, 117, 44 N. J. Eq. 268 (quoting *Ang. Waters*, § 44).

"'Margin of the lake' is a term of unequivocal import, meaning the line where the earth and water meet around the lake." This is the meaning to be given to the term when used in a deed making the margin of the lake a boundary or corner of the land conveyed. *Lembeck v. Andrews*, 24 N. E. 686, 689, 47 Ohio St. 336, 8 L. R. A. 578.

Where land is described as lying in the vicinity of and on the margin of a bay, it is considered to have a boundary on the bay. *State v. Brown*, 27 N. J. Law (3 Dutch.) 13, 17.

Of canal.

"Margin" is defined by Webster as, "specifically, a part of a page at the edge, left uncovered in writing or printing; an uncovered bordering space." As used in a deed executed by the Governor and Auditor of Indiana, conveying to the purchaser all the right, title, and interest of the state to a certain canal, including its banks, "margin," towpaths, etc., it is used in a sense broad enough to cover any property belonging to the state, adjacent to and on the margin of the canal, which had been appropriated or set apart or occupied by the state for canal uses, or is reasonably necessary for such uses. *Indiana Cent. Canal Co. v. State*, 53 Ind. 575, 594.

Of creek or stream.

Sess. Laws 1861, p. 67, § 1, providing that all persons having claims "on the bank, margin, or neighborhood" of any stream of water, creek, or river shall be entitled to use the water thereof, includes all lands in the immediate valley of the stream. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 451.

The use of the words "margin of a creek," to describe one boundary of land as being on a nonnavigable creek, fixes the boundary at the center of the stream. *Ex parte Jennings* (N. Y.) 6 Cow. 518, 527, 16 Am. Dec. 447.

The popular understanding of a description of land, describing one boundary as being upon the "margin of the stream" or on the stream itself, would doubtless limit the grant to the land adjacent to the stream, but the legal construction of such words has by repeated adjudications been established otherwise, and held to fix the boundary to the center of the stream. *Varick v. Smith* (N. Y.) 9 Paige, 547, 551.

Of highway.

The "margin" of a highway, in which the board of supervisors of the county can confer no right or grant anything in or to the lands on such margin, means the border side. *Clay v. Postal Telegraph-Cable Co.*, 11 South. 658, 659, 70 Miss. 406.

A grant of land, described as bounded "by the margin of," or "by the side of," or "by the line of" a highway, excludes the soil of the highway. *Baltimore & O. R. Co. v. Gould*, 8 Atl. 754, 756, 67 Md. 60.

MARGIN (In Stock Market).

A margin is a deposit of money made by the purchaser or seller of goods, stocks, and grains bought or sold for future delivery, to protect the persons from whom they buy, or to whom they sell, from a loss by depreciation or increase in the value of the stocks, goods, or grain so sold. *Memphis Brokerage Ass'n v. Cullen*, 79 Tenn. (11 Lea) 75, 77.

"Margins" is the name of payments required from buyer to seller, or vice versa, to cover fluctuations in the price of products sold for future delivery. If the product sold advances in price, the buyer receives the difference between the price at the time of settlement and that at the time the sale is made; while, if the price declines, the seller is in like manner paid the difference. *Lemonius v. Mayer*, 14 South. 33, 34, 71 Miss. 514.

"Margin," as the term is used in dealings on boards of exchange, bucket shops, etc., means a portion of the price of a commodity purchased which the purchaser pays to the commissionman as a security for the purchase of the property. If the price advances, the purchaser "orders a sale at the advance and pockets the profits"; if the prices recede, the margin stands as security to protect the commissionman if he is compelled to sell at a loss. *Fortenbury v. State*, 1 S. W. 58, 59, 47 Ark. 170.

The "margin" is the security against loss on the part of a broker which may arise from a fall in the market price of the shares of stock purchased for another. The margin, instead of being paid in money, may be secured by a pledge of property, and such security would then be subject to the rules of law governing pledges. *Markham v. Jaudon* (N. Y.) 49 Barb. 462, 465.

"Margin," as used in reference to dealings in stocks on a margin, is nothing but security. In *re Taylor & Co.'s Estate*, 43 Atl. 973, 974, 192 Pa. 304, 73 Am. St. Rep. 812; *Hopkins v. O'Kane*, 32 Atl. 421, 169 Pa. 478.

"Margin" means, in the lexicon of the broker, additional collateral security against loss to the broker while he is carrying stock

for his employer on a declining market. *McNeil v. Tenth Nat. Bank* (N. Y.) 55 Barb. 59, 64.

"Margin," as ordinarily used in connection with stock sales, means the sum deposited by a purchaser of stock with his broker, being a certain percentage of the purchase price of the stock, the broker agreeing to advance the balance of the purchase price on condition that he should hold the stock as security for his advances, with the right to sell it in case of depreciation of value and failure of the purchaser to keep the "margin" good. It is also employed to describe deposits made by sellers and purchasers of stock for future delivery on a variety of conditions and in various ways, and is so used in Const. 1879, art. 4, § 26, providing that contracts for sales of shares of stock on margin shall be void. *Sheehy v. Shinn*, 37 Pac. 393, 394, 103 Cal. 325.

The meaning of the word "margin," in an order to buy shares of stock on margin, is to be proven by witnesses familiar with stocks, and who know from experience and observation the meaning attached to the word. *Hatch v. Douglas*, 48 Conn. 116, 128, 40 Am. Rep. 154.

A payment made on account by a customer to a stockbroker, under an agreement between the customer and the stockbroker in which the stockbroker agreed either to sell or to buy from the customer a certain number of shares of stock, but under which in fact no delivery or transfer of shares was contemplated, is known in stockbrokers' parlance as a "margin." *McClain v. Fleshman* (U. S.) 106 Fed. 880, 882, 46 C. C. A. 15.

The word "margin," as used in the act for the suppression of bucket shops, etc., shall be held to mean and include not only sums of money paid or to be paid upon executory wagering contracts, but also money paid, or agreed or required to be paid, upon executory contracts which the party paying or to pay the same does not intend to complete by receiving or delivering the whole of what is so contracted for, but to resell before the time fixed by contract for such delivery, or at such time to pay or receive the difference between the contract price and the market price of that concerning which such contract is made. *Bates' Ann. St. Ohio* 1904, § 6934a-4.

MARINE.

Webster defines the word "marine" as an adjective "pertaining to the sea; transacted at sea." "Marine," as a noun, he defines to be a soldier that serves on board of a ship and fights in naval engagements. He defines "marines" to be a body of troops trained to do military service on board ships; also the whole navy of a kingdom or state; again, the whole economy of naval affairs.

Nothing is more common than to speak of our "naval marine" and our "commercial marine." The term "marine" is not exclusively appropriate to either; it is common to both; and a bequest to the trustees of the "Marine Society of Philadelphia," where there is no other claimant of the bequest, or no other institution answering to the description of a marine asylum, must mean the society for the benefit, protection, or support of mariners or seamen, whether naval or commercial, and would include captains. *Doughten v. Vandever*, 5 Del. Ch. 51, 73.

MARINE BELT.

The "marine belt" over which the jurisdiction of the municipal laws of the adjacent land extends is generally understood and agreed upon among nations. It is determined by the law of nations, and the extent of such jurisdiction out over the open seas is three miles from shore, or what at one time was the range of a cannon shot. As that range is now extended to about 12 miles, some writers on international law claim that the marine belt ought to reach out that far. Even within this limit the waters are considered as a part of the common highway of nations, and the jurisdiction of the local authorities exists only for the protection of the coast and its inhabitants, not to subject passing vessels to the local laws of the government of the shore. *The Alexander* (U. S.) 60 Fed. 914, 918.

MARINE CARRIER.

Carriers upon the ocean and upon arms of the sea are "marine carriers." Civ. Code Cal. 1903, § 2087.

Carriers upon the ocean, upon arms of the sea, upon the Great Lakes, or such other navigable waters or rivers as are within the admiralty jurisdiction of the United States, are "marine carriers." All others are "inland carriers." Rev. St. Okl. 1903, § 652; Rev. Codes N. D. 1899, § 4176.

MARINE CAUSE.

A canal boat designed to make a transit over the artificial waters of a canal from port to port is not a vessel in the merchant service performing voyages, and hence an action by the master of such a canal boat for his wages is not a "marine cause," within the meaning of Code Civ. Proc. § 317, giving to the City Court of New York the same jurisdiction in marine causes that is possessed by the District Court. *Warn v. Easton & McMahan Transit Co.*, 2 N. Y. Supp. 620, 622.

MARINE CONTRACT.

See "Maritime Contract."

MARINE CORPS.

The "Marine Corps of the United States" is a military body designed to perform military services, and, while they were not necessarily performed on board ships, their active service in time of war is chiefly in the navy, and accompanying or aiding naval expeditions. In times of peace they are located in navy yards mainly, though occasionally they may be used in forts and arsenals belonging more immediately to the army. They may be ordered to service in either branch. They are a military body primarily belonging to the navy, and under the control of the head of the naval department, with liability to be ordered to service in connection with the army, and in that case under the command of army officers. *United States v. Dunn*, 7 Sup. Ct. 507, 508, 120 U. S. 249, 30 L. Ed. 667.

MARINE INSURANCE.

"Historically, marine insurance had its first appearance in any code or system of laws in the law maritime as promulgated by the various maritime states and cities of Europe. It undoubtedly grew out of the doctrine of contribution and general average, which is found in the maritime laws of the ancient Rhodians. By this law, if either ship, freight, or cargo was sacrificed to save the others, all had to contribute their proportionate share of the loss. This division of loss naturally suggested a division of risk, first amongst those engaged in the same enterprise, and next amongst associations of shipowners and shipping merchants. Hence it is found that the earliest form of the contract of insurance was that of mutual insurance, which, according to Pardessus, dates back to the tenth century, if not earlier, and in Italy and Portugal was made obligatory. By a regulation of the latter kingdom, made in the fourteenth century, every shipowner and merchant in Lisbon and Oporto was bound to contribute 2 per cent. of the profits of each voyage to a common fund from which to pay losses whenever they should occur. The next step in the system was that of insurance upon premium. Capitalists familiar with the risks of navigation were found willing to guaranty against them for a small consideration or premium paid. This, the final form of the contract, was in use as early as the beginning of the fourteenth century, and the tradition is that it was introduced into England in that century by the Lombard merchants who settled in London and brought with them the maritime usages of Venice and other Italian cities." A contract of marine insurance is a maritime contract within the admiralty and maritime jurisdiction. *New England Marine Ins. Co. v. Dunham*, 78 U. S. (11 Wall.) 1, 32, 20 L. Ed. 90.

"Marine insurance" is an insurance against risks connected with navigation to

which a ship, cargo, freightage, profits, or other insurable interest in movable property may be exposed during a certain voyage or a fixed period of time. *Rev. Codes N. D. 1899, § 4537; Civ. Code S. D. 1903, § 1883; Civ. Code Mont. 1895, § 3540; Civ. Code Cal. 1903, § 2655.*

MARINE LEAGUE.

A "marine league" is equivalent to three geographical miles, or three sea miles. *Rockland, Mt. D. & S. S. Co. v. Fessenden*, 8 Atl. 550, 552, 79 Me. 140.

MARINE RISK.

See "Extraordinary Marine Risk."

"Marine risk," as used in the charter of a vessel to the government in the time of war, by which the owners were to take the marine risk, but the government the war risks, should be construed to include a stranding of the vessel incurred by her attempt to cross a bar, in charge of a government pilot, on an order of the quartermaster of the government, when the wind was high and the water low, against the judgment of both the master and pilot. *Morgan v. United States*, 81 U. S. (14 Wall.) 531, 535, 20 L. Ed. 738.

"Marine risk," as used in a charter of a vessel during the War of the Rebellion, the owners agreeing to bear "marine risks," the war risks to be borne by the government, should be construed to include the risk of being wrecked by ice in a river, though the United States quartermaster had ordered the captain of the vessel to proceed down the river. *Reybold v. United States*, 82 U. S. (15 Wall.) 202, 206, 21 L. Ed. 57.

Where a vessel was detained by a marshal, at the instance of the holder of a bottomry bond, for repairs to a vessel in stopping a leak, it was a "marine risk," within the meaning of a charter with the United States by which the vessel was to carry military stores, the owner warranting the vessel to be tight, staunch, and strong, and to be kept so, the war risk to be borne by the United States, and the "marine risk" by the owner. *Goodwin v. United States*, 84 U. S. (17 Wall.) 515, 517, 21 L. Ed. 669.

MARINE TORT.

See "Maritime Tort."

MARINER.

Carpenter of ship.

The term "mariner" was said in *Ross v. Walker*, 2 Wils. 264, to include any officer or common man who assists in navigating the ship, except the master, and to even include the surgeon. The term includes the ship's carpenter, and, in short, any one whose serv-

ices are employed to preserve the ship or those on board of her. *Wilson v. The Ohio* (U. S.) 30 Fed. Cas. 149, 150.

Cook or steward.

"Mariners," as used in a statute authorizing mariners to sue in the admiralty court, includes the cook and steward of a ship. *Black v. The Louisiana* (U. S.) 3 Fed. Cas. 503.

"Mariner," as used in 2 Rev. St. p. 60, § 22, providing that nuncupative wills should not be valid unless made by a soldier while in actual military service, or by a mariner while at sea, should be construed to include a cook on board a steamship, though he is not ordinarily understood as a mariner. The term "mariner" applies to every person in the naval or mercantile service, from the common seaman to the captain or admiral. It is not limited or restricted to any special captain on shipboard, but a purser or any other person whose particular vocation does not relate to the sailing of the vessel possess the same right as the sailor. *Morrell v. Morrell*, 1 Hagg. 51; *In re Hayes*, 2 Curt. Ecc. 338. A cook is certainly as much a necessary part of the effective service of the vessel as the purser or the sailor, and there would seem to be no reason why he should seem to be excluded from the advantage of a rule designed for the benefit of men engaged in the marine, without reference to the particular branch of duty performed in the vessel. *Ex parte Thompson* (N. Y.) 4 Bradf. Sur. 154, 158.

A female employed as cook on board of a vessel is a "mariner." *Sage-man v. The Brandywine* (U. S.) 21 Fed. Cas. 140.

Crew of whaler.

Men engaged on a whaling voyage, employed solely for their skill in finding or catching whales or drying out oil, are "mariners," and entitled to the same rights respecting wages as the crew, though they take no part in the navigation of the ship. *The Minna* (U. S.) 11 Fed. 759, 760.

Fisherman.

To ascertain what constitutes a "mariner" within the meaning of the statute of the United States which exempts from militia duty "a mariner actually employed in the sea service of any citizen or merchant of the United States," recourse must be had to the laws of the United States, because, as to the regulation of the militia and of the sea service, these laws are by the Constitution paramount. To be actually employed in the sea service of a citizen or merchant of the United States is to be a "mariner," and in that character liabilities and privations are incurred which are inconsistent with militia duty, because mariners properly engaged are subject to duties and penalties at all times and sea-

sons, and the public interest is as dependent on the uninterrupted performance of their duty as in the training and disciplining of the militia. Now, men employed in the fishing business, in vessels which require a license, and an agreement in the nature of a shipping paper, are as much mariners as those who go on coasting or foreign voyages, and they are so treated by the laws of the United States. *Commonwealth v. Douglas*, 17 Mass. 49, 51.

Within the meaning of a statute exempting from militia duty all "mariners" actually employed in the sea service of the United States, the master of a schooner of the burden of 54 tons, belonging to a citizen of the United States, such schooner being duly enrolled and licensed to carry on the cod fishery, and who for 4½ months previous had in that vessel, with a crew of six men, been engaged in catching mackerel, the usual length of a voyage being from three to four weeks, and who at the time he was warned to appear for militia duty had just returned from a four weeks' voyage and was engaged in discharging the mackerel caught on such voyage, was a "mariner" and entitled to exemption from such duty. *Bayley v. Merritt*, 19 Mass. (2 Pick.) 597, 598.

Lighterman.

Within the meaning of the statute exempting from military duty a "mariner" actually employed in the sea services of a citizen within the United States, one who was a lighterman plying within the harbor of Boston, transporting ballast and stones from one part to another part of the harbor in a vessel under 20 tons burden, was not a "mariner" employed in the sea service, and hence not exempt from military service. *Pratt v. Hall*, 4 Mass. 239, 241.

Officer of vessel.

Every person in the naval or mercantile service, from the common seaman to the captain, is a "mariner." (*Morrell v. Morrell*, 1 Hagg. 51; *In re Hayes*, 2 Curt. Ecc. 338.) A commandant on a gunboat is therefore a mariner. *In re Gwin's Will* (N. Y.) 1 Tuck. 44.

The mate of a vessel is the first officer under the master, and is not a seaman or "mariner," within Laws U. S. vol. 1, p. 134, providing for the government and regulation of seamen in the merchant service. The crew are styled "seamen or mariners." *Ely v. Peck*, 7 Conn. 239, 242.

2 Rev. St. 60, § 22, providing that no unwritten will bequeathing personal estate shall be valid unless made by a "mariner" while at sea, should be construed to include the captain of a coasting vessel while on a voyage. "Mariners" includes the whole service, applying equally to superior officers up to the commander in chief, as to the common sea-

man. *Hubbard v. Hubbard*, 8 N. Y. (4 Seld.) 196, 199.

Purser.

"Mariner or seaman," as used in the statute of wills, 1 Vict. c. 26, § 11, providing that any "mariner or seaman," being at sea, might dispose of his personal estate as he might have done before the making of the act, should be construed to include the purser of a man-of-war. The term "mariner or seaman" does not exclude any person in Her Majesty's navy, though superior officers of the ship, being at sea, from the exception contained in the act. The reasons for the provision apply equally to a commander in chief as to a common seaman. In *re Hayes*, 2 Curt. Ecc. 338.

In an action against a steamship company to recover for a sack of money, containing \$5,000, which had been delivered to such company for transportation, the bill of lading providing that the company should not be liable for any loss occasioned by "theft on land or afloat," "barratry of master or mariners," the sack of money being stolen by the purser, the court said: "I am of the opinion that the purser does fall within the term 'mariner' as used in this bill of lading, and that embezzlement by him was barratry. He was permanently attached to the ship as one of its officers, and performed duties which would otherwise devolve upon the master. He lived on board the ship and had no other residence, and had been thus employed by the defendant for several years. He was one of the ship's company, and it is very difficult to perceive that when the shipowner stipulated for exemption from liability for the dishonesty of all the officers and crew of the vessel, including the master, it should have been intended to exclude this single member of the ship's company. It is not necessary to bring a person within the definition of 'mariner,' that he should be engaged in navigating the ship, provided his employment is on the sea and he is attached to a ship. The duties of the purser are marine duties. He is subordinate to the captain, and performs duties which would otherwise be performed by him, and in earlier times were so performed. (*McLachlen on Shipping*, 146, 148; *The Gratitude*, 3 C. Rob. 240, 257.) The cook and steward have been held to be mariners, and entitled to sue as such. (*The Jane and Matilda*, 1 Hagg. Adm. 187, 190.) So of porters permanently employed on passenger vessels; also all subordinate employes, engineers, clerks, cooks, etc., when necessary to the service of the ship. (*Bouv. Law Dict. 'Mariner.'*) By Rev. St. U. S. § 4573 [U. S. Comp. St. 1901, p. 3102], the master of every foreign-bound vessel is required to give the collector a list of all the persons composing the ship's company, and by section 4612 [U. S. Comp. St. 1901, p. 3120] it is

provided that every person (except apprentices) who shall be employed or engaged to serve in any capacity on board the ship shall be deemed to be a seaman. The same definition is made in the English statute (7 and 8 Vict. c. 112, § 2), any 'seaman, that is, any person engaged to serve in any capacity on board his ship (apprentices excepted). I can see no room to doubt that a purser permanently attached to the ship comes within the description of seaman or mariner, as defined and understood at the time this bill of lading was issued, and I find no foundation for holding that a theft by him is not barratry." *Spinetti v. Atlas S. S. Co.*, 80 N. Y. 71, 80, 81, 36 Am. Rep. 579.

Seamen on rivers or bays.

The master of a sloop sailing on the Hudson between Poughkeepsie and New York was not a "mariner" within the exemption from militia duty in 2 Laws U. S. p. 93. *Brush v. Bougardus* (N. Y.) 8 Johns. 157, 159.

"The provision under which the respondent claims an exemption from duty under the militia laws of the United States and of this commonwealth is thus expressed: 'All mariners actually employed in the sea service of any citizen or merchant within the United States.' He claims to be such a mariner, on the ground that he is master of a vessel or lighter of 33 tons, enrolled and licensed, and as having paid hospital money. The exemption is to be determined by the occupation of the person claiming to be a mariner, and not by the character of the vessel; for a small vessel may be enrolled, and hospital money may be paid, for the very purpose of evading militia duty. It appears that the respondent was not employed in the sea service, but only in the transportation of stones, etc., from one part of the same district to another. There is no difference in principle between this case and that of *Pratt v. Hall*, 4 Mass. 239. For the difference in the size of the vessel, and the increased distance of transportation, cannot give an exemption, where the nature of the business is the same, and where it is not necessary to go beyond the bay, or out of the reach of common-law jurisdiction, to pursue that business. The case of fishermen would seem to require the exemption much more than those who are employed, like the respondent, in transporting stones from one river or inlet to another within the same bay; for the former are constantly upon the water, and cannot so well calculate their business on shore as the latter. But the Legislature has refused this exemption to fishermen. For, by the statute of 1814, c. 63, they repealed the statute of 1810, c. 111, which secured this privilege to fishermen, considering them not as mariners employed in the sea service. Those fishermen who are employed in the bank fishery are probably to be considered as mariners

while actually engaged therein. But there seems to be no reason why the master of a small vessel, plying from Braintree or Weymouth to Boston, should be exempt, which would not in a great measure apply as well to teamsters who should carry on the same business in wagons and carts." *Commonwealth v. Newcomb*, 14 Mass. 394, 395.

A seaman contracting for wages on a voyage between ports of adjoining states, and on the tide waters of a river or bay, is a "mariner" within the statute giving federal courts jurisdiction of maritime contracts. *Smith v. The Pekin* (U. S.) 22 Fed. Cas. 620.

Slave seaman.

A slave hired as a seaman is a mariner, so that his wages might be forfeited by his misconduct. *Slacum v. Smith* (U. S.) 22 Fed. Cas. 316, 317.

Stevedore.

"Mariners," as used in a bill of lading exempting the carrier from the negligence or default of the "pilot, master, and mariner," does not include stevedores employed by them to unload the vessel. *Zung v. Howland* (N. Y.) 5 Daly, 136, 137.

MARINERS OF THE UNITED STATES.

Act Cong. 1803, c. 62, 2 St. 203, c. 9, providing for the recovery of a penalty for the benefit of the United States where a master of a vessel refuses to take destitute "mariners and seamen of the United States" on board his vessel and transport them to the United States, includes foreigners while employed as seamen in the merchant ships of the United States, as well as citizens of the United States. *Matthews v. Offley* (U. S.) 16 Fed. Cas. 1128, 1129.

MARINES.

As soldiers, see "Soldier."

"Marines" are simply soldiers serving aboard ship. *The Rita* (U. S.) 89 Fed. 763, 767.

"Though marines are not in some senses seamen, and their duties are in some respects different, yet they are, while employed on board public vessels, persons in the naval service, persons subject to the orders of naval officers, persons under the government of the Naval Code as to punishment, and persons amenable to the Navy Department. Their very name of 'marines' indicates the place and nature of their duties generally." *Wilkes v. Dinsman*, 48 U. S. (7 How.) 89, 124, 12 L. Ed. 618, and their pay is fixed in the same way as that of seamen, and they have always been associated with the navy, except when specially detailed by the president for

service in the army. *United States v. Dunn*, 7 Sup. Ct. 507, 509, 120 U. S. 249, 30 L. Ed. 667.

MARITAL.

Relating to, or connected with, the status of marriage; pertaining to a husband; incident to a husband. *Black, Law Dict.*

MARITAL PORTION.

When a wife has not brought any dowry, if the husband die rich, leaving a survivor in necessitous circumstances, the latter has the right to take out of the succession of the deceased what is called the "marital portion"; that is, the one-fourth of the succession in full property if there be no children, and the same portion in usufruct only when there are but three or a smaller number of children. *Rev. Civ. Code*, art. 2382; *Dupuy v. Dupuy*, 27 South. 287, 52 La. Ann. 869.

MARITAL RIGHTS.

The word "marital," as used in *Civ. Code*, § 55, providing that consent alone will not constitute marriage, but that it must be followed up by a solemnization or by a mutual assumption of marital rights, duties, or obligations, is "to be treated as the equivalent of 'conjugal,' to include the rights and duties of the wife as well as those of the husband." *Sharon v. Sharon*, 16 Pac. 345, 349, 75 Cal. 1.

Civ. Code, § 55, provides that marriage is a personal relation arising out of a civil contract to which the consent of the parties capable of making it is necessary. Consent alone will not constitute marriage. It must be followed by a solemnization or by a mutual assumption of "marital rights, duties, or obligations." These words mean such rights, duties, and obligations as arise from the contract of marriage and constitute its object, and therefore embrace what the parties to such contract mutually agree to perform towards each other and to society. *Kilburn v. Kilburn*, 26 Pac. 636, 637, 89 Cal. 46, 23 Am. St. Rep. 447.

Act Cong. Republic Jan. 20, 1840, § 4, provides that on dissolution of marriage by death the community property shall go to the survivor, if the deceased have no descendants. Section 13 provides that the marital rights of persons who married elsewhere and removed to Texas before passage of the act shall be regulated by the law as it was previously. Held, that "marital rights" does not include the capacity of the survivor to inherit the community property, and hence, where persons were married in Alabama, and removed to Texas in 1839, descent of the community property on the death of the husband was regulated by section 4, and not by

the former law. *McCown v. Owens*, 40 S. W. 336, 337, 15 Tex. Civ. App. 346.

MARITIME.

"Maritime" means pertaining to the sea or ocean, or the navigation thereof; or to commerce conducted by navigation of the sea or (in America) of the Great Lakes and rivers. It is nearly equivalent to "marine" in many connections and uses; in others, the two words are used as quite distinct. *Black, Law Dict.*

MARITIME CHARACTER.

Maritime character means any act which contributes to the navigation of a vessel, presently or prospectively; as used in the test of admiralty jurisdiction, that the services arising from the contract to be performed on water, or for the benefit of a vessel which is afloat, must be of a "maritime character." *The Sirius* (U. S.) 65 Fed. 226, 228.

MARITIME CONTRACT.

A maritime contract is "a contract concerning the sea." *The Vidal Sala* (U. S.) 12 Fed. 207, 212.

A maritime contract is a contract to be performed on the high seas. *The O. C. Trowbridge* (U. S.) 14 Fed. 874, 876.

Maritime contracts are such as relate to commerce and navigation. *Edwards v. Elliott*, 88 U. S. (21 Wall.) 532, 553, 22 L. Ed. 487.

"It is not easy to get an exact definition of the term 'maritime contract.' It is far easier to say what is not a maritime contract. 'The true criterion,' says Mr. Justice Bradley, 'is the nature and subject-matter of the contract, as where it has reference to maritime services or maritime transactions.' *New England Marine Ins. Co. v. Dunham*, 78 U. S. (11 Wall.) 1, 20 L. Ed. 90. *Browne*, in his work on Civil and Admiralty Law (volume 2, p. 82), asks the question, 'What contracts should be cognizable in admiralty?' and answers it, 'All contracts which relate purely to maritime affairs.' Maritime contracts are such as relate to commerce and navigation. *The Orpheus* (U. S.) 30 Fed. Cas. 859. To be a maritime contract it is not enough that the subject-matter of it, the consideration or the service, is to be done on the sea. The contract must be in its nature maritime. It must relate to maritime affairs, and have a connection with the navigation of the ship, with her equipment or preservation, or with maintenance or preservation of the crew who are necessary to the navigation and safety of the ship. Thus, a carpenter, surgeon, and steward, though not strictly mariners or seamen, may all sue for their wages in admiralty, because they contribute

in their several ways to the preservation and support of the vessel and her crew." *Doolittle v. Knobloch* (U. S.) 39 Fed. 40 (citing *The Farmer* [U. S.] 23 Fed. Cas. 877).

A maritime contract is one which relates to the business of navigation of the sea or to business appertaining to commerce or navigation to be transacted or done on the sea or in seaports. Contracts relating to the interstate navigation of our inland lakes and great rivers are not in a strict sense maritime contracts, though they are within admiralty jurisdiction. *Holt v. Cummings*, 102 Pa. 212, 215, 48 Am. Rep. 199.

Maritime contracts include, among other things, charter parties, affreightments, marine hypothecations, contracts for marine service in the building, repairing, supplying, and navigating ships, contracts and quasi contracts respecting averages, contributions and jettisons, and policies of insurance. *De Lovio v. Boit* (U. S.) 7 Fed. Cas. 418, 435; *The Josephine*, 39 N. Y. 19, 22.

The subject-matter is the test of a marine contract. A contract appertaining to commerce and navigation, wherever made, to be performed on the navigable waters of the United States, is in general a marine contract. *United States v. Burlington & Henderson County Ferry Co.* (U. S.) 21 Fed. 331, 336.

Maritime contracts are contracts that pertain to maritime commerce and navigation. Thus a letter of credit issued for the purpose of directly aiding the prosecution of current voyages, and upon the faith of the freights to be earned as a part of the contract, is as purely maritime as a bottomry bond, and no commercial transactions are more characteristically maritime than these. *Freights of the Kate* (U. S.) 63 Fed. 707, 720.

Charter party.

A charter party in which there is complete contract for maritime services to be rendered is a maritime contract within the jurisdiction of the United States courts. *Maury v. Culliford* (U. S.) 10 Fed. 388, 391.

A charter party is a maritime contract, and, as between the parties to it, a court of admiralty has jurisdiction to determine the obligations arising therefrom, whether they have been violated, as to any damages suffered by either party or both parties, and to pronounce judgment therefor. *The Fifeshire* (U. S.) 11 Fed. 743.

Consortship between wreckers.

An agreement of consortship between the masters of two vessels engaged in the business of wrecking is a maritime contract enforceable in admiralty. *Andrews v. Wall*, 44 U. S. (3 How.) 568, 11 L. Ed. 729.

Furnishing coal to dredge.

A maritime contract must concern transportation by sea; it must relate to navigation and to maritime employment; it must be one of navigation and commerce on navigable waters. So it is held that a contract under which coal is furnished to a steam dredge engaged in sucking up material from the bottom of a lake and discharging it through pipes upon the distant shore, not for the purpose of improving navigation, but merely to make a fill to be used for railroad purposes, is not a maritime contract under which a maritime lien may arise. *In re Hydraulic Steam Dredge No. 1*, 80 Fed. 545, 556, 25 C. C. A. 628.

A maritime contract must concern transportation by sea; it must relate to navigation and to maritime employment; it must be one of navigation and commerce on navigable waters; and a contract made for the shipment of a cargo of grain from Chicago to Buffalo, the grain to be stored in the vessel at Buffalo until the following spring, is not maritime in character in respect to the provision for such storage. *The Richard Winslow* (U. S.) 71 Fed. 426, 428, 18 C. C. A. 344.

Furnishing motive power.

A contract to furnish motive power to a vessel is a maritime contract. *The W. J. Walsh* (U. S.) 30 Fed. Cas. 405.

Hypothecation.

Maritime hypothecations fall under the denomination of "maritime contracts." *Freights of the Kate* (U. S.) 63 Fed. 707, 720.

Insurance.

The criterion whether a contract is within admiralty and maritime jurisdiction is the nature and subject-matter of the contract—that is, whether they have reference to maritime service, maritime transactions, or maritime casualties, without regard to the place where they were made—and therefore a contract of marine insurance is a maritime contract within admiralty jurisdiction, though the contract was made on the land and performed on the land, since payment depends on the maritime risk and guaranties one against loss from the dangers of the sea, and cannot be distinguished from a contract of affreightment, in which the master guaranties that the goods shall be safely transported; and, moreover, a contract of insurance and the rights of the parties arising therefrom are affected by and mixed up with all the questions that can arise in maritime commerce, as jettison, abandonment, average, salvage, capture, prize, bottomry, etc. *New England Marine Ins. Co. v. Dunham*, 78 U. S. (11 Wall.) 1, 31, 20 L. Ed. 90.

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Materialman's contract.

The contract of a materialman is a maritime one, and may be enforced in admiralty. *The City of Salem* (U. S.) 10 Fed. 843, 844 (citing *The St. Lawrence*, 66 U. S. [1 Black] 522, 17 L. Ed. 180).

Obtaining charter.

A contract to obtain a charter for a vessel is not maritime, so as to give a court of admiralty jurisdiction of an action thereon to recover commissions. *Taylor v. Weir* (U. S.) 110 Fed. 1005.

Procuring insurance.

While a contract for insurance on a proper subject is a maritime contract, a contract to procure such insurance is not a maritime contract enforceable in admiralty. *Marquardt v. French* (U. S.) 53 Fed. 603.

Salvage.

A contract for salvage is a maritime contract, and hence admiralty has jurisdiction thereof. *Ex parte Easton*, 95 U. S. 68, 76, 24 L. Ed. 373.

Services of ship's brokers, etc.

A contract for services such as are usually performed by ship's brokers and business agents, and performed on land, is not a maritime contract. *The Humboldt* (U. S.) 86 Fed. 351, 352.

Shipbuilding.

Contracts for shipbuilding, or for labor performed or materials furnished in the construction of ships or vessels, are not maritime contracts, and not cognizable in the admiralty courts. *The M. Tuttle v. Buck*, 23 Ohio St. 565, 567, 13 Am. Rep. 270; *Roach v. Chapman*, 63 U. S. (22 How.) 129, 132, 16 L. Ed. 291; *McMaster v. One Dredge* (U. S.) 95 Fed. 832, 835; *People's Ferry Co. v. Beers*, 61 U. S. (20 How.) 393, 401, 15 L. Ed. 961; *Olsen v. Birch*, 65 Pac. 1032, 1033, 133 Cal. 479.

A lien given by a state statute for labor done in the original construction of a vessel, even after she is launched, is not enforceable in the federal admiralty court, the contract not being of a maritime nature. *The William Windom* (U. S.) 73 Fed. 496, 499.

Steamship agent's contract.

A contract constituting a person general passenger and freight agent of a steamship, and giving him entire control of her passengers and freight business, is not a maritime contract. *The Humboldt* (U. S.) 86 Fed. 351, 352.

Transportation of freight or passenger.

A contract of affreightment entered into between a steamship company and the ship-

pers of goods is a maritime contract cognizable in admiralty. *The Queen of the Pacific* (U. S.) 61 Fed. 213, 214.

A contract entered into with a shipowner by which, on a certain consideration, the shipowner agreed to transport the contractor from New York to San Francisco as a steerage passenger, with reasonable dispatch, and to furnish him with proper and necessary food, water, and berth or other conveniences for lodging, on the voyage, as it related exclusively to a service to be performed on the high seas, and pertained solely to the business of commerce and navigation, was held to be a maritime contract, the court saying that there was no distinction in principle between such a contract and a contract for the transportation of merchandise. *The Moses Taylor*, 71 U. S. (4 Wall.) 411, 427, 18 L. Ed. 397.

A contract, claim, or service, to be cognizable in the admiralty, must be maritime in such a sense that it concerns rights and duties pertaining to commerce or navigation. On the trial of a libel to recover freight, respondents tendered a certain amount which they considered to be due, the balance of the claim consisting of money advanced by libellant steamship company to pay charges for railway transportation of the goods to the port at which they were taken by libellant's vessel. Held, that the agreement to reimburse libellant for such advances was not a maritime contract. *Pacific Coast S. S. Co. v. Moore* (U. S.) 70 Fed. 870, 871.

Wharfage contract.

The term "maritime contract" includes a contract for wharfage. *Ex parte Easton*, 95 U. S. 68, 76, 24 L. Ed. 373.

A contract of wharfage is a maritime contract for which, if the vessel or water craft is a foreign one, or belongs to the port of a city other than that where the wharf is situated, a maritime lien arises against the ship or vessel in favor of the proprietor of the wharf. *Broeck v. The John M. Welch* (U. S.) 2 Fed. 364, 371 (citing *Ex parte Easton*, 95 U. S. 68, 24 L. Ed. 373).

MARITIME HYPOTHECATION.

Maritime hypothecations had their origin in the necessities of commerce, and are said to be the creatures of necessity and distress. They are of high and privileged character, and are held in great sanctitude by maritime courts. Such contracts are intended for the purpose of procuring the necessary supplies for ships which may be in distress in foreign ports where the master and owner are without credit. *Burke v. The M. P. Rich* (U. S.) 4 Fed. Cas. 742, 744.

"Hypothecation," as the term is used in maritime law, is frequently used to desig-

nate a bottomry mortgage of the vessel made by the master in case of necessity, and without any personal responsibility. *Cole v. White* (U. S.) 26 Wend. 511, 516.

An hypothecation, under the maritime law, is equivalent to an assignment as security under the municipal law. *Freights of the Kate* (U. S.) 63 Fed. 707, 714.

MARITIME INTEREST.

Maritime interest is the premium paid for the loan secured by means of a contract of bottomry. Such interest may be fixed, without necessary limit, from a legal rate of interest where the loan is made or where it is to be paid. *The Dora* (U. S.) 34 Fed. 343, 344.

MARITIME JURISDICTION.

See "Admiralty Jurisdiction."

MARITIME LAW.

"A maritime law is not the law of a particular country, but the general law of nations." *Vasse v. Ball* (Pa.) 2 Yeates, 178, 182 (quoting 2 Burrows, 887; Lofft. 639).

"The maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law, or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several states of this Union also presents an analogous case. It is the basis of all state laws, but is modified as each sees fit. The actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. The maritime codes of France, England, Sweden, and other countries are not one and the same in every particular. But whilst there is a general correspondence between them, arising from the fact that each adopts the essential principles and the great mass of the general maritime law as a basis of its system, there are varying shades of difference, corresponding to the respective territory, climate, and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit." *The Lottawanna*, 88 U. S. (21 Wall.) 558, 572, 22 L. Ed. 654.

The words "maritime law" include jurisdiction of all things done upon or relating to

the sea, or, in other words, all transactions and proceedings relating to commerce and navigation, and to damages and injuries, upon the sea. It may now be said, without fear of contradiction, that it extends to civil marine torts and injuries, illegal dispossession or withholding of possession from the owners of ships, municipal seizures of ships, etc. Petitory as well as possessory suits are cases of admiralty and maritime jurisdiction. *Jervy v. The Carolina* (U. S.) 66 Fed. 1013, 1015.

The maritime law has no application to flatboats on the Ohio river, their pilots and navigators. *Leddo v. Hughes*, 15 Ill. (5 Peck) 41, 45.

Maritime law is entirely distinct from the law of the land. It is and always has been a distinct and separate jurisprudence. But though relating to the sea, and radically different in some respects from the conception of municipal law, it has always been an attribute of some sovereignty, and enforced in the courts of such sovereignty. The Constitution of the United States transfers this jurisprudence from the sovereignty of the state to that of the nation. The maritime law proper finds its expression now only in the national will. The state can add nothing to it, nor take anything from it; and, in the field of strictly maritime law, state legislation is ineffectual except as such legislation may be adopted by the national will. *The Unadilla* (U. S.) 73 Fed. 350, 351.

MARITIME LIEN.

Maritime liens proper are such as the maritime law has recognized as needful to the affairs of the sea. Their primary object is to give wings and legs to the ship. They constitute the first debt of a ship. The debt arises from the necessity of civil existence. *The Unadilla* (U. S.) 73 Fed. 350, 351.

A maritime lien is an implied hypothecation of the ship, and depends upon the intention of the parties, to be gathered from all the circumstances of the transaction. Where there are several equal co-owners of the vessel, resident in different states, no lien will arise for supplies furnished in a state of the known residence of either. *Stephenson v. The Francis* (U. S.) 21 Fed. 715, 719.

Maritime liens are stricti juris, and do not arise on all contracts made by the owners to result in profit to the ship. The test is to be applied to the subject, and not to the object. It is the subject-matter of the contract which must be maritime, and not the mere object—the ship. *Taylor v. Weir* (U. S.) 110 Fed. 1005.

A maritime lien upon the offending ship for injury by a collision is a jus in re in the ship herself, and carries with it the right

to libel her in an admiralty court of the United States, unless the owners institute proceedings in such a court to limit their liability; and an admiralty court has peculiar rules of its own in some respects, such as the priority of this and other liens, and the effect of contributory negligence of the libellant upon the recovery of damages. *Paxson v. Cunningham* (U. S.) 63 Fed. 132, 134, 11 C. C. A. 111.

A maritime lien is a jus in re, which is a proportion of the thing made by the law, to the end that deeds of a certain class be always secure. It is not a security collateral with the liability of the owner, but a special property in the ship, which practically can be realized in no other way but by a proceeding in rem against the ship; and the liability of the ship was originally the primary liability, the liability of the owner being merely incidental to his ownership. *The Kate Tremaine* (U. S.) 14 Fed. Cas. 144, 147.

Maritime liens for supplies and repairs are of ancient origin, and were recognized, both in England and on the Continent, to bind both foreign and domestic vessels. Both have generally been bound upon the Continent, and also by the admiralty law of England, but such law was denied enforcement by writs of prohibition from the English common-law courts in the case of foreign and domestic vessels alike. In the American admiralty law there has been a general tendency to hold a vessel liable for her repairs and supplies, unless the owner, to the knowledge of the furnisher, has declined to allow the lien. *The Underwriter* (U. S.) 119 Fed. 713, 715.

A maritime lien is a claim or privilege upon the thing, to be carried into effect by legal process. *The Lamington* (U. S.) 87 Fed. 752, 755.

Credit of vessel.

The fundamental requisite for the creation of a maritime lien is a maritime claim, contracted or incurred on the credit of the vessel, and not on the credit of the owner or other person in interest. In the absence of such credit in the transaction, express or implied, there is no hypothecation, but the credit to the vessel is implied when the obligation is incurred by the master under conditions otherwise authorizing the implied hypothecation. A contract of like nature made by the owner or charterer in person, not being master as well, stands on a different footing—is presumptively made on the personal credit of the contracting party—and, without proof of facts or circumstances to repel the presumption, no lien attaches. *The C. W. Moore* (U. S.) 107 Fed. 957, 958.

That a contract of insurance on a ship is in its nature maritime is no longer an

open question. It is, however, a contract for the personal indemnity of the insured. The credit is given to him, and not to the ship. The principle upon which the law recognizes a lien for necessities is that the ship may thus be enabled to engage in the competition of commerce. Security is given the materialman, it is true, but the chief benefit is to the ship. It enables her to sail. A contract of insurance in no way aids the ship. She sails no better and no faster because of the insurance. It puts no steam into her boilers and no wind in her sails, so that no general lien is created by the maritime law in favor of the insurer for unpaid premiums. In *re Insurance Co. of Pennsylvania* (U. S.) 22 Fed. 109, 115.

Possession.

A maritime lien, unlike a lien at common law, may exist without possession of the thing upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim for damages. *The J. E. Rumbell*, 13 Sup. Ct. 498, 500, 148 U. S. 1, 37 L. Ed. 345; *The Rock Island Bridge*, 73 U. S. (6 Wall.) 213, 215, 18 L. Ed. 753; *The Nestor* (U. S.) 18 Fed. Cas. 9, 13; In *re Byrne* (U. S.) 97 Fed. 762, 764.

A "maritime lien" does not include or require possession. The word is used in maritime law, not in the strict legal sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession, actual or constructive, but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the civil law, by which there might be a pledge with possession, and a hypothecation without possession, and by which, in either case, the right traveled with the thing into whosoever possession it came. *The John G. Stevens*, 18 Sup. Ct. 544, 545, 170 U. S. 113, 42 L. Ed. 969; *The Frank G. Fowler* (U. S.) 8 Fed. 331, 335.

A maritime lien is a *jus in re*, a proprietary interest in the thing, which may be enforced directly against the thing itself by a libel in rem, in whosoever possession it may be, and to whomsoever the general title may be transferred. *The Young Mechanic* (U. S.) 30 Fed. Cas. 873, 875; *The J. W. Tucker* (U. S.) 20 Fed. 129, 132.

"The maritime privilege or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a *jus in re*, without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding in rem. This sort of proceeding against personal property is unknown to the

common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed 'proceedings in rem,' are not within the category. *Vandewater v. Mills*, 60 U. S. (19 How.) 82, 89, 15 L. Ed. 554; *The Glide*, 17 Sup. Ct. 930, 932, 167 U. S. 606, 42 L. Ed. 296; *The Arcturus* (U. S.) 18 Fed. 743, 745, 746.

As a legal lien.

A maritime lien for damages is a legal and not an equitable lien, though doubtless it got its rank, if not its existence, from the strong inherent equity of holding a ship answerable for injuries done by its instrumentality, no matter who was on board, or to whom it belonged, or who had mortgages or other liens, maritime or nonmaritime, upon it, and no matter whether the wrong was done or the seizure for it was made on the high seas, or in a home port, or in a foreign port. Indeed, though this lien owed its origin to public policy, this very equity underlies that policy, and thus was the ultimate ground of the lien, both with reference to its extent and its rank. *Green v. Coast Line R. Co.*, 24 S. E. 814, 820, 97 Ga. 15, 33 L. R. A. 806, 54 Am. St. Rep. 379.

As a vested interest.

A maritime lien is a vested proprietary interest in the property itself from the time of the accrual thereof, and is not a mere right to arrest the vessel for debt, which constitutes no incumbrance thereon. *The J. W. Tucker* (U. S.) 20 Fed. 129, 132.

A maritime lien is not a mere right or remedy, but a right in the nature of a title, which, when enforced, transfers the property in the vessel from the time when the lien should attach. *Briggs v. A Light Boat*, 89 Mass. (7 Allen) 287, 295, 296.

MARITIME LOAN.

A maritime loan is a contract by which the lender lends to the borrower a certain sum of money upon condition that, in case of loss of the effects on account of which it is lent by any peril of the sea or superior force, the lender shall not be repaid unless to the amount of what shall remain. *The Draco* (U. S.) 7 Fed. Cas. 1032, 1042.

MARITIME OBLIGATION.

A liability for general average is a "maritime obligation" within the United States statute which gives to the admiralty court jurisdiction of "maritime obligations"; hence the admiralty court has jurisdiction of an action brought on a general average bond. *The San Fernando v. Jackson* (U. S.) 12 Fed. 341.

MARITIME SERVICE.

The term "maritime service," as used in the admiralty law, means a service performed on waters within the ebb and flow of the tide. *Thackarey v. The Farmer of Salem* (U. S.) 23 Fed. Cas. 877, 879; *The Atlantic* (U. S.) 53 Fed. 607, 609.

A service is not necessarily a "maritime service" because rendered on the high seas or on navigable rivers. It must have some relation to commerce or navigation; some connection with a vessel employed in trade—with her equipment, her preservation, or the preservation of her crew. *Cope v. Vallette Dry-Dock Co.* (U. S.) 16 Fed. 924, 925.

Furnishing air pump.

Furnishing an air pump to a water craft commonly called a chucker, used for pumping water out of a dry dock in the Hudson river, is a maritime service, and the lien given by local law for such service may be enforced in admiralty. *Winslow v. A Floating Steam Pump* (U. S.) 30 Fed. Cas. 308.

Towing raft.

The question whether one who, in the performance of a contract, rendered services in towing a floating raft of lumber on a navigable river, has a maritime lien for his services, is one on which the authorities are in conflict. Perhaps the sounder argument supports the position that such a raft is the proper subject of admiralty. *McCaffrey v. Knapp, Stout & Co. Company*, 74 Ill. App. 80, 85.

Unloading vessel.

Every service rendered to a ship in discharging her own maritime obligations must be held to be maritime, for it has reference exclusively to a maritime transaction. The work of a stevedore in loading or unloading cargo is a maritime service. *The Hattie M. Bain* (U. S.) 20 Fed. 389, 390.

The United States statute giving a lien on a vessel on or for which maritime services were rendered, etc., should be construed to include the services of a stevedore, in loading or unloading cargo in other than the home port. *The Main* (U. S.) 51 Fed. 594, 598, 2 C. C. A. 569.

Using ship as warehouse.

A ship is not employed in a maritime service when used merely as a warehouse to hold her cargo after the completion of a voyage and while navigation is suspended. The actual employment of a structure designed for use in the transportation of merchandise or passengers by sea is not, under all circumstances, conclusive. *McRae v. Bowers Dredging Co.* (U. S.) 86 Fed. 344, 347.

MARITIME TORT.

A marine tort is an unlawful act, injurious to another, independent of contract, happening or being committed on the sea or upon tide water. *Philadelphia & Havre De Grace Steam Towboat Co. v. Philadelphia, W. & B. R. Co.* (U. S.) 19 Fed. Cas. 474, 475.

A marine tort is a tort that occurs on any public navigable water of the United States, whether caused by a wrongful act or omission. *Holmes v. Oregon & C. Ry. Co.* (U. S.) 5 Fed. 75, 77.

Maritime torts are all injuries, trespasses, or unlawful or injurious acts done and committed on the seas or navigable streams connected with the ocean. Their character as maritime depends exclusively on the place where they are committed. In *re Long Island North Shore Passenger & Freight Transp. Co.* (U. S.) 5 Fed. 599, 608.

Where a tort is committed upon a public navigable water of the United States, it is a marine tort within the jurisdiction of the admiralty court. Where the voyage upon which the tort was committed was made on a public navigable water of the United States, it matters not whether the vessel was moving in connection with a railroad or otherwise, or whether it was plying up or down a stream or across it, the length or direction of the voyage, or its relation to other means or modes of transportation, it in no way affects the fact that the tort was a marine tort. *Holmes v. Oregon & C. Ry. Co.* (U. S.) 5 Fed. 75, 77.

A maritime tort cannot be made to depend on the kind of commerce in which the ship is employed. If a marine tort be committed anywhere on a navigable water of the United States, whether the ship or vessel be engaged in commerce wholly domestic to a state, or interstate, the case is one of admiralty and maritime jurisdiction. *United States v. Burlington & Henderson County Ferry Co.* (U. S.) 21 Fed. 331, 338.

When committed upon navigable waters, negligence is a maritime tort which subjects the vessel to liability to an extent coincident with the liability of the owner. *Coughlin v. The Rheola* (U. S.) 19 Fed. 926, 927.

MARITIME WARFARE.

"Maritime warfare" consists of war on the sea. Such warfare, with its incidents of blockade and the right of search, imposes heavy burdens and restrictions on all commercial nations; in the view of international law, it is the right of sovereigns only. Such warfare, admitted to be carried on by unorganized rebels, in the eye of the law is mere private and unauthorized warfare, and therefore unlawful, which the government affected

has a technical right to suppress at its discretion. *United States v. The Ambrose Light* (U. S.) 25 Fed. 408, 412.

MARK.

See "Trade-Mark."

"Mark," as defined by Webster, means, in its usual signification, a visible sign made or left on anything; a line, point, stamp, figure, or the like, drawn or impressed, so as to attract attention, and carry some information or intimidation; a token; a trace. *Moorman v. Hoge* (U. S.) 17 Fed. Cas. 715, 718.

As point out.

"Mark," as used in a statute requiring the court of common pleas to mark and lay out the bounds and rules of the prisons of their several counties, is not used in a literal sense, but means to point out, to settle, to define, to describe. And the bounds, therefore, may be sufficiently marked and laid out by course and distance, without fixing any visible marks or boundaries on the ground. *Allen v. Smith*, 12 N. J. Law (7 Halst.) 159, 165.

As a signature.

See, also, "Sign—Signature."

A mark, for a name or signature, is most often the sign of the cross made in a little space left between the Christian name and surname, and the word "his" is usually written above the mark, and the word "mark" below it (2 Bl. Comm. 305); and when so made, though it may be made otherwise, it is a signature or a signing in law (*Maupin v. Berkley*, 3 Ky. Law Rep. 617). In *Bouvier's Law Dictionary* it is said: "It is not necessary that a party should write his name himself to constitute a signature. His mark is now held sufficient, though he was able to write." *Staples v. Bedford Loan & Deposit Bank*, 33 S. W. 403, 98 Ky. 451.

Boundary.

"Mark," as used in the act of 1859 directing certain commissioners correctly to run and mark distinctly the boundary line of a certain county, means that the commissioner should determine the line by marks on the ground. *Keller v. Young*, 78 Pa. (28 P. F. Smith) 166, 171.

Election ticket.

The device or mark by which one ticket in an election may be known or distinguished from another, which is excluded by Code 1880, § 137, will be construed to include a dotted line across the face of a ticket, which distinguishes it from other tickets. *Steele v. Calhoun*, 61 Miss. 556, 563.

Stock.

"Marks," as used in Civ. Code, § 2248, making it the duty of overseers or track menders of railroads to file with the station agents "a list of the different marks and brands of all stock killed upon their respective sections the preceding week," includes only such marks as are placed upon stock by artificial means for purposes of identification, the word "mark" generally indicating some change made in some part of the animal by a knife or other means, such as boring or slitting the ear. *Churchill v. Georgia Railroad & Banking Co.*, 33 S. E. 972, 973, 108 Ga. 265.

MARK OF PUNCTUATION.

Quotation marks are marks of punctuation, within the rule that the punctuation of an act or its title is not controlling in construing it for the purpose of ascertaining its real meaning. *State v. Banfield*, 72 Pac. 1093, 1095, 43 Or. 287.

MARKET.

See "Foreign Markets"; "Legally Constituted Market"; "Meat Market"; "Municipal Market"; "Public Market."

A "market" implies competition. *Watts v. Weston* (U. S.) 62 Fed. 136, 188, 10 C. C. A. 302.

"A 'market' is defined by legal writers to be the privilege within a town to hold a market." None can have a fair or market but by grant or prescription. 2 Inst. 220. A market, when established, may imply a license to any one to enter as a buyer, but not necessarily as a seller. All the shops of London are by custom "markets overt," and a sale therein changes the property. Every day there is market day, except Sunday. *Hughes v. The Farmers' Ass'n* (Pa.) 1 Phila. 338 (citing 5 Coke, 83, 86).

As current prices.

A contract for advertising, which, after specifying the papers to be advertised in, and the amount of advertisement, contained the following provision, "For which service including a position of first advertisement following markets I agree to pay, etc.," refers to the publication of current prices for farm products and other merchandise. *Hubbard v. Rowell*, 51 Conn. 423, 428.

As everything offered for sale.

In an ordinance providing that the clerk and inspector shall seize any article not wholesome for food he may find "in market" and cause it to be destroyed, etc., "market" is not used in the sense of market house, but means all articles of food offered for purchase or sale in the city. *Georgia Packing*

Co. v. City of Macon (U. S.) 60 Fed. 774, 777, 22 L. R. A. 775.

As market house.

"Market," as used in a municipal ordinance providing that, as soon as a market shall be completed, the stands, stalls, and other parts thereof shall be rented by the city, etc., means the market house, as distinguished from the market place. *Harney v. City of St. Louis*, 2 S. W. 271, 273, 90 Mo. 214.

"Markets," as used in Sp. Laws 1874, c. 1, § 3 (City Charter of St. Paul), conferring power to establish "markets and other public buildings," was meant to refer to buildings used for the purposes of a public market, and hence did not authorize the passage of an ordinance regulating the sale of garden produce on the streets. *City of St. Paul v. Traeger*, 25 Minn. 248, 253, 33 Am. Rep. 462.

As public place for sale.

A "market," says 2 Bl. (2 Comm. 37), is a franchise or liberty derived from the Crown, or in some cases held by prescription, which presupposes a grant, and may be granted to a public body or to a private person. It is a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale, and in some cities they are known by the articles there exposed for sale. *Caldwell v. City of Alton*, 33 Ill. 416, 419, 75 Am. Dec. 282; *City of Jacksonville v. Ledwith*, 7 South. 885, 887, 26 Fla. 163, 9 L. R. A. 69, 23 Am. St. Rep. 558; *Smith v. City of Newbern*, 70 N. C. 14, 18, 16 Am. Rep. 766 (citing Bouv. Law Dict.); *Ketchum v. City of Buffalo*, 14 N. Y. (4 Kern.) 356, 361, 21 Barb. 294.

The purpose of markets has always been to secure to all persons the privileges and conveniences arising from a general concourse of buyers and sellers. One main object is to enable producers to meet consumers of the usual necessities of life directly and without the interference of middlemen. Freedom of access to farmers and gardeners and all other persons having provisions and the like to sell, so that purchasers may get supplies directly from them, as well as find all the different varieties of supplies in the same place, is regarded as an important legal right which should not be interfered with. The other chief value of markets is the facility of regulation and inspection, which cannot exist very perfectly, if at all, where there is not a central place of concourse for buying and selling. And where the city of Detroit accepted a franchise authorizing it to issue bonds and construct a "market," and the rights of the public have once been vested in such franchise, the city has no right to dispose of such market or appropriate it to other use. *Taggart v. City*

of Detroit, 38 N. W. 714, 718, 719, 71 Mich. 92.

A market is a place where vegetables, fish, and meats of all sorts are furnished for the daily sustenance of the population of a city. *New Orleans v. Morris* (U. S.) 18 Fed. Cas. 111, 112.

In this country the right to open or conduct a market is derived from the municipality within whose limits the market is kept. A "market" may be defined, with practical accuracy, as a place designated by the municipal authorities of a city or an incorporated town for the sale of articles necessary or convenient for the subsistence of men and domestic animals. *Strickland v. Pennsylvania R. Co.*, 26 Atl. 431, 154 Pa. 348, 21 L. R. A. 224.

As sell.

"Market," as used in a lease of land belonging to plaintiff, providing that plaintiff should have a lien upon the crops as security for rent and that the lessee should market the same, means "sell." *Milliman v. Neher* (N. Y.) 20 Barb. 37, 40.

MARKET HOURS.

The term "market hours," as used in Sp. Laws 1881, c. 93, § 15, authorizing a common council to restrain and prohibit during market hours the sale at other places than in the public market, or the market places, of certain articles, except by regularly licensed dealers, is not a natural period of time. Market hours must be established or designated. *State v. Municipal Court of City of St. Paul*, 20 N. W. 243, 244, 32 Minn. 329.

MARKET OVERT.

Wharf as, see "Wharf."

"Market overt" is defined to be a fair or market held at stated intervals in particular places by virtue of a charter or provision (2 Bl. Comm. 449), to which our ordinary markets or stores for the sale of merchandise bear no resemblance. The reason why a sale of stolen property in market overt conveyed a title to the purchaser is understood to be that, as the market was held at stated intervals, in particular places, and known to the whole community, those who had lost property, by theft or otherwise, could be present to make known their loss. Failing to do so, and as by the publicity of the transaction the assurance was given to purchasers that the sale was honest and fair, it was but just that the purchaser should be protected by the title thus acquired. *Fawcett v. Osborne*, 32 Ill. 411, 426, 427, 83 Am. Dec. 278.

MARKET PLACE.

As used in Comp. St. 1893, c. 12a, § 62, authorizing the city to erect market houses and make market places, the term "market place" means something more than land occupied by the market house, and includes the site upon which the market house may be built. *Tukey v. City of Omaha*, 74 N. W. 613, 614, 54 Neb. 370, 69 Am. St. Rep. 711.

The term "market place" does not necessarily or usually mean an uncovered space of ground dedicated as a market, but a market house, and it was so used in Acts 1779, c. 25, § 13, relating to the regulation of the town of Newbern, and conferring upon the commissioners power to make rules, orders, regulations, and ordinances appointing "market places" and regulating the same; hence, under this power, the commissioners would have authority to erect a market house. *Smith v. City of Newbern*, 70 N. C. 14, 18, 16 Am. Rep. 768.

MARKET PRICE.

See "Regular Market Price."

As actual or market value.

The expressions "actual value," "market value," or "market price," when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales, public or private, in the way of ordinary business. *Sanford v. Peck*, 27 Atl. 1057, 1058, 63 Conn. 486 (citing *Murray v. Stanton*, 99 Mass. 348; *Cliquot's Champagne*, 70 U. S. [3 Wall.] 114, 18 L. Ed. 116).

The "market price" and "market value" of an article of commerce are ordinarily the same, and therefore generally and ordinarily the two terms mean the same thing, and courts ordinarily permit the market price of an article to be the measure of its market value. The market price is evidence of market value, but is not conclusive. The market value is that which arises from the ordinary transaction of buying and selling, and doubtless includes the ordinary vicissitudes of prices in business. *Johnson-Brinkman Commission Co. v. Wabash R. Co.*, 64 Mo. App. 590, 593.

Ordinarily, when an article of sale is in the market, and has a market value, there is no difference between its value and the "market price," and the law adopts the latter as the proper evidence of the value. Value and price are therefore not synonymous, or the necessary equivalents of each other, though commonly "market value" and "market price" are legal equivalents. *Theiss v. Weiss*, 31 Atl. 63, 66, 166 Pa. 9, 45 Am. St. Rep. 638 (citing *Kountz v. Kirkpatrick*, 72 Pa. [22 P. F. Smith] 376, 13 Am. Rep. 687).

As fixed by buying and selling.

"Market price," for produce, means a fixed and established price for the time. To make a market price, there must be buying and selling, purchase and sale. *Barrett v. The Wacousta* (U. S.) 2 Fed. Cas. 928, 929.

"We consider 'market price' to be the value, the rate at which the thing is sold. To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price that nobody will give for it, can that be said to be its market value?" *Blydenburgh v. Welsh* (U. S.) 3 Fed. Cas. 771, 775.

"The market price of a commodity is the actual price at which it is commonly sold. That price may be fixed by sales in market at or about the time. If no sales can be shown on the day, due recourse may be had to sales before or after that day, and for that inquiry a reasonable range in point of time is allowed." *Douglas v. Merceles*, 25 N. J. Eq. (10 C. E. Green) 144, 147 (citing *Dana v. Fiedler*, 12 N. Y. [2 Kern.] 40, 62 Am. Dec. 130; *Beach v. Raritan & D. B. R. Co.*, 37 N. Y. 457).

The market price of personal property is nothing but the general or ordinary price for which property may be bought and sold. There is no particular number of sales necessary to be proved before such price can be said to be established. It seems plain, however, that proof of the price obtained at an actual sale made bona fide, and not a sale which was in any way forced, would tend in the direction of proving or establishing a market price, and hence would be some evidence of the value of property. In an ordinary case of purchase and sale of property, the fact that the purchaser and seller have met and agreed upon the price, and actually bought and sold the property at that price, ought to be, in the nature of things, some evidence of the value of that property which has thus changed hands in a bona fide transaction. Thus, in an action against a sheriff for wrongful sale under an execution against a third person of a shop-worn stock of miscellaneous books and stationery owned by plaintiff, evidence of what the purchasers at execution sale obtained for the stock at bona fide private sales to citizens some miles distant from the place of conversion, and nearly a year afterwards, was held competent as tending to prove the market price of the goods at the time of the conversion, the value of the stock being of a staple character and not liable to fluctuations. *Parmenter v. Fitzpatrick*, 31 N. E. 1032, 1034, 135 N. Y. 190.

As current price.

"Market price" means the current price. *Sloan v. Baird*, 56 N. E. 752, 753, 162 N. Y. 327.

As fair value.

The term "market price" is not limited to the price which an article might realize at a forced sale; it means the fair value of the property as between one who desires to purchase and one who desires to sell. It is not what could be obtained for it under peculiar circumstances, when, by reason of the necessities of the owner, more than a fair price could be realized. It is the real market price, and not the speculative value. *Palmer v. Penobscot Lumbering Ass'n*, 38 Atl. 108, 110, 90 Me. 193 (citing *Chase v. City of Portland*, 86 Me. 367, 29 Atl. 1104).

As price clear of charges.

"Market price," as used in a revenue law referring to the market price or value of an article at the place of exportation, means the price at which such articles are sold and purchased clear of every charge but such as is laid upon it at the time of sale. This is also the general meaning of the expression. *Goodwin v. United States (U. S.)* 10 Fed. Cas. 625, 627.

As price in market with open competition.

The "market price" of an article is the price fixed by buyer and seller in an open market in the usual and ordinary course of lawful trade and competition, and a price fixed by a combination of all the knife manufacturers in the United States for the express purpose of controlling the price of the articles manufactured by themselves will not be deemed the market price of knives, binding on a purchaser whose contract stated the price to be the "market price." *Lovejoy v. Michels*, 49 N. W. 901, 903, 88 Mich. 15, 13 L. R. A. 770

MARKET SQUARE.

The words "market square," on a plat of a city, as designating a certain block, do not, of themselves, necessarily indicate more than that such is the name given to the ground. But where the city has always treated the land as public, by omitting to tax it, and the dedicator has never treated the land as private, the plat is sufficient to constitute a dedication of the square to the city. *Scott v. City of Des Moines*, 20 N. W. 752, 754, 64 Iowa, 438.

MARKET VALUE.

See "Actual Market Value"; "Aggregate Market Value"; "Cash Market Value"; "Fair Market Value"; "Present Market Value."

The "market value" of property is the price which the property will bring in a fair market after fair and reasonable efforts have been made to find a purchaser who will give

the highest price for it. *Winnipeg Lake Cotton & Woolen Mfg. Co. v. Town of Gilford*, 35 Atl. 945, 946, 67 N. H. 514 (citing *State v. James*, 58 N. H. 67; *Atlantic & St. L. R. Co. v. State*, 60 N. H. 133, 140; *Low v. Railroad*, 63 N. H. 557, 562, 3 Atl. 739, 743; *Winnipeg Lake Cotton & Woolen Mfg. Co. v. Town of Gilford*, 10 Atl. 849, 850, 64 N. H. 337, 348).

"Market value" is the price at which the owner of goods, or the producer, holds them for sale, the price at which they are freely offered in the market to all the world, such price as dealers in the goods are willing to receive and the purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade. *Muser v. Magone*, 15 Sup. Ct. 77, 81, 155 U. S. 240, 39 L. Ed. 135.

The full and fair "market value" which a railroad is required to pay for property taken under its right of eminent domain means "what the property is worth or will sell for as between one who wants to purchase and one who wants to sell. 'Market value' is such sum of money as the property was worth in the market to persons generally who would pay its just and full value." *Esch v. Chicago, M. & St. P. Ry. Co.*, 39 N. W. 129, 130, 72 Wis. 229.

The "market value" of land is the price that would in all probability result from fair negotiations where the seller is willing to sell and the buyer desires to buy. *Sharpe v. United States (U. S.)* 112 Fed. 893, 898, 50 C. C. A. 597, 57 L. R. A. 932; *Kansas City, W. & N. W. R. Co. v. Fisher*, 30 Pac. 111, 49 Kan. 17; *Cincinnati, I., St. L. & C. Ry. Co. v. Pfitzer (Ohio)* 1 Prob. R. 248, 255; *Ligare v. Chicago, M. & N. R. Co.*, 46 N. E. 803, 808, 166 Ill. 249; *Stewart v. Ohio River R. Co.*, 18 S. E. 604, 608, 38 W. Va. 438 (citing *Lewis, Eminent Domain; Pittsburgh, V. & C. Ry. Co. v. Vance*, 115 Pa. 325, 8 Atl. 764; *Lawrence v. City of Boston*, 119 Mass. 126; *Little Rock Junction Ry. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51); *Boom Co. v. Patterson*, 98 U. S. 403, 408, 25 L. Ed. 206; *Orleans & J. Ry. Co. v. Jefferson & L. P. Ry. Co.*, 26 South. 278, 282, 51 La. Ann. 1605.

The "market value" which is the true criterion of damages to land taken for railway purposes means such a price as the vendor could obtain with ample time taken to effect a sale. The word "market" conveys the idea of selling, and the "market value," it would seem to follow, is the selling value. It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability and the occasion to buy are willing to pay. The owner, in parting with his property to the state, is entitled to receive just such an amount as he could obtain if he were to go upon the market and

offer the property for sale. To give him more than this would be to give him more than the market value, and to give him less would not be full compensation. Real estate is not like cotton, grain, and other commercial products. It cannot be sold upon an hour's notice. To sell land at its market value sometimes requires effort and negotiations for some weeks and even for some months, and, when it is said that the owner is entitled to receive the price for which he could sell the property, it is not meant the price he would realize at a forced sale upon short notice, but the price that he could obtain after reasonable and ample time, such as would ordinarily be taken by the owner to make a sale of like property. *Little Rock Junction Ry. v. Woodruff*, 5 S. W. 792, 793, 19 Ark. 381, 4 Am. St. Rep. 51.

The market value of property is the price which it would bring in a fair market, and that price may be established by competent witnesses who know the character and situation and usefulness of the property. It is held that a mining prospect upon which shafts have been sunk, but which has produced no return, has a market value, and that such value is to be ascertained in proceedings for the condemnation of the claim for railroad purposes under the same rule as the value of other property. Testimony as to the value of property is not necessarily based upon sales of the same or similar property. *Montana R. Co. v. Warren*, 12 Pac. 641, 643, 6 Mont. 275.

As actual cash value.

The expression "market value" of an article, and its "actual cash value," have practically the same meaning. The proof of actual cash value is furnished by showing what the article is worth in the market—the market value; so that in an action on a policy of fire insurance, which provided that the company should not be liable beyond the actual cash value of the property destroyed, an instruction that the jury might find for the plaintiff the fair "market value" of the property destroyed is not error. *Manchester Fire Ins. Co. v. Simmons*, 35 S. W. 722, 723, 12 Tex. Civ. App. 607.

In legal contemplation, the "present market value" of property is its present cash value in market, unless something is said showing that a valuation as a time sale is intended. So, in fixing the value of property taken in condemnation proceedings for right of way of a railway company, the present cash market value should be allowed as compensation. *Brown v. Calumet River Ry. Co.*, 18 N. E. 283, 286, 125 Ill. 600.

The market value of stock is its value in money. *Hughes v. Western Union Tel. Co.*, 19 S. E. 100, 114 N. C. 70, 41 Am. St. Rep. 782.

As price at or near time and place.

Within the meaning of the rule that the market value was the measure for damages to the owner of property deprived of its use, by "market value" was meant the price or sum for which the equivalent could be reasonably and fairly purchased at or near the place where the property should have been delivered, and within a reasonable time after refusal to deliver. *Bullard v. Stone*, 8 Pac. 17, 18, 67 Cal. 477.

Cost of covering.

"Market value," as used in the customs duty act, includes the cost of the box, package, or covering in all cases where the merchandise in question is actually purchased therein, and is usually so purchased and sold for shipment in the foreign market, and where the price includes the box, package, or covering, as well as the goods therein contained. *Cobb v. Hamlin* (U. S.) 5 Fed. Cas. 1128, 1132.

The term "market value," in Act Aug. 30, 1842, requiring certain tariff duties to be based on actual market value or wholesale price of merchandise imported into the United States, includes the cost of the covering of wool baled up before it was purchased in a foreign market, as well as of the goods themselves. *Harding v. Whitney* (U. S.) 11 Fed. Cas. 496, 497.

Intrinsic value distinguished.

The term "market value" means the actual price in which the commodity spoken of is commonly sold. The term is not synonymous with "intrinsic value." *Douglas v. Mercedes*, 25 N. J. Eq. (10 C. E. Green) 144, 147.

As market price.

The expressions "actual value," "market value," or "market price," when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales, public or private, in the way of ordinary business. *Sanford v. Peck*, 27 Atl. 1057, 1058, 63 Conn. 486 (citing Cent. Dict.; And. Law Dict.; *Murray v. Stanton*, 99 Mass. 345, 348; *Cluquot v. United States*, 70 U. S. [3 Wall.] 114, 18 L. Ed. 116).

The "market value" of goods at the time of the tortious taking, which is the measure of damages for the wrongful taking and conversion of the stock of goods, where there is no question of malice or claim to recover exemplary damages, is the price at which the goods can be replaced for money in the market, not the retail value or price for which they are sold at retail. *Wehle v. Haviland*, 69 N. Y. 448, 450.

Market for goods not required.

"Market value," as used to signify the value for which the owner of goods will re-

cover for their loss in transportation, due to the negligence of the railroad company transporting the same, should not be construed to mean that there must be an actual market for the article in order to entitle the owner thereof to a recovery for its destruction. If there is no market at the place for the articles destroyed, some other criterion of value must be adopted. *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354, 380, 15 Am. Rep. 362.

Peculiar or speculative value.

"Market value" means the fair value of the property as between one who wants to purchase and one who wants to sell, not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained, nor its speculative value, nor a value obtained from the necessities of another; nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer. It is what it would bring at a fair public sale when one party wanted to sell and the other to buy. *Kansas City, W. & N. W. R. Co. v. Fisher*, 30 Pac. 111, 49 Kan. 17; *Dady v. Condit*, 58 N. E. 900, 902, 188 Ill. 234.

Where property was, at the time of proceedings by a railroad company for its condemnation, being used as a part of its right of way under a lease, the words "market value," as used in an instruction that the owner was entitled to the market value of the property for it, will not be understood to mean an enhanced value because of the apparent necessities of the company. *Ligare v. Chicago, M. & N. R. Co.*, 46 N. E. 803, 808, 166 Ill. 249.

In estimating the market value of property taken for public purposes, all the capabilities and all the uses to which it is adopted are to be considered; not merely the use to which it is applied by the owner, or its value to him, or an unwillingness on his part to sell it. *Cincinnati, I., St. L. & C. Ry. Co. v. Pfitzer* (Ohio) 1 Prob. R. 248, 255.

The market value of land at a given time was what the land would have sold for in cash at such time, or on such terms as would be equivalent to cash. The amount which some person might have been willing to have paid at the date named for purely speculative purposes is not the market value. *Kerr v. South Park Com'rs*, 6 Sup. Ct. 801, 805, 117 U. S. 379, 29 L. Ed. 924.

The term "market value" is not limited to the price which an article might realize at a forced sale. It means the fair value of the property as between one who desires to purchase and one who desires to sell. It is not what could be obtained for it under peculiar circumstances when, by reason of the necessities of the owner, more than a fair

price could be realized. *Chase v. City of Portland*, 86 Me. 367, 29 Atl. 1104. It is the real market price, and not the speculative value. *Palmer v. Penobscot Lumbering Ass'n*, 38 Atl. 108, 110, 90 Me. 193.

Where a contract or pledge provided that, in the event of said security or any part thereof depreciating in market value, the pledgor authorized the pledgee to sell and dispose of such security, or any part thereof, either before or after the maturity of the debt, the words "depreciating in market value" can have reference only to a security that becomes less valuable in market after it is pledged than it was at the time it was pledged, and had no proper application to security, the marketable condition of which has remained unchanged, but which was at the time of the pledge, and has remained, worthless. *National Bank of Illinois v. Baker*, 21 N. E. 510, 511, 128 Ill. 533, 4 L. R. A. 586.

The market value is the fair value of the property as between one who wants to buy and one who wants to sell, irrespective of peculiar circumstances rendering the property of peculiar value to either the purchaser or vendor. *Reilly v. Cullen*, 74 S. W. 370, 373, 101 Mo. App. 32 (citing *Lawrence v. City of Boston*, 119 Mass. 126); *Kennebec Water Dist. v. City of Waterville*, 54 Atl. 6, 18, 97 Me. 185, 60 L. R. A. 857 (citing *Lawrence v. City of Boston*, 119 Mass. 126).

In determining the market value of property, the question is not what estimate does the owner place upon it, but what is its real worth in the judgment of honest, competent, and disinterested men. The use to which the owner has applied his property is of no importance beyond its influence upon the present value. If highly cultivated it will be worth more than if it had been suffered to run to waste. But in determining the market value of property to be condemned for public benefit, the owner is not entitled to a sufficient sum of money to secure him in that mode of enjoyment for the future. The proper mode of adjusting the question of damages is to inquire what is the present value of the land, and what it will be worth when the contemplated work is completed. In deciding these questions, neither the purpose to which the property is now applied, nor the intention of the owner in relation to its future enjoyment, can be a matter of much importance. In both cases the proper inquiry is what is the value of the property for the most advantageous uses to which it may be applied. *Lowe v. City of Omaha*, 33 Neb. 587, 50 N. W. 760, 763.

Price at forced sale.

"Market value" of land is not necessarily the price which it would command in a

forced sale by public auction. The price which, upon full consideration of the matters stated, the judgment of well-informed and reasonable men will approve, may be regarded as the market value. *Pittsburgh, V. & C. Ry. Co. v. Vance*, 8 Atl. 764, 766, 115 Pa. 325; *Chase v. City of Portland*, 29 Atl. 1104, 1107, 86 Me. 367.

The "market value" of land does not necessarily mean what it would bring at forced sale or under peculiar circumstances, but such sum as the property is worth in the market—that is, to persons generally—if those desiring to purchase were found who were willing to pay its just and fair value. *St. Louis, K. & A. Ry. Co. v. Chapman*, 16 Pac. 695, 697, 38 Kan. 307, 5 Am. St. Rep. 744.

The market value of land taken for public use, which is the criterion of compensation to be paid the owner, is its full value, not at a forced sale, but such a sum as it is fairly worth in the market. *In re New Reservoir (N. Y.)* *Sheld.* 408, 411; *Somerville & E. R. Co. v. Doughty*, 22 N. J. Law (2 Zab.) 495, 511; *Little Rock Junction Ry. v. Woodruff*, 5 S. W. 792, 793, 49 Ark. 381, 4 Am. St. Rep. 51.

The consensus of the best-considered cases is that in condemnation proceedings the value of the property to be condemned is to be determined according to its "market value," by which is meant, not what the owner could realize at a forced sale, but the price that he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property. In many instances, however, there is no actual demand or current rate of price, either because there has been no sales of similar property, or because the particular property is the only one of its kind in the neighborhood, and no one has been able to use it for the purposes for which it is suitable, and for which it may be highly profitable to use it. In such cases it may be said that the property has no proper "value," in the strict sense of the term; still it cannot be appropriated under the right of eminent domain for nothing. There the value must from necessity be arrived at from the opinions of well-informed persons, based upon the purposes for which the property is suitable. By so doing, the property is not taken at the "value in use" to the owner, as contradistinguished from the "market value," but what is done is to take into consideration the purposes for which the property is suitable, as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which, in a general sense, may be said to be the "market value"; and in such an inquiry the fact that the property has not previously been used for the purposes in question is irrele-

vant. *San Diego Land & Town Co. v. Neale*, 20 Pac. 372, 373, 78 Cal. 63, 3 L. R. A. 83.

Price at free sales.

The "market value" of land is the sum it could be sold for at a fairly conducted sale, attended by bidders each duly understanding all such matters of legal right as would induce him to buy or affect his judgment in determining what price he would offer. *Low v. Concord R. R.*, 3 Atl. 739, 743, 63 N. H. 557.

In an action to recover for damages sustained by a lessee by the taking of the property leased by a city in widening a street, the judge correctly instructed the jury as follows: "The value of the leases is their market value; 'market value' means the fair value of the property as between one who wants to purchase and one who wants to sell any article; not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; not its speculative value; not a value obtained from the necessity of another. Nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer. It is what it would bring at a fair public sale, when one party wanted to sell and the other to buy. The fact, therefore, that the lessee did not want to move, wanted to stay there, would have paid a very large sum to stay there, is not a test of market value, because it is not a case of one who wants to sell and one who wants to buy. The question is, if he wanted to sell his lease, what he could have obtained for it upon the market from parties who wanted to buy and would give its fair price." *Lawrence v. City of Boston*, 119 Mass. 126, 128, 129.

Price in open market.

"Market value" is the price that could have been obtained in open market on fair competition. *Wallingford v. Western Union Tel. Co.*, 31 S. E. 275, 276, 53 S. C. 410.

The market value of stock is determined by the selling price of its shares in open market. *Commonwealth v. Edgerton Coal Co.*, 30 Atl. 125, 164 Pa. 284.

The "market value" of cattle on their arrival at market means the price they will bring when the market is opened. It will not do to say that, because a shipment of live stock reaches the market at a time other than the office hours of the buyers, it therefore has no market value. *Southern Kansas Ry. Co. of Texas v. Crump (Tex.)* 74 S. W. 335, 336.

The market value of any article at a particular place is the price at which the same is obtainable there, without regard to the person from whom it is to be obtained; that is, what such goods ordinarily sell for in the open market. *Russell v. Horn, Brannen*

& Forsyth Mfg. Co., 59 N. W. 901, 903, 41 Neb. 567.

The market value of a thing is the value—the rate at which the thing is sold when placed on the market. To make a market, there must be buying and selling—a purchase and sale. *Chicago, K. & W. R. R. Co. v. Parsons*, 32 Pac. 1083, 1084, 51 Kan. 408.

The marketable value of land taken for the purposes of a railroad is the amount for which the property would sell if put on the open market and sold in the manner in which property is ordinarily sold in the community in which it is situated. *Everett v. Union Pac. R. Co.*, 13 N. W. 109, 110, 59 Iowa, 243.

The market value is the price at which similar property is bought and sold in the market. *Boston Belting Co. v. City of Boston*, 67 N. E. 428, 430, 183 Mass. 254

Price at ordinary sales.

Market value is a price established by public sales or sales in the way of ordinary business, as of merchandise. *Sloan v. Baird*, 56 N. E. 752, 753, 162 N. Y. 327; *Abbott v. Southern Pac. R. Co.*, 41 Pac. 1099, 1101, 109 Cal. 282; *Murray v. Stanton*, 99 Mass. 345, 348; *Meixell v. Kirkpatrick*, 6 Pac. 241, 248, 33 Kan. 282.

Plaintiff contracted with defendant to make for him a covering for a tent of very large dimensions, the canvas to be of a certain "market value"; it being further provided that, if the market value of such canvas should be less than that specified in the contract, the difference should be deducted. The court said: "We think the words 'market value' in this contract must be taken to mean the price of the commodity in the market as between the manufacturer and an ordinary purchaser, and that those words are not to receive a different interpretation because a person requiring so large a quantity as was wanted in this case might have purchased the canvas at a lower rate. We think the contract is one to be considered to mean the ordinary price in the market, irrespective of a particular contract." *Orchard v. Simpson*, 89 E. C. L. 298, 304, 2 C. B. (N. S.) 299, 305.

By the words "market value," as used in an instruction, on a trial for the larceny of a trunk containing family wearing apparel, requiring the jury to find the market value of the property, is meant the price at which the property could ordinarily be bought and sold by or between persons who would ordinarily buy or sell such goods for cash or trade at an equivalent. In determining such value, the jury are not necessarily confined to the price at which dealers in secondhand clothing would buy and sell the property, but they should ascertain and return the sum they should find, upon consideration of all

the facts to be shown by the evidence, and the evidence of all the witnesses, to be the reasonable market value thereof. *State v. Hathaway*, 69 N. W. 449, 100 Iowa, 225.

Value synonymous.

"Market value" of land is synonymous with "value." It is not limited to the price which it might realize at a forced sale by auction. "Market value" means the fair value of the property as between one who wants to purchase and one who wants to sell any article; not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; not its speculative value; not value obtained from the necessities of another. It is what it would bring at a fair public sale when one party wanted to sell and the other to buy. *Chase v. City of Portland*, 29 Atl. 1104, 1107, 86 Me. 367 (citing *Lawrence v. City of Boston*, 119 Mass. 126; *Edmands v. City of Boston*, 108 Mass. 535; 3 Suth. Dam. 462; *Cooley, Const. Lim.* [6th Ed.] 697).

Text-writers use the terms "value" and "market value" as interchangeable, and both as being the equivalents of "actual value," "salable value," and, in proper cases, "rental value." *Jonas v. Noel*, 39 S. W. 724, 725, 98 Tenn. 440, 36 L. R. A. 862.

Value for any use.

Market value is not what the property is worth solely for the purpose for which it is devoted, but the highest price it will bring for any and all uses to which it is adapted and for which it is available. *City of Omaha v. Croft*, 82 N. W. 120, 123, 6 Neb. 57 (quoting *Lowe v. City of Omaha*, 33 Neb. 587, 588, 50 N. W. 760).

The market value to be paid for land appropriated for public purposes is to be determined by the same consideration as in the sale of property between private parties. The inquiry must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the same time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. *Little Rock & Ft. S. Ry. Co. v. McGehee*, 41 Ark. 202, 208.

In an action against a coroner for conversion of goods taken by him under attachment which was claimed to have been wrongful, the market value of the property is not what it was worth solely for the purpose for which it was devoted, but the highest price it would bring for any use to which it is adapted and for which it is available. *Maui v. Drexel*, 76 N. W. 163, 167, 55 Neb. 446.

In estimating the market value of property, all the capabilities of the property, and all the uses to which it may be applied or for which it is adapted, are to be taken into consideration, and not merely the condition it is in at the time and the use to which it is then applied by the owner, if, by reason of its surroundings or its natural advantages, or its artificial improvements or its intrinsic character, it is peculiarly adapted to some particular use. The same considerations are to be regarded as in the sale of property between private parties, the inquiry in such cases being, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth at the time—its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Its availability for valuable uses, and not its present employment, is the criterion from which its value is to be determined. *Mississippi & Rum River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206 (cited and approved in *Orleans & J. R. Co. v. Jefferson & L. P. Ry. Co.*, 26 South. 278, 282, 51 La. Ann. 1605).

Value determined by situation, condition, etc.

The market value of land is made up of a great many items—its productiveness, its pleasantness, its nearness to markets, mills, or even a mill privilege not yet occupied, etc. The expectation or certainty to a reasonable intent that a highway or railroad will be called for by the public interest, and that from the physical conformation of the country it must follow a certain route, adds an appreciable value to the land along the probable route. *Stafford v. City of Providence*, 10 R. I. 567, 570, 14 Am. Rep. 710.

The market value of land taken by a transportation company is estimated upon a fair consideration of the land, the extent and condition of its improvements, its quantity and productive qualities, and the uses to which it may reasonably be applied, taken with the general selling price of lands in the neighborhood at the time. The price which, upon full consideration of the matters stated, the judgment of well-informed and reasonable men will approve, may be regarded as the market value. *Michael v. Crescent Pipe-Line Co.*, 28 Atl. 204, 205, 159 Pa. 99; *Curtin v. Nittany Valley Ry.*, 19 Atl. 740, 135 Pa. 20 (citing *Pittsburgh & W. R. Co. v. Patterson*, 107 Pa. 461; *Pittsburgh, V. & C. R. Co. v. Vance*, 115 Pa. 325, 331, 8 Atl. 764; *Low v. Concord R. R.*, 3 Atl. 739, 63 N. H. 557); *Reiber v. Butler & P. R. Co.*, 50 Atl. 311, 313, 201 Pa. 49.

The term "market value," when applied to land taken for public purposes, is measured by the price usually given for such land in that neighborhood, making due allowance for difference of possession, soil, and improvement. *Searle v. Lackawanna & B. R. Co.*, 33 Pa. 57, 63.

In computing the difference between the market value of a farm before and after a railroad right of way is condemned across the farm, in determining damages therefor, the jury is entitled to take into consideration the burden of increased fencing, in so far as the value of the land is depreciated thereby. *Seattle & M. Ry. Co. v. Murphine*, 30 Pac. 720, 722, 4 Wash. 448.

To ascertain the market value of lands, it is proper to regard their location, and to judge by the probable uses to which they will be put and for which they can be sold, in the same manner as their value would be fixed by a prudent seller or purchaser. In assessing the market value, the jury is not governed by the price which lands would bring on a forced cash sale, but by such price as they believe the lands would bring in the hands of a prudent seller at liberty to fix the time and conditions of the sale. *Somerville & E. R. Co. v. Doughty*, 22 N. J. Law (2 Zab.) 495, 504.

The market value of property condemned for public use includes its value for any use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be considered in estimating the market value. *Boyer & Lucas v. St. Louis, S. F. & T. Ry. Co. (Tex.)* 76 S. W. 441.

MARKETABLE TITLE.

See, also, "Good and Marketable Title."

The term "marketable title," when applied to real estate, means one free from reasonable doubt. *Austin v. Barnum*, 53 N. W. 1132, 52 Minn. 136; *Hedderly v. Johnson*, 44 N. W. 527, 528, 42 Minn. 443, 18 Am. St. Rep. 521; *Sproule v. Davies*, 75 N. Y. Supp. 229, 230, 69 App. Div. 502; *Fleming v. Burnham*, 2 N. E. 905, 907, 100 N. Y. 1; *Wright v. Mayer*, 62 N. Y. Supp. 610, 612, 47 App. Div. 604; *Kerrigan v. Backus*, 74 N. Y. Supp. 906, 907, 69 App. Div. 329; *Same v. Vanderveer*, Id.; *Fuhr v. Cronin*, 81 N. Y. Supp. 536, 538, 82 App. Div. 210 (citing *Simis v. McElroy*, 12 App. Div. 434, 42 N. Y. Supp. 290); *Kilpatrick v. Barron*, 26 N. E. 925, 928, 125 N. Y. 751; *Richmond v. Koenig*, 45 N. W. 1093, 43 Minn. 480; *Holmes v. Woods*, 32 Atl. 54, 57, 168 Pa. 530; *Morrison v. Waggy*, 27 S. E. 314, 316, 43 W. Va. 405.

A marketable title is one that is free from reasonable doubt. There is a reasonable doubt when there is uncertainty as to some fact appearing in the course of its deduction, and the doubt must be such as affects the value of the land or will interfere with its sale. *Vought v. Williams*, 24 N. E. 195, 196, 120 N. Y. 253, 8 L. R. A. 591, 17 Am. St. Rep. 634; *Weil v. Radley*, 52 N. Y. Supp. 398, 400, 31 App. Div. 25; *Schenck v. Wicks*, 65 Pac. 732, 734, 23 Utah, 576.

A "marketable title" is defined to be, in equity, a title in which there is no doubt involved either as to matter of law or fact. *Dalzell v. Crawford* (Pa.) 1 Pars. Eq. Cas. 37, 45. Every title is doubtful which invites or exposes the party holding it to litigation. If there be color of outstanding title which may prove substantial, though there is not enough in evidence to enable the chancellor to say so, a purchaser will not be held to take it and encounter the hazard of litigation. *Herman v. Somers*, 27 Atl. 1050, 1051, 158 Pa. 424, 38 Am. St. Rep. 851.

A marketable title is one of such a character as should assure to the vendee a peaceful enjoyment of the property. *Barnard v. Brown*, 112 Mich. 452, 455, 70 N. W. 1038, 67 Am. St. Rep. 432.

By "marketable title" is meant one reasonably free from such doubts as would affect the market value of the estate; one which a prudent man with knowledge of all the facts and their legal bearing would be willing to accept. *Roberts & Corley v. McFaddin, Weiss & Kyle* (Tex.) 74 S. W. 105, 109 (citing *Hollifield v. Landrum*, 71 S. W. 979, 31 Tex. Civ. App. 187).

A marketable title is one free from judicial doubt or uncertainty as to matter of facts, and one in which the possession can be acquired and retained without litigation or judicial decision. If a reasonable doubt exists in reference to any facts on which the title depends, or such a doubt exists that a court of law would not feel called on to instruct a jury to find that the fact existed, or where the title depends on a matter of fact such as is not capable of satisfactory proof, the title is not marketable. In order to be a marketable title, it should also be such as dealers in real estate, savings banks, and trust companies would be willing to take and invest in. *Vought v. Williams* (N. Y.) 46 Hun, 638, 642.

A title open to reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending on a disputed question of fact or a doubtful question of law, in the absence of the party in whom the disputed right was vested. *Heller v. Cohen*, 36 N. Y. Supp. 668, 670, 15 Misc. Rep. 378. He would not be bound by the adjudication, and could raise the same

question in a new proceeding. The cloud on the purchaser's title would remain, although the court undertook to decide the fact or the law, whatever moral weight the decision might have. A title is not marketable when it exposes the party holding it to litigation. The distinction which once prevailed, as to marketable titles, between courts of law and equity, no longer exists, and an action at law by the vendee to recover back purchase money paid may be based on the same ground that would justify a court of equity in refusing to compel him to accept the title. *Brokaw v. Duffy*, 59 N. E. 196, 198, 165 N. Y. 391.

A title that is not marketable is, in the first place, one where the written title contains on its face some notice or something outside which may lead to some fact that may disturb the title; where the deeds, wills, or decrees give on their face some indication of some existing outstanding fact which will affect the title. Then another one is where the title depends necessarily upon matter in pais, which is in itself a doubtful fact, and never can be determined or established except by bringing every party interested into court, certainly others besides the immediate parties to the suit for specific performance. An instance of this is a will without a proper attestation clause, properly executed in fact, but not so appearing on its face, and never offered for probate. *Rutherford Land & Improvement Co. v. Sannrock* (N. J.) 44 Atl. 938, 939.

A title cannot be considered unmarketable where there is no question of fact involved in a decision as to its validity, but one of law only, upon which the court, where the controversy is limited, is competent to pass. The mere fact that laymen, or even some lawyers, may have had some doubt as to the conclusiveness of the decrees of the probate court upon persons not in being who may be interested in the estate of a deceased person, is not such a doubt as to render the title unmarketable in any legal sense, or constitute any ground for a court refusing specific performance. *Ladd v. Weiskopf*, 64 N. W. 99, 101, 102, 62 Minn. 29.

It cannot be held that the phrase "unmarketable title" is necessarily equivalent to a "bad title." A good title may be unmarketable sometimes; that is to say, that, though good, ordinary purchasers might be reluctant to buy by reason of such circumstance or irregularity. *Block v. Ryan*, 4 App. D. C. 283, 287.

A "marketable title," to which the vendee in a contract for the sale of land is entitled, means a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise

of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept. *Todd v. Union Dime Sav. Inst.*, 28 N. E. 504, 506, 128 N. Y. 636.

Encroachment on adjoining land.

Where a contract for the sale of land warranted a fee simple, but a building on the land encroached one inch on an adjacent lot to which the vendor had no title, it was held that the conveyance of the lot owned by vendor would not give a clear title to the building and the lot on which it was situated, and that the title was not a marketable one. *Stevenson v. Fox*, 57 N. Y. Supp. 1094, 40 App. Div. 354.

Outstanding dower.

A title with an outstanding, inchoate dower upon it, or one that the dower has fastened upon it by the death of the husband, is not a "marketable title" in the ordinary sense of these words. Ordinary purchasers will not accept such a title. *Cooper v. Cooper*, 38 Atl. 198, 200, 56 N. J. Eq. 48.

Tax deed.

A tax deed fair upon its face is prima facie a marketable title which the vendee is bound to accept as such, unless specific objection is made, and at the hearing, or upon the usual inquiry or reference as to the state of the title, it is found not free from reasonable doubt. *Gates v. Parmly*, 66 N. W. 253, 259, 93 Wis. 294.

Title dependent on bar of limitations.

A title which depends upon the bar of the statute of limitations is a marketable title, where it clearly appears that the real owner is barred. *Pratt v. Eby*, 67 Pa. (17 P. F. Smith) 396, 403 (cited in *Hedderly v. Johnson*, 44 N. W. 527, 528, 42 Minn. 443, 18 Am. St. Rep. 521).

MARL.

"Marl" is a substance known eo nomine in the law. It is a kind of earth or mineral, and in its natural state is a part of a freehold; and the words "You're a thief, you stole my marl," are not actionable without showing that the marl had previously been dug up or severed from the land; for, while annexed and a part of the freehold, it is not subject to larceny, and to charge a man with stealing that which cannot be stolen is not actionable. *Ogden v. Riley*, 14 N. J. Law (2 J. S. Green) 186, 187, 25 Am. Dec. 513.

MARQUE.

See "Letters of Marque and Reprisal."

MARRIAGE.

See "Actual Marriage"; "Agreement in Consideration of Marriage"; "Celestial Marriage"; "Common-Law Marriage"; "Moral Marriage"; "Putative Marriage."

The word "marriage" is used in two different senses, the one denoting the act and the entry into the marriage relation, and the other the relation itself. *Campbell v. Crampton* (U. S.) 2 Fed. 417, 424.

"Marriage" means generally a certain existing relation or status, and "a marriage" can mean nothing more than this same status as existing between two particular persons, and will not be held to mean the marriage ceremony; that is, the gateway through which the parties enter the married state. *Linebaugh v. Linebaugh*, 69 Pac. 616, 137 Cal. 26.

As a civil contract.

The term "marriage," as used in our language, is borrowed from the French word "marrier," signifying to marry, and "marl," a husband. It is defined to mean by commentators "a civil and religious contract, whereby a man is joined and united to a woman for the purpose of civilized society." The Latin word "maritagium," which corresponded with the term "marriage" in the English, was likewise used under the feudal system to denote the giving of a ward or widow in marriage, and the portion and lands which the husband took by the marriage. Among nations less civilized the customs are various, but, through all, the evidence is plain that it is esteemed a contract. Every people esteem it a binding trade, and furnish the injured party a remedy against the offending party for a reparation of the injury and the enforcement of his or her duty. Almost every commentator on civil law prior to the time of Sir William Blackstone has invested it with the double character of a civil and religious contract, but no one has at any time treated it as less a civil contract because of its double character. *State v. Fry*, 4 Mo. 120, 126.

At common law, "marriage" is considered in no other light than a civil contract, and the holiness of the matrimonial state is left entirely to the ecclesiastical law. The temporal courts consider unlawful marriage as a civil inconvenience. To punish or annul unscriptural marriages is the province of the spiritual courts, which act pro salute animæ. *Deitzman v. Mullin*, 57 S. W. 247, 248, 108 Ky. 610, 50 L. R. A. 808, 94 Am. St. Rep. 390.

Marriage is a contract by which a man and woman are reciprocally engaged to live with each other during their joint lives, and to discharge toward each other the duty im-

posed by law on the relation of husband and wife. *Mott v. Mott*, 22 Pac. 1140, 1141, 82 Cal. 413 (quoting *Bouvier's Law Dict.*).

Marriage is a civil contract by one man and one woman, competent to contract, whereby they are mutually bound to each other, so long as they both shall live, for the discharge to each other and the community of the duties and obligations which flow by law from such relation. *State v. Bittick*, 103 Mo. 183, 15 S. W. 325; *Banks v. Galbraith*, 51 S. W. 105, 106, 149 Mo. 529.

Marriage is a civil contract founded in the social nature of man, and intended to regulate, chasten, and refine the intercourse between the sexes, and to multiply, preserve, and improve the species. It is an engagement by which a single man and a single woman, of sufficient discretion, take each other for husband and wife. *Town of Milford v. Town of Worcester*, 7 Mass. 48, 52.

"Rutherford, in his first volume of *Natural Law*, p. 314, says, marriage is a contract between a man and woman, in which, by their mutual consent, each acquires a right in the person of the other for the purpose of mutual happiness and the production and education of children." *State, to Use of Gentry, v. Fry*, 4 Mo. 120, 180; *Goodrich v. Goodrich*, 44 Ala. 670, 674.

"Marriage" is defined to be a contract between a man and woman for the procreation and education of children. *White v. White* (N. Y.) 4 How. Prac. 102, 107 (citing *Bac. Abr.*); *White v. White* (N. Y.) 5 Barb. 474, 480.

Marriage, so far as personal rights and the rights of property are concerned, has always been a civil contract, requiring only the present assent of parties competent to contract, and such ceremonial observations as the positive municipal law has prescribed. *Cheney v. Arnold*, 15 N. Y. 845, 351, 69 Am. Dec. 609.

Marriage, while from its very nature a sacred obligation, is notwithstanding, in civilized nations, a civil contract, usually regulated by law. *Reynolds v. United States*, 98 U. S. 145, 165, 25 L. Ed. 244 (cited and approved *United States v. Snow*, 9 Pac. 697, 698, 4 Utah, 313); *Barkshire v. State*, 7 Ind. 389, 390, 65 Am. Dec. 738; *Di Lorenzo v. Di Lorenzo* (N. Y.) 67 N. E. 63, 64 (citing *Kujek v. Goldman*, 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 Am. St. Rep. 670); *Appeal of Bonowitz*, 32 Atl. 98, 100, 168 Pa. 561.

"Marriage" is defined to be a contract between one man and one woman, by which they agree each with the other that they will assume the marital relations and live together as husband and wife. *United States v. Tenney* (Ariz.) 11 Pac. 472, 477.

5 Wbs. & P.—30

"Marriage" is often termed by text-writers and in decisions of courts a "civil contract," but this is generally done for the purpose of indicating that it must be founded on the agreement of the parties and does not require any religious ceremony for its solemnization. *Maynard v. Hill*, 8 Sup. Ct. 723, 725, 729, 125 U. S. 190, 31 L. Ed. 654. "It is not a 'contract' in the full common-law sense of the term, and it is from the Romans, from whom the civil law is derived, that the idea has prevailed that marriage was a civil contract. It was, however, with them a contract without much of an obligation, as a continuation of the relation depended almost wholly on caprice of one or other of the parties." *White v. White* (N. Y.) 4 How. Prac. 102, 106 (citing 2 Kent [3d Ed.] Comm. 85).

Marriage is everywhere regarded as a civil contract. The statutes in many of the states, it is true, regulate the mode of entering into the contract, but they do not confer the right. Marriage is founded on the law of nature, and is anterior to all human law. A marriage is a mutual agreement of man and woman to live together in the relation and under the duties of husband and wife. Mutual consent to enter into the relation of husband and wife is all that is essential. In *re McLaughlin's Estate*, 30 Pac. 651, 652, 4 Wash. 570, 16 L. R. A. 699.

Marriage is a contract. It was said by Sir William Scott, in *Dalrymple v. Dalrymple*, 2 Hagg. 45, that it was "in its origin a contract of natural law." *Wait v. Wait* (N. Y.) 4 Barb. 192, 208.

Marriage is contemplated by the law as a civil contract, for which the consent of the two contracting parties, capable in law of contracting, is essential. *Comp. Laws N. M.* 1897, § 1415; *Rev. St. Wis.* 1898, § 2328; *Chapline v. Stone*, 77 Mo. App. 523, 520 (citing *Rev. St.* 1889, § 6840).

As a civil institution.

Marriage is a civil institution established for great public objects, but it is wanting in many of the essential ingredients of a contract, and is regulated more upon grounds of public policy, to accomplish the great objects of such a relation, than it is with reference to the pecuniary rights of the parties as regards each other. *White v. White* (N. Y.) 4 How. Prac. 102, 107.

Mr. Justice Story, in his *Conflict of Laws*, § 108, though treating marriage in its origin a contract of natural law, proceeds in note 3 to remark: "But it appears to me to be more than a mere contract. It is rather to be deemed an institution of society founded upon the consent and contract of the parties, and in this view it has more peculiarities in its natural character, operation, and extent of obligation different from what belongs to ordinary contracts." So *Fraser*, in 1 *Fras.*

Dom. Rel. 87, while defining "marriage" as a contract, adds: "Unlike other contracts, it is one instituted by God himself, and has its foundation in the law of nature. It is the parent, not the child, of civil society." *Lewis v. Tapman*, 45 Atl. 459, 461, 90 Md. 294, 47 L. R. A. 385.

According to Judge Story, marriage is not treated as a mere contract between the parties, but as a civil institution, the most interesting and important in its nature of any in society. *Green v. State*, 58 Ala. 190, 193, 29 Am. Rep. 739 (citing *Townsend v. Griffin* [Del.] 4 Har. 440; *Story, Conf. Laws*, § 200); *Dickerson v. Brown*, 49 Miss. 357, 372.

Marriage is a civil institution, in the maintenance of which and its purity the public is deeply interested. *Maynard v. Hill*, 8 Sup. Ct. 723, 725, 729, 125 U. S. 190, 31 L. Ed. 654.

The marriage relation is in no sense a contract; it is rather a civil institution, beyond the control of caprice of the parties to it, to be governed and regulated by law. This law, and not contract, regulates and prescribes the rights of the parties in the property of each other. *Starr v. Hamilton* (U. S.) 22 Fed. Cas. 1107, 1111.

2 Rev. St. p. 138, providing "that marriage, so far as its validity in law is concerned, shall continue in this state a civil contract to which the consent of parties capable in law of contracting shall be essential," does not attempt to define the nature, attributes, or distinguishing features of marriage. Marriage is more than a contract. It partakes more of the character of an institution, regulated and controlled by public authority for the benefit of the community. *Wade v. Kalbfleisch*, 58 N. Y. 282, 284, 17 Am. Rep. 250.

Marriage is undoubtedly a civil contract, because consent is necessary to its legal validity. But in its attributes and distinguishing features it is sui generis. It is declared a civil contract for certain purposes, but it is not thereby made synonymous with the word "contract" as employed in the common law or in statutes. It may be entered into by persons during minority, and cannot, when consummated, be dissolved by the parties. It is more than a contract. It requires certain acts of the parties to constitute marriage, independent of and beyond a contract. It partakes more of the character of an institution regulated and controlled by proper authority, upon principles of public policy, for the benefit of the community. *Flint v. Gilpin*, 3 S. E. 33, 35, 29 W. Va. 740.

As a civil relation.

Marriage is both a civil contract and a civil relation. *State v. Fry*, 4 Mo. 120, 180.

Marriage has its inception in contract—the assent of the parties—but when estab-

lished it becomes a relation. *Starr v. Hamilton* (U. S.) 22 Fed. Cas. 1107, 1111.

"Marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and, as to these, uncontrollable by any contract which they can make. When formed, this relation is no more a contract than fatherhood and sonship is a contract. It is no more a contract than serfdom, slavery, or apprenticeship are contracts, the latter of which it resembles in this, that it is formed by contract." *Ditson v. Ditson*, 4 R. I. 87, 101.

As a civil status.

Marriage is something more than a mere contract. It is a status or institution of society founded on the consent of the parties, and the subject of regulation by law. *Livingston v. Livingston*, 66 N. E. 123, 127, 173 N. Y. 377, 61 L. R. A. 800, 93 Am. St. Rep. 600.

While by statute marriage is declared to be a civil contract, it is almost universally held to be something more than an ordinary contract. Marriage is a status created by contract, and may be defined as follows: "Marriage is the civil status of one man and one woman, capable of contracting, united by contract and mutual consent, for life, for the discharge to each other and to the community of the duties legally incumbent on those whose association is founded on distinction of sex." *State v. Bittick*, 103 Mo. 183, 15 S. W. 325, 327, 11 L. R. A. 587, 23 Am. St. Rep. 869; *State v. Cooper*, 15 S. W. 327, 329, 103 Mo. 266.

"Marriage," as distinguished from the agreement to marry and from the act of becoming married, is the civil status, condition, or relation of one man and one woman united in law, for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex. *Olson v. Peterson*, 50 N. W. 155, 156, 33 Neb. 358; *White v. White* (N. Y.) 4 How. Prac. 102, 106; *Campbell v. Crampton* (U. S.) 2 Fed. 417, 424.

Marriage, strictly speaking, is not a mere civil contract, but a status created by contract. It is true, it is founded on consent of the parties, but the consent is the contract, because of which the status is created. *Palmer v. Palmer*, 72 Pac. 3, 7, 26 Utah, 31, 61 L. R. A. 641; *Hilton v. Roylance*, 25 Utah, 129, 139, 69 Pac. 660, 58 L. R. A. 723, 95 Am. St. Rep. 821.

At common law, marriage is the voluntary union for life of one man and one wo-

man, to the exclusion of all others. The legal status of marriage rests solely on the basis of a civil contract, in which the contracting parties mutually consent and agree to be bound by the various obligations and liabilities which by operation of law arise from the relations of the contracting parties on the consummation of the marriage. *Riddle v. Riddle*, 72 Pac. 1081, 1084, 26 Utah, 268.

Marriage is not only a contract, but an institution. It not only creates rights and imposes obligations, but it confers a status. *Edgecomb v. Buckhout*, 31 N. Y. Supp. 655, 658, 83 Hun, 168.

Contract distinguished.

Marriage, though in one sense a contract, is nevertheless sui generis, and, unlike ordinary or commercial contracts, it establishes fundamental and most important domestic relations; and therefore, as every well-organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, as the most elementary and useful of them all, is regulated and controlled by the sovereign power of the state. In *re Marriage License Docket*, 4 Pa. Dist. R. 162, 163.

The marriage contract is one of peculiar character, and subject to peculiar principles. It may be entered into by persons not capable of performing any other lawful contract; it can be violated and annulled by law, which no other contract can; it cannot be determined by the will of the parties, as any other contract may be; and its rights and obligations are derived rather from the law relating to it than from the contract itself. *Townsend v. Griffin* (Del.) 4 Har. 440, 442; *Green v. State*, 58 Ala. 190, 193, 29 Am. Rep. 739.

Same—Capacity of parties.

Unlike other contracts at the common law, the parties may enter into the contract of marriage, the male at the age of fourteen, and the female at the age of twelve years. *White v. White* (N. Y.) 4 How. Prac. 102, 107.

Same—Dissolution.

Marriage is more than a contract, for the reason that, though the consent of the parties is essential to its existence, yet, when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged or entirely released on the consent of the parties, but when the marriage relation is once formed, the law steps in and holds the parties to various obligations and liabilities. Marriage is the foundation of the family and of society, without which there would be neither civilization nor progress. *Maynard v. Hill*, 8 Sup. Ct. 723, 725, 729, 125 U. S.

190, 31 L. Ed. 634. So the marriage relation differs from other contractual relations in that, when the status is once created, the state becomes an interested party, and thereafter the marriage, with the rights and duties assigned by the law of matrimony, is not subject, as to its continuance, dissolution, or effects, to the mere intention and pleasure of the contracting parties. It is regulated and controlled, and cannot be dissolved, only through the sovereign power of the state, whenever justice to either or both parties or the welfare of the public demands it. *Hilton v. Roylance*, 69 Pac. 660, 663, 25 Utah, 129, 58 L. R. A. 723, 95 Am. St. Rep. 821; *Palmer v. Palmer*, 72 Pac. 3, 7, 26 Utah, 31, 61 L. R. A. 641.

The law views marriage as being merely a civil contract, not different from any other contract, except that it is not revocable or soluble on the will of the parties. *Hulett v. Carey*, 69 N. W. 31, 33, 66 Minn. 327, 34 L. R. A. 384, 61 Am. St. Rep. 419.

While marriage is undoubtedly a contract, it is in its nature indissoluble except by the violation of duty on one part, to be taken advantage of in a special manner, provided by law, on the other. *Smith v. Smith*, 79 Mass. (13 Gray) 209, 210 (quoting *In Re Higbee*, 5 Pac. 693, 697, 4 Utah, 19).

Marriage cannot, like ordinary contracts, be dissolved by mutual agreement, or canceled upon a valuable consideration; neither can its obligations be modified by the parties. The will of society and public policy supercedes the will of the parties, and, however unable one of the parties may become to perform obligations resulting from the relation, the other is still bound. Not even a total overthrow of all the mental powers, terminating in fixed and permanent insanity, is permitted to operate as a discharge of the other party from its obligations. The very creation of this relation dissolves all previous contracts between the parties, and produces a total incapacity to enter into other contracts between themselves. Almost the only essential feature of a contract is that the assent of the parties is necessary to create the relation. *White v. White* (N. Y.) 4 How. Prac. 102, 107.

The contract of marriage is not dissolvable at the will of either or both of the parties. It can only be dissolved by death, or a decree of divorce by a competent court. *Banks v. Galbraith*, 51 S. W. 105, 106, 149 Mo. 529.

"Marriage is the union of one man and one woman so long as they both shall live, to the exclusion of all others, by an obligation which during that time the parties cannot of their own volition and act dissolve, but which can be dissolved only by authority of the state. Nothing short of this is a mar-

riage. And nothing short of this is meant when it is said that marriages valid where made will be upheld in other states." Where the union of a man and woman belonging to an Indian tribe was simply and exactly a contract and state of concubinage, it did not constitute a marriage. *Roche v. Washington*, 19 Ind. 53, 57, 81 Am. Dec. 376.

Marriage is that ceremony or process by which the relationship of husband and wife is constituted. The consent of the parties is everywhere deemed an essential condition to the forming of this relation. To this extent it is a contract. But when the relation is constituted, then all its incidents, as well as the rights and duties of the parties resulting from the relation, are absolutely fixed by law. Hence, after a marriage is entered into, the relation becomes a status, and is no longer one resting merely on contract. It is the relation fixed by law, in which the married parties stand to each other, towards all other persons, and to the state. And it is a relation from which the persons cannot separate themselves by their own agreement or by their own misconduct. This status can only be dissolved between living parties by the assent of the state, which is ordinarily indicated by the judgment of a competent court. When an attempt is made, through the courts, to undo a marriage, the state becomes in a sense a party to the proceedings, not necessarily to oppose, but to make sure that the attempt will not prevail without sufficient and lawful cause, shown by the real facts of the case, nor unless those conditions are found to exist at the time the decree is made upon which the state permits a divorce to be granted. The state has an interest in the maintenance of the marriage tie, which neither the collusion nor the negligence of the parties can impair. *Allen v. Allen*, 46 Atl. 242, 73 Conn. 54, 49 L. R. A. 142, 84 Am. St. Rep. 135.

Same—Duration.

Marriage differs from ordinary contracts in that it can only exist where one man and one woman are legally united for life, whereas ordinary civil contracts may exist between two or more of either or both sexes for any stipulated time. *Hilton v. Roylance*, 25 Utah. 129, 139, 69 Pac. 660; *Palmer v. Palmer*, 72 Pac. 3, 7, 26 Utah, 31.

"Marriage does not mean a mere temporary agreement to dwell together for a time for the gratification of sexual or lustful desires, but it is essential that the contract be entered into with a view to its continuance through life, and then be followed by celebration and cohabitation, with the apparent object of continuing such cohabitation through life." *Olson v. Peterson*, 50 N. W. 155, 156, 33 Neb. 358.

From the nature of the contract of marriage, it exists during the lives of the two

parties, unless dissolved for causes which defeat the object of marriage, or from relations imposing duties repugnant to matrimonial rights and obligations. *Town of Milford v. Town of Worcester*, 7 Mass. 48, 52.

Marriage is the joining of one man and one woman for life, or until the relation is dissolved by a decree of a court of competent jurisdiction. *Hoker v. Boggs*, 63 Ill. 161, 162.

Same—Impairment of obligation.

The marriage relation is not created by what we understand to be a "contract," in the strict common-law sense of that term, and is not what in popular language and common parlance we understand by the term "contract," and is not therefore a "contract" within the spirit and meaning of the United States Constitution, providing that no state shall pass any law impairing the obligation of a contract. *White v. White* (N. Y.) 5 Barb. 474, 480.

"It has generally been considered by the courts of this country, federal and state, that marriage, though in some respects a contract, is not within the constitutional interdiction of legislative acts impairing the obligation of contracts." *Cabell v. Cabell's Adm'r*, 58 Ky. (1 Metc.) 319, 326; *Livingston v. Livingston*, 66 N. E. 123, 127, 173 N. Y. 377, 61 L. R. A. 800, 93 Am. St. Rep. 600; *Rugh v. Ottenheimer*, 6 Or. 232, 236, 25 Am. Rep. 513; *State v. Tutty* (U. S.) 41 Fed. 753, 757, 7 L. R. A. 50. Contra, see *State v. Fry*, 4 Mo. 120, 126.

Same—Interest of state.

Marriage is a contract, but it is not merely a civil contract, for it can only be entered into in a manner recognized by law, and can only be dissolved in a like manner. The state is the third party to every such contract, and has a direct interest therein. *Trammell v. Vaughan*, 59 S. W. 79, 81, 158 Mo. 214, 51 L. R. A. 854, 81 Am. St. Rep. 302.

Same—Legislative control.

Marriage is a civil contract, involving rights under the control of the law-making power of the state. And the Legislature has the constitutional right to provide that whenever injury not resulting in death shall be wrongfully inflicted on a wife, and a right of action accrues to her and also to her husband, the two rights of action shall be redressed in one suit. (Act May 8, 1895, § 1.) *Donoghue v. Consolidated Traction Co.*, 50 Atl. 952, 201 Pa. 181.

"Marriage is not only a contract, but, when consummated, creates the most peculiar and solemn of all domestic relations. It comes into existence in pursuance of a contract, but when formed it involves rights and duties flowing from a source transcendently above any and all contracts which the parties are capable of making. It is akin to the

tender relation between parent and child, and has a peculiar sanctity, not to be expressed in any commercial phraseology like the word 'contract.' Its obligations can be enforced and its violations redressed in ways unknown to the law of contracts. It is shielded from unholy intrusion by severe penalties enacted in laws both human and divine. It unites two persons for life by giving to each a new status before the law as to society, each other, and the property of each. This status not only involves the well-being of the parties thus united, but the good of society and the state. It is therefore a proper subject of legislation, and may from public considerations be fixed, regulated, and controlled by law." *Cook v. Cook*, 14 N. W. 33, 36, 56 Wis. 195, 43 Am. Rep. 706.

It is within the power of the Legislature to modify and change the rights and legal obligations of the marriage contract, unless, perhaps, in cases where property has been reduced into possession and used, or rights exercised so as to be incapable of restoration and return. *Townsend v. Griffin* (Del.) 4 Har. 440, 442

Same—Public policy.

It is said by Shaw, C. J., in *Smith v. Smith*, 79 Mass. (13 Gray) 209, that "marriage is undoubtedly a contract, but it is a contract sanctioned by law and controlled by considerations of public policy, and vital to the order and harmony of social life." In *re Higbee*, 5 Pac. 693, 697, 4 Utah, 19.

The contract of marriage is something more than a mere civil agreement between the parties, the existence of which affects only themselves. It is the basis of the family, and its dissolution, as well as its formation, is matter of public policy, in which the body of the community is deeply interested, and it is to be governed by other considerations than those which obtain with regard to any ordinary civil contract inter partes. *Fisk v. Fisk*, 39 N. Y. Supp. 537, 538, 6 App. Div. 432.

Same—Sunday laws.

Marriage is not within the prohibition of a statute prohibiting Sunday contracts, as it is not purely a civil, but also a religious, contract. *Commonwealth v. Nesbit*, 34 Pa. (10 Casey) 398, 409.

Creation of relation.

Marriage is a contract, according to the form prescribed by the law, by which a man and woman, capable of entering into such contract, mutually engage with each other to live their whole lives together in the state of union which ought to exist between husband and wife. *Kilburn v. Kilburn*, 26 Pac. 636, 637, 39 Cal. 46, 23 Am. St. Rep. 447.

Marriage is a civil contract, the essence of which is consent. *Mathewson v. Phoenix*

Iron Foundry (U. S.) 20 Fed. 281, 282; *State v. Hughes*, 12 Pac. 28, 29, 35 Kan. 626, 57 Am. Rep. 195.

A contract of present marriage alone, without form or ceremony superadded, constitutes marriage. It is a civil contract, to the validity of which the consent of parties able to contract is all that is required by natural or public law. The parties must intend, and the agreement, whether oral or in writing, must evidence, marriage. If the parties agree eo instante to take each other for husband and wife, it is *ipsum matrimonium*. *Ahlberg v. Ahlberg*, 24 N. Y. Supp. 919.

The essence of a contract of marriage is the consent of the parties, as in the case of any other contract, and, whenever there is a present perfect consent to be husband and wife, the contract of marriage is completed. *Hulett v. Carey*, 69 N. W. 31, 33, 66 Minn. 327, 34 L. R. A. 384, 61 Am. St. Rep. 419.

Marriage is the relation of husband and wife, and in law is complete when parties able and willing to contract have actually contracted to be man and wife in the form and with the solemnities required by law. *Gise v. Commonwealth*, 81 Pa. (31 P. F. Smith) 428, 431.

To constitute a valid marriage, either under the statute or at common law, there must be: First, one man and one woman, capable of contracting; second, they must enter into a contract by which they assume the relation of husband and wife for their joint lives, and they must both understand that neither one nor the other can rescind the contract or destroy the relation. A marriage at common law required no particular form or ceremony to make it valid, but enough had to be said and done to make it a contract. *State v. Cooper*, 15 S. W. 327, 329, 103 Mo. 266.

Same—Capacity of parties.

Every contract of marriage implies that the contracting parties know of no legal or physical impediment to the contractual relation, and its consequences. *Trammell v. Vaughan*, 59 S. W. 79, 81, 158 Mo. 214, 51 L. R. A. 854, 81 Am. St. Rep. 302.

In a prosecution for bigamy, where it appeared that the second marriage was a common-law marriage by means of a contract and cohabitation, it was contended that, the defendant being previously married, there could be no such thing as a common-law marriage, but it was held that it is none the less marrying because one spouse is already married, and in every case of bigamous marriage the second marriage is void, it being the entering into a void marriage while the valid marriage exists, which the statute punishes. *People v. Mendenhall*, 78 N. W. 325, 326, 119 Mich. 404, 75 Am. St. Rep. 408.

Marriage is now deemed in all respects a civil union, depending on contract, express or implied, and requiring the exercise of reason. Thus it is said of a woman claiming dower: "She must have been the wife of a person who, at the time of marriage, was of sound mind, as a man of unsound mind is incapable of contract, although in the time of Lord Coke the law was held otherwise." (Clancy, Rights, 197.) According to the civil law, the marriage of a person of unsound mind was, like other verbal agreements, void; and such, too, is the modern doctrine of the common law. *Jenkins v. Jenkins' Heirs*, 32 Ky. (2 Dana) 102, 104, 28 Am. Dec. 437 (citing 1 Bl. Comm. 438, 1 Rolle, Abr. 357; *Wightman v. Wightman*, 4 Johns. Ch. 343).

All persons are able to contract marriage, unless they are under legal age or other disability at common law. A female of the age of 12 years could assent to marriage. Act March 6, 1845, providing that, if a married woman die without children surviving her, the husband shall be entitled to the administration, and all her property, both real and personal, applies as well where the wife is under 21 years of age as where she has attained that age, and where a wife under 21 years of age died this act controls the descent of her property. *Coogler v. Rogers*, 7 South. 391, 393, 25 Fla. 853.

Same—Cohabitation.

"Marriage is simply a civil contract, differing from other contracts only in this: that it cannot be rescinded at the will of the parties. It may be consummated by agreement per verba de presenti, without the presence of a magistrate or a clergyman or the sanction of the church, but an executory contract to marry at some future time, followed by cohabitation, will not of itself constitute matrimony. In order to establish that most sacred and honorable relation of husband and wife, there must have been entered into by the parties an actually executed contract of present marriage. While cohabitation as man and wife, attended with some publicity, is evidence tending to show that a contract of marriage has at some time been consummated between the parties, it does not in itself constitute matrimony, nor afford conclusive evidence of the fact." *Clayton v. Wardell*, 4 N. Y. (4 Comst.) 230, 238.

A marriage at common law in the absence of statutory prohibition may be per verba futuro cum copula, but the copula must be in fulfillment of the agreement to marry, or in consummation of the contract. The fact that intercourse occurs after an agreement to marry at a future day is not of itself sufficient to establish a common-law marriage. To be availing, the parties at the time of such intercourse must then ac-

cept each other as husband and wife. A marriage at common law in the general sense of the term is an agreement in presenti by which the parties agree at that time each to take the other to be his or her spouse for life, and to thereafter assume the marriage relation. *Stoltz v. Doering*, 112 Ill. 234, 240.

A perfect marriage may be constituted by the consent of the parties to live together as husband and wife, as well as a ceremonial marriage, and either form of marriage may be proved by any circumstances justifying the deduction as well as by direct evidence. But, in the absence of direct proof, marriage cannot be proved by cohabitation alone, however long maintained. The evidence must support a matrimonial cohabitation, as distinguished from a meretricious one. *Arnold v. Chesebrough* (U. S.) 58 Fed. 833, 834, 7 C. C. A. 508.

A marriage is complete if there be a full, free, and mutual consent between parties capable of contracting, though not followed by cohabitation. *Jackson v. Winne* (N. Y.) 7 Wend. 47, 50, 22 Am. Dec. 563.

Same—Consent of state.

"Marriage is a contract of so solemn and binding a nature, and which so affects the public weal, that consent of the parties alone, even though they are capable of consent, will not constitute marriage or create the relation of marriage, but one to which the consent of the state is also required." *Mott v. Mott*, 22 Pac. 1140, 1141, 82 Cal. 413.

Marriage is a personal relation arising out of a civil contract, to which the consent of parties legally competent of contracting and of entering into it is necessary, and the marriage relation shall only be entered into, maintained, or abrogated as provided by law. Rev. St. Okl. 1903, § 3482; Rev. Codes N. D. 1899, § 2720.

Same—Implied agreement.

It was long ago decided in this state that a marriage ceremony was not necessary to constitute a valid marriage. But at no time has it been said that, in the absence of a valid marriage ceremony, an implied agreement to live together, even though the parties intended to carry out the agreement, is sufficient to constitute a valid marriage unless acted on by living together as husband and wife. *Lorimer v. Lorimer*, 83 N. W. 609, 610, 124 Mich. 631.

Recognition of the marriage relation by the parties is generally accepted as ground for inferring a contract of marriage, but, if the nature of the recognition is such that it points to an illegal transaction, it cannot have the effect of changing a state of illicit cohabitation into the legal state of marriage. *State v. Whaley*, 10 S. C. (10 Rich.) 500, 503.

Same—Solemnization.

"Marriage has been considered among all nations as the most important contract into which individuals can enter, as the parent, not the child, of civil society. In the Dark Ages a notion prevailed of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character, by which notion some were carried so far as to say that a marriage of an insane person could not be invalidated on that account. In more modern times it has been considered in its proper light as a civil contract, as well as a religious vow, and, like all civil contracts, will be invalidated by the want of consent of capable persons. It has been most commonly everywhere celebrated by some religious solemnities; and from its nature and object has been held to be obligatory during the joint lives of the parties, without the power of being thrown off at the pleasure of either or both of them, except perhaps in the single instance, according to the ancient and now obsolete law, where the husband or wife, with the consent of the other, became a monk or nun professed, whereby the contract of marriage was virtually dissolved. According to the law of England, a contract of marriage is not deemed complete, so as to entitle the wife to dower and the issue to inherit, unless it be celebrated in the face of the church or with the blessing of a priest. In Scotland no religious ceremony is necessary to constitute a legal marriage, and in England, during the time of the commonwealth, marriage was allowed to be contracted before a justice of the peace. In Maryland there was a time when marriage might have been legally contracted before a county court, or in the presence of a magistrate, but now it is the most correct, if not the only legal, mode of contracting marriage, to have it celebrated in the face of some church, or with the blessing of a clergyman. In general, it is sufficient to show that a man and woman have cohabited as husband and wife, and have represented themselves as such, or have been reputed in the neighborhood of their residence to have been legally married, to establish the fact of their marriage and the legitimacy of their children. The only exceptions to this rule are in prosecutions for bigamy or in actions for criminal conversation, in either of which proof of an actual marriage is necessary." *Fornhill v. Murray* (Md.) 1 Bland, 479, 481, 18 Am. Dec. 344.

"Marriage is regarded as a civil contract, and no form is necessary for its solemnization. If it takes place between parties able to contract, an open avowal of the intention and an assumption of the relative duties which it imposes on each other is sufficient to render it valid and binding." *Graham v. Bennet*, 2 Cal. 503, 508.

"The word 'marriage' has a technical meaning, and includes a compliance by the parties entering into that relation with all the legal forms and prerequisites to constitute husband and wife, if neither is laboring under any disqualifying disability or legal obstruction at the time. *Commonwealth v. Whaley*, 69 Ky. (6 Bush) 266, 267.

If the contract is made *per verba de presenti*, but remains without cohabitation, or if made *per verba de futuro* and followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary. *Hulett v. Carey*, 69 N. W. 31, 33, 66 Minn. 327, 34 L. R. A. 384, 61 Am. St. Rep. 419.

Marriage, in the absence of civil and statutory regulations, consists of the mutual, present assent to the immediate marriage by persons capable of assuming that relation without any formal solemnization. *State v. Walker*, 13 Pac. 279, 283, 36 Kan. 297, 59 Am. Rep. 556; *Hantz v. Sealy* (Pa.) 6 Bin. 405.

Marriage, according to the settled rule of the common law, is any mutual agreement between the parties to be husband and wife in *presenti*, especially where it is followed by cohabitation, if there is no legal disability on the part of either to contract matrimony. *Rose v. Clark* (N. Y.) 8 Paige, 574, 580; *Askew v. Dupree*, 30 Ga. 173, 178. It is, of course, consensual, for it is of the essence of all contracts to be constituted by the consent of both parties, and it is not necessary that it be solemnized by a person in holy orders and *in facie ecclesiæ*. *Askew v. Dupree*, 30 Ga. 173, 178.

Marriage *per verba de presenti* is illustrated by text-writers thus: Where the man says to the woman, "I do take thee to be my wife," and she replies, "I do take thee to be my husband." Any sign of assent is sufficient. Consent is the essence of marriage, without which it cannot exist; but no formal contract, assent, or ceremony is necessary to the creation of the contract creating the marital relation. *Dickerson v. Brown*, 49 Miss. 357, 372.

Marriage is a contract between a man and woman to enter into the marriage relation, and is complete when there is a full, free, and mutual consent by the parties, capable of contracting, even when not followed by cohabitation. It requires no ceremony nor solemnization. *Caujolle v. Ferrie* (N. Y.) 26 Barb. 177, 184; *Jackson v. Winne* (N. Y.) 7 Wend. 47, 50, 22 Am. Dec. 563.

Marriage is a civil contract, not requiring any particular form of solemnization before officers of church or state, but it must be evidenced by words in the present tense, uttered for the purpose of establishing the conjugal relation. *Commonwealth*

v. Stump, 53 Pa. (3 P. F. Smith) 132, 136, 91 Am. Dec. 198.

Marriage is a civil contract, the essence of which is consent. An agreement certifying that a man and woman acknowledge themselves before two witnesses to be man and wife, signed in the presence of two persons, is a good contract of marriage per verba de presenti or at common law. *Mathewson v. Phoenix Iron Foundry Co.* (U. S.) 20 Fed. 281, 282.

Marriage is everywhere regarded as a civil contract. Statutes in many states, it is true, regulate the mode of entering into the contract, but they do not confer the right. Hence they are not within the principle that, where a statute creates a right, and provides a remedy for its enforcement, the remedy is exclusive. No doubt a statute may take away a common-law right, but there is always a presumption that the Legislature has no such intention, unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner, but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by license or publication of bans, or attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common-law right to form a marriage by words of present assent. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity. *State v. Zichfeld*, 40 Pac. 802, 803, 23 Nev. 304, 34 L. R. A. 784, 62 Am. St. Rep. 800.

Marriage is a personal relation arising out of a civil contract to which the consent of parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization authorized by the Civil Code. Civ. Code Cal. 1903, § 55.

Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations. Civ. Code S. D. 1903, § 34; Civ. Code Idaho 1901, § 1989; *Kilburn v. Kilburn*, 26 Pac. 636, 637, 89 Cal. 46, 23 Am. St. Rep. 447; *People v. Lehmann*, 38 Pac. 422, 104 Cal. 631; *Sharon v. Sharon*, 16 Pac. 345, 367, 75 Cal. 1.

Marriage is a personal relation arising out of a civil contract, to which the consent of the parties capable of making it is

necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual and public assumption of the marital relation. Civ. Code Mont. 1895, § 50.

Evidence of.

Actual marriage may be inferred in ordinary cases from cohabitation, acknowledgments of the parties, etc., as well as by positive proof of the fact. *Rose v. Clark* (N. Y.) 8 Paige, 574, 580 (citing 2 Kent, Comm. 87).

Marriage is a civil contract, and in civil cases, at least, reputation and cohabitation are sufficient evidence of it. *Appeal of Bonowitz*, 32 Atl. 98, 100, 168 Pa. 561.

One person created.

Blackstone says: "By marriage the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything, and is therefore called a *feme covert*." *Hoker v. Boggs*, 63 Ill. 161, 162.

At common law the husband and wife are treated as one person. Marriage operates as a suspension, in most respects, of the legal existence of the latter. All the disabilities of married women spring from the supposed unity of husband and wife. At common law the right of the wife to the consortium exists. The right to the society of his wife is no greater to the husband than her right to his society. Marriage gives to each the same right in that regard. Each is entitled to the society and affection of the other. They both spring from the marriage contract, and are mutual in character. *Deitzman v. Mullin*, 57 S. W. 247, 248, 108 Ky. 610, 50 L. R. A. 808, 94 Am. St. Rep. 390 (citing 1 Bl. Comm. 432).

As a sacrament.

"The common law considers marriage in no other light than a civil contract. In Roman Catholic countries, and in some Protestant countries, marriage is treated as a sacrament, but in this as a civil contract." *Phillips v. Gregg* (Pa.) 10 Watts, 158, 168, 170, 36 Am. Dec. 158.

"By the Mexican law which follows the Canon law in this particular, marriage lawfully contracted in the face of the Catholic Church, according to its rights and ceremonies, and between members thereof, and finally consummated, is elevated to the rank of a sacrament, and cannot be dissolved by the civil tribunals. On the other hand, the union of a man and woman in the character of husband and wife without the sanction of the church, when both of them belong to the class of the unfaithful, is construed as

mere civil contract." *Harman v. Harman*, 1 Cal. 215.

MARRIAGE BROKAGE CONTRACT.

"A marriage brokerage contract is an agreement for the payment of money or other compensation for the procurement of a marriage. Although they may not be a fraud on either party, such contracts are held to be void, forasmuch as they are calculated to bring to pass mistaken and unhappy marriages, to countervail parental influence in the training and education of children, and to tempt the exercise of an undue and pernicious influence for selfish gain in respect to the most sacred of human relations." *White v. Equitable Nuptial Ben. Union*, 76 Ala. 251, 258, 52 Am. Rep. 325.

MARRIAGE BROKERAGE.

"Marriage brokerage" has been defined to be the act by which a person interferes, for a consideration to be received by him, between a man and woman for the purpose of promoting a marriage between them. *Helen v. Anderson*, 83 Ill. App. 506, 509 (quoting *Bouv. Law Dict.*).

MARRIAGE CONTRACT.

See "Contract of Marriage."

The term "marriage contract" is "applied both to the public ceremony of marriage and to the prior contract to marry which that ceremony implies." *Develli v. Riggsbee*, 4 Ind. 464, 466.

MARRIAGE IN FACT.

Though every marriage is, in a general sense, a marriage in fact, or a fact of marriage, yet that expression, as used in the books, has acquired a technical meaning in the law, and signifies the fact proved by direct testimony by the marriage register, or by any other evidence the effect of which is not derived from the presumed innocence of a cohabitation reputed matrimonial. *State v. Sherwood*, 35 Atl. 352, 353, 68 Vt. 414.

MARRIAGE LICENSE.

As record, see "Record."

MARRIAGE LICENSE DOCKET.

A "marriage license docket" is a public record in the sense that it is open to the public to inspect and copy therefrom. *Marriage License Docket*, 4 Pa. Dist. R. 162, 163.

MARRIAGE PORTION.

By "marriage portion" is commonly understood the property, usually a substantial amount, which a woman brings with her

upon her marriage. In *re Croft*, 37 N. E. 784, 162 Mass. 22.

MARRIAGE PROMISE.

"Marriage promise" is an agreement between two persons to marry each other. It is a contract founded on sufficient consideration, the consideration being the reciprocal promise. *Perry v. Orr*, 35 N. J. Law (6 Vroom) 295, 296.

MARRIAGE REGISTER.

A "marriage register" is prima facie evidence of the fact of marriage and the time when it occurred. *Maxwell v. Chapman* (N. Y.) 8 Barb. 579, 582.

MARRIAGE SETTLEMENT.

Marriage contracts have been upheld and enforced by the courts from earliest times. They involve an agreement between a man and woman to assume the marital relation—to live together as husband and wife—in consideration of which each relinquishes his or her claim to the other's property, or one agrees to convey or deliver to the other certain property or money. If they, in pursuance of the agreement, marry, and live together as husband and wife, the contract is considered executed as far as that part of the undertaking is concerned; and it has been held that neither misconduct of a party after marriage (*Fisher v. Koontz*, 110 Iowa, 498, 80 N. W. 551), nor subsequent divorce, in the absence of some term in the contract providing against such contingency, affect the validity of the marriage settlement. *Moayon v. Moayon*, 72 S. W. 33, 37, 24 Ky. Law Rep. 1641 (citing *Barclay v. Waring*, 58 Ga. 86; *Babcock v. Smith*, 39 Mass. [22 Pick.] 61).

"Stewart in his Treatise on Marriage and Divorce, § 32, says, contracts or conveyances in contemplation of marriage, whereby property is promised to or settled on either or both of the parties by either or both of the parties or by a third party, and whereby either or each of the parties releases or modifies or agrees to release or modify his or her property rights, which would otherwise arise from the marriage, are called 'marriage settlements' or contracts." *Corker v. Corker*, 25 Pac. 922, 923, 87 Cal. 643.

The term "marriage settlement" in Act 1823, declaring that no marriage settlement shall be valid until recorded, was used in its ordinary and commonly understood sense to mean the actual conveyance or executed contract by which not only the property is changed and the title vested, but by which property to some extent is tied up and rendered inalienable. The term has never been applied to the mere executory agreement by which the title to the property is not changed. *Baskins v. Giles* (S. C.) Rice Eq. 315, 317.

MARRIED.

Any Married Woman, see "Any."

Const. art. 9, § 3, gives a homestead exemption to any resident of the state who is married or head of a family, and it is held that being married is not equivalent to being the head of a family, so that the land of the wife occupied as a home by the husband and her family is a homestead. *Thompson v. King*, 14 S. W. 925, 926, 54 Ark. 9.

Rev. St., which declares that any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen, does not refer to the time when the ceremony is celebrated, but to a state of marriage; that is, the statute means that whenever a woman, who, under previous acts, might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act, or subsequent to or before it, or not till after the marriage, she becomes by that fact a citizen also. *United States v. Kellar* (U. S.) 13 Fed. 82, 84; *Kelly v. Owen*, 74 U. S. (7 Wall.) 496, 498, 19 L. Ed. 283.

Marriage Act, § 12, providing that all persons who live together as man and wife "without being married" shall be liable to certain penalties, means an admission of the marriage relation without being married in the manner and on the conditions that the Legislature has declared marriage should be contracted. *State v. Walker*, 13 Pac. 279, 285, 36 Kan. 297, 59 Am. Rep. 556.

The phrase "married women at the time of marriage" in Const. art. 15, § 5, providing that the property and pecuniary rights of every married woman at the time of marriage or afterwards acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of the husband, does not operate to render the clause only operative as to marriages occurring after its adoption. "The simple, natural construction of the words used in this section, read by scholars unrestrained by legal technicalities or rules of construction of statutes, would include the property and pecuniary rights of married women who were then married and owning property which could be made subject to the provision. The plain meaning of the section is that it applied in all its force to women then married, and, as the members of the Constitutional Convention were mostly farmers, it will be given its popular meaning." *Rugh v. Ottenheimer*, 6 Or. 231, 234, 25 Am. Rep. 513.

Married in this commonwealth.

St. 1855, c. 304, § 1, provided that the real and personal property of any woman who may hereafter be married in this commonwealth, and its rents, issues, and profits,

shall remain her sole and separate property. Held, that the term "hereafter married in this commonwealth" was not restricted to a case where the marriage ceremony was actually performed in Massachusetts, but included a case of a woman who, with her husband, had their domicile in Massachusetts both before and after their marriage, though the marriage was solemnized in another state. *Woodbury v. Freeland*, 82 Mass. 16 Gray, 105, 107.

MARRIED MAN.

A "married man," within the meaning of Donation Act, § 4, allowing a married man to settle on a certain number of acres of public land, includes a settler whose wife is an Indian woman. *Vandolf v. Otis*, 1 Or. 153, 155.

MARRIED WOMAN'S CONTRACT.

A "married woman's contract" while her common-law disabilities remained was in fact regarded in equity as creating not a personal liability, but a liability of her separate estate. The decree was against this separate estate, and was never against her personally. Such contracts as recognized in equity are only contracts *sub modo*. The indebtedness which they create is not a legal indebtedness, but only an equitable liability. *Demarest v. Terhune*, 50 Atl. 664, 666, 62 N. J. Eq. 663.

MARSHAL.

In general usage, the term "to marshal" means to arrange or rank in order. In the sense in which it is used in courts of equity, it means so to arrange different funds under administration that all parties having equities therein may receive their due proportion. *Quinnipiac Brewing Co. v. Fitzgibbons*, 47 Atl. 128, 130, 73 Conn. 191.

As officer.

A "marshal" is defined to be an officer of the peace appointed by authority of a city or borough who holds himself in readiness to answer such calls as fall within the general duties of a constable or sheriff. *Attorney General v. Connors*, 9 South. 7, 10, 27 Fla. 329.

MARSHALING OF ASSETS.

The marshaling of assets means that, where a person has two funds, he shall not, by his election, disappoint the party having only one fund. The doctrine of marshaling of assets rests upon equity under justice. *Willey v. St. Charles Hotel Co.*, 28 South. 182, 186, 52 La. Ann. 1581.

MARSHALING OF SECURITIES.

As a general rule, the debts of a mortgagee who has more than one security will be thrown upon all his securities ratably according to the value, and thus leave the residue of each to satisfy the other incumbrancers to whom it is specially mortgaged; but if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only—as, for example, where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of them is given to another—the former mortgagee must seek satisfaction out of that fund which the latter cannot touch. This doctrine is known as the “marshaling of securities.” *Shewmaker v. Yankee*, 68 S. W. 1, 2, 23 Ky. Law Rep. 1759.

MARTEN.

The term “stole” in a charge that another stole a marten out of a trap in the woods, is not slanderous as imputing larceny, as a marten in a trap is not a subject of larceny. *Norton v. Ladd*, 5 N. H. 203, 20 Am. Dec. 573.

MARTIAL LAW.

Martial law is founded on paramount necessity. It is the will of the commander of the forces. In the proper sense, it is not law at all. It is merely a cessation, from necessity, of all municipal law, and what necessity requires it justifies. Under it a man in actual armed resistance may be put to death on the spot by any one acting under the orders of competent authority, or, if arrested, may be tried in any manner which such authority shall direct; but if there be an abuse of the power so given him, and acts are done under it not bona fide to suppress rebellion and in self-defense, but to gratify malice, or in the caprice of tyranny, then for such acts the party doing them is responsible. In *re Ezeta* (U. S.) 62 Fed. 972, 977, 1002.

Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity, it is arbitrary, but it must be obeyed; and where the place in which it is in force is the theater of most active and important military operations, and the civil authority is overthrown, the general in command is the military ruler, and his will is law, and necessarily so. *Diekelman v. United States*, 11 Ct. Cl. 417, 439; *Carver v. United States*, 16 Ct. Cl. 361, 385 (citing *United States v. Diekelman Case*, 92 U. S. 520, 23 L. Ed. 742).

Martial law is the right of a general in command of a town or district menaced with a siege or insurrection to take the requisite

measures to compel the enemy, and depends for its extent, existence, and operation on the imminence of the peril and the obligation to provide for the general safety. As the offspring of necessity, it transcends the ordinary course of law, and may be exercised alike over friends and enemies, citizens and aliens. *Commonwealth v. Shortall*, 55 Atl. 952, 954, 206 Pa. 165.

Martial law is neither more nor less than the will of the general in command of the army. It overreaches and supersedes all civil law by the exercise of military power, and every citizen or subject within the confines of its power is subject to the mere will or caprice of the commander. He holds the life and liberty of all in the palm of his hand. Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander is the legislator, judge, and executor. His order to the provost marshal is the beginning and the end of the trial and condemnation of the accused. There may be a hearing or not, as he wills. If permitted, it may be before a drumhead court-martial or the more formal board of a military commission, or both forms may be dispensed with and the trial and condemnation be equally legal, though not equally humane and judicious. In *re Egan* (U. S.) 8 Fed. Cas. 367.

“The martial law has for its object the order, discipline, and duty of an army. It operates on the person to compel obedience. It extends to all in actual service, whether as soldiers by voluntary enlistment or as militia called out for a limited time. In countries which claim to be free, and of course in this country, it is prescribed by the supreme power of the state, and is sometimes called the ‘Rules of War.’ In the execution of this law there are courts of various grades, and from the inferior there is an appeal to, or rather a revision of, the sentence by the superior, and ultimately by the commander in chief.” *State v. Davis*, 4 N. J. Law (1 Southard) 311, 312.

Martial law is the law of force, and is employed under two general conditions: First, in a part or the whole of a foreign country, when, being at war with such country, our army may invade it, and expel the governing power from a part or the whole of it; second, when force may expel the civil authority from part or the whole of our own territory, or, perhaps, it may be said, martial law is exercised in our own country, the military being on the spot to execute it, where no civil authority exists. But where the civil authority exists the Constitution is imperative that it shall be paramount to the military. *Griffin v. Wilcox*, 21 Ind. 370, 377.

Military law distinguished.

See “Military Law.”

MARTINMAS.

In an avowal by the defendant in replevin that the rent was due at "Martinmas, to wit, November 23d," the word "Martinmas" must be taken to mean New Martinmas. *Smith v. Walton*, 8 Bing. 235.

MARY.

The proper name "Mary" is synonymous with "Mollie," the latter being a diminutive of the former. The two names are really the same, and constitute only one name. *State v. Watson*, 1 Pac. 770, 774, 30 Kan. 281.

MASON.

See "Brick Mason."

A "mason" is one whose occupation is to lay bricks and stones, or to construct walls of buildings, chimneys, or the like, which consists of bricks and stones. The term in a statute giving liens to masons and carpenters for work done in building or repairing any house does not include a plasterer. *Fox v. Rucker*, 30 Ga. 525, 527.

The words "masons or carpenters," in a statute giving masons and carpenters a mechanic's lien for work and materials furnished by them in building and repairing houses, cannot be construed as including the owners of mills who furnish lumber, but is confined to actual masons or carpenters. *Pitts v. Bomar*, 33 Ga. 96, 97.

MASONWORK.

The term "masonwork," as used in a contract to construct waterworks for a city, is ambiguous, and may or may not include the laying of inlet suction and drain pipes; and hence extraneous evidence is admissible to show the meaning of such words. *City of Elgin v. Joslyn*, 26 N. E. 1090, 1091, 136 Ill. 525.

MASONIC HOME.

As public charity, see "Public Charity."

MASONIC SOCIETY.

As charitable institutions, see "Charity."

MASONRY.

In an ordinance providing that a certain culvert should be constructed with a block of masonry at each end of designated dimensions, "masonry" may mean either brick or stone. *Shannon v. Village of Hinsdale*, 54 N. E. 181, 182, 180 Ill. 202.

MASON'S MEASURE.

"Mason's measure" is the term applied to a custom among stone masons and build-

ers whereby stone masons are entitled to claim in the measurement of work done by them not only the actual solid contents of a wall or structure built by such masons, but credit for all openings, such as windows, etc., in the same manner as if the same were solid masonry. *Patterson v. Crowther*, 16 Atl. 531, 532, 70 Md. 124.

MASS.

The mass is the sacrifice in the sacrament of the eucharist or the consecration and oblation of the host. It is a public service, a public act of worship, by which, according to the tenets of the Roman Catholic Church, the priest who celebrates the mass is helping the living and obtaining rest for the dead. *Coleman v. O'Leary's Ex'r*, 70 S. W. 1068, 1074, 24 Ky. Law Rep. 1248.

The saying of mass is a Catholic ceremonial celebrated by the priest in open church, where all who choose may be present and participate therein. It is a solemn and impressive ritual, from which many draw spiritual solace, guidance, and instruction. It is religious in its form and teaching, and clearly comes within that class of trusts or uses denominated in law as "charitable." *Webster v. Sughrow*, 45 Atl. 139, 141, 69 N. H. 380, 48 L. R. A. 100.

Masses are religious ceremonials or observances of the Catholic Church, and come within the religious or pious uses which are upheld as public charities. *Sherman v. Baker*, 40 Atl. 11, 20 R. I. 446, 40 L. R. A. 717 (citing *In re Schouler*, 134 Mass. 426).

MASS CONVENTION.

A mass convention is said to be one where every voter represents himself, and himself only. *Manston v. McIntosh*, 60 N. W. 672, 673, 58 Minn. 525, 28 L. R. A. 605.

MASSAGE.

Massage is defined as a rubbing or kneading of the body, so that the statement by the district attorney in a prosecution for publishing obscene and lewd advertisement relating to baths and massage, that in the massage treatment the man is stripped naked from the sole of his feet to the crown of his head, and is rubbed with the hands, is not prejudicial. *Dunlop v. United States*, 165 U. S. 486, 498, 17 S. Ct. 375, 41 L. Ed. 799.

MASTHEAD.

The term "masthead," as used in a maritime regulation that a sailing vessel at anchor in roadsteads or fairways exhibit between sunset and sunrise a constant bright light at her masthead, means at the very

top of the standing mast. *Valentine v. Cleugh*, 29 Eng. Law & Eq. 49, 56.

MASTER.

See "Special Master"; "Taxing Master." Factor distinguished, see "Factor."

A master is one who exercises personal authority over another and that other is his servant. *Ginter's Ex'rs v. Shelton* (Va.) 45 S. E. 892, 893.

In *Robinson v. Webb*, 74 Ky. (11 Bush) 465, the court quotes with approval a definition of "master" as follows: "He is to be deemed a master who has the superior choice, control, and direction of the servant, and whose will the servant represents, not merely in the ultimate result of the work, but in the details." *Central Coal & Iron Co. v. Grider's Adm'n*, 74 S. W. 1058, 1060, 25 Ky. Law Rep. 165.

A master is one whose will is represented not merely in the ultimate result in hand, but in all its details; one who is the responsible hand of a given industry; who has the power to discharge; one who not only prescribes the duty, but directs and may at any time direct, the means and method of doing the work. A master is one who has the superior choice, control, and direction. *Quinn v. Kansas City, M. & B. R. Co.*, 30 S. W. 1036, 1037, 94 Tenn. 713, 28 L. R. A. 552, 45 Am. St. Rep. 767; *Powers v. Massachusetts Homeopathic Hospital* (U. S.) 109 Fed. 294, 298, 47 C. C. A. 122.

MASTER IN CHANCERY

As referee, see "Referee."
As trustee, see "Trustee."

A master in chancery is an assistant to the chancellor; an officer to whom are referred interlocutory orders for stating accounts, computing damages, etc. *Schuchardt v. People*, 99 Ill. 501, 504, 39 Am. Rep. 34; *In re Durant*, 12 Atl. 650, 653, 60 Vt. 176.

A master in chancery is an officer appointed by the court to assist it in various proceedings incidental to the progress of the case before it, and is usually employed to take and state accounts; to take and report testimony, and to perform such services as require the computation of interest, the value of annuities, the amount of damages in particular cases, the auditing and ascertaining of liens upon property involved, and similar services. The information which he may communicate by his findings in such cases upon the evidence presented to him is merely advisory to the court, which it may accept and act upon, or disregard in whole or in part, according to its own judgment as to the weight of the evidence. *Kimberly v. Arms*, 9 Sup. Ct. 355, 359, 129 U. S. 512, 32 L. Ed.

764 (citing *Basey v. Gallagher*, 87 U. S. [20 Wall.] 670, 680, 22 L. Ed. 452; *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800). See, also, *Gunn v. Black*, 60 Fed. 151, 153, 8 C. C. A. 534; *Johnson v. Gallegos*, 60 Pac. 71, 72, 10 N. M. 1.

Masters in chancery are not judicial, but ministerial, officers, whose findings are only prima facie correct, and not binding on the chancellor nor courts of review; but it is the duty of the court, where exceptions are filed, to approve or disregard the master's conclusions as they appear to be in accordance with or against the weight of the evidence. *Ennesser v. Hudek*, 169 Ill. 494, 495, 48 N. E. 673, 674 (reversing *Hudek v. Ennesser*, 68 Ill. App. 609).

MASTER OF A SHIP.

"A master of ship is one who, for his knowledge of navigation, and for his facility and discretion, has the government of the ship committed to his care and management." *Martin v. Farnsworth*, 33 N. Y. Super. Ct. (1 Jones & S.) 246, 260; *Millaudon v. Marton* (La.) 6 Rob. 534, 540.

The master of a ship is one who commands the ship on her voyage under an appointment from the owners, in the discharge of which duty he possesses an extensive implied power as agent to bind the owners, himself being bound to the strictest responsibility. *Hubbell v. Denison Buckley* (N. Y.) 20 Wend. 181, 182.

Within the federal statute requiring that before a vessel depart from a port in the United States for a foreign port a manifest of the cargo on board sworn to by the master shall be tendered to the collector, means the person in actual command of the vessel having charge of all affairs concerned in its navigation. *Bas v. Steel* (U. S.) 2 Fed. Cas. 987.

The word "master," as used in a definition of a bill of lading, as a written acknowledgment, signed by the master, that he has received goods, etc., stands for any one authorized to bind the vessel or carrier. *The Guiding Star* (U. S.) 62 Fed. 407, 411, 10 C. C. A. 454.

The word "master," as used in the title relating to the collection of duties upon imports, may include any person having the chief charge or command of the employment and navigation of a vessel. *Comp. St. U. S.* 1901, p. 1861.

In the construction of the title relating to merchant seamen every person having command of any vessel belonging to any citizens of the United States shall be deemed to be the "master" thereof. *Comp. St. U. S.* 1901, p. 3120.

The term "master," as used in an act for the protection of submarine cables, unless the context otherwise requires, shall be taken to include every person having command or charge of a vessel. Comp. St. U. S. 1901, p. 3589.

Engineer of steam dredge.

The engineer on a steam dredge chartered for work on a government contract is not the master of such dredge, who was the highest officer on the dredge, and directed the fireman and any other hands aboard, but who had no authority to engage or dismiss hands or purchase supplies, his wages being paid at the office of the charterer, and receiving pay only for each day that the dredge was at work. *The Atlantic* (U. S.) 53 Fed. 607, 608.

Registration of vessel not implied.

A libel to enforce a lien under Act June 13, 1836, giving to mechanics and materialmen a lien upon vessels, stated that the work for which a lien was sought was done at the request of the "master and managing owner of the vessel." Held, that the words "master and managing owner of the vessel," as so used, did not imply that the vessel was registered and enrolled under the laws of the United States. "It is plain that the words 'master and managing owner' were not used in any merely technical sense signifying that the vessel was registered and enrolled and had passed under the jurisdiction and control of the United States government. In a purely technical sense, perhaps, she could have a 'master and managing owner,' properly so called, only by virtue of the laws of the United States; but she had owners, in the general sense of the word, from the time the work of construction and equipment began; and if any one of the owners had the superintendence and the control of the construction, with power to bind his fellows, he might well be considered the managing owner, or even the master, in the general sense of these terms." *The Odorilla v. Baizley*, 18 Atl. 511, 128 Pa. 283.

MASTER'S DRAFT.

A "master's draft" is held to be but an abbreviated form of bottomry. *Hanschell v. Swan*, 51 N. Y. Supp. 42, 44, 23 Misc. Rep. 304.

MATCH.

In its general use the word "match" has never acquired the meaning of illicit or criminal intercourse. It is sometimes used to denote honorable marriage. So that to speak of a woman that a man "matched" her is not libelous. If the word has a local or provincial meaning, importing such fact, it must

be set out by way of inducement. *Clute v. Clute*, 76 N. W. 1114, 101 Wis. 137.

MATE.

The *Lex Mercatoria Americana*, p. 181, says the "mate" of a merchant's ship is called the first officer under the master. *Millaudon v. Martin* (La.) 6 Rob. 534, 539.

The mate is a respectable officer in a ship, and is generally chosen with the consent of the owners. He is under the orders of the master in his ordinary duty, but his contract is not subject to arbitrary control. He may forfeit his right to command and wages by fraudulent, unfaithful, and illegal practices, by gross and repeated negligence, or wilful and unjustifiable disobedience, by incapacity, brought on him by his own fault, to perform his duty, or palpable want of skill in his profession. *Atkyns v. Burrows* (U. S.) 2 Fed. Cas. 115, 116.

The mate of a vessel is the first officer under the master, and is not a seaman or mariner, who are the crew, within Laws U. S. vol. 1, p. 134, providing for the government and regulation of seamen in the merchant's service. *Ely v. Peck*, 7 Conn. 239, 242.

The mate of a ship is the officer next in command to the master. Rev. Codes N. D. 1899, § 4150; Civ. Code S. D. 1903, § 1503.

The mate of a ship is the officer next in rank to the master, and in case of the master's disability he must take his place. By so doing he does not lose any of his rights as mate. Civ. Code Cal. 1903, § 2048.

MATERIAL

Material means important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form. *Black, Law Dict.*

Webster defines "material" as relating to matter corporeal, not separately, physical; and so it is held that the treatment of a patient by rubbing and manipulating the affected parts, commonly known as "massage treatment," involves the use of material remedy, and is practicing medicine, within the Illinois act regulating the practice of medicine, and does not come within the exception in the amendatory act of 1899, applying to persons treating the sick by mental or spiritual means. *People v. Jones*, 92 Ill. App. 447, 449.

MATERIAL ALLEGATION.

A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the plead-

ing without leaving it insufficient. *Iba v. Central Ass'n*, 40 Pac. 527, 530, 5 Wyo. 355; *Gillson v. Price*, 1 Pac. 459, 18 Nev. 109; *Lusk v. Perkins*, 48 Ark. 247, 2 S. W. 847, 851, 48 Ark. 238; *Tucker v. Parks*, 7 Colo. 62, 67, 1 Pac. 427, 429; *Barret v. Godshaw*, 75 Ky. (12 Bush) 592, 600; *Rhemke v. Clinton*, 2 Utah, 230, 236; *Ricknor v. Clabber* (Ind. T.) 76 S. W. 271-273; *Bates' Ann. St. Ohio* 1904, § 5082; *Ann. Codes & Sts. Or.* 1901, § 96; *Code Civ. Proc. Cal.* 1903, § 463; *Ballinger's Ann. Codes & St. Wash.* 1897, § 4944; *Rev. St. Wyo.* 1899, § 3556.

The word "material," as applied to allegations and pleadings in the absence of a statutory definition, must be understood in its ordinary sense as meaning an issue of fact or law, which, so far as relates to the particular cause of action to which the allegation refers, will decide the cause. *Newman v. Otto*, 6 N. Y. Super. Ct. (4 Sandf.) 668, 670.

The term "material allegation," as used in a reply denying each and every "material allegation of new matter in an answer," means material matter, as distinguished from immaterial matter set forth in the answer, on which no issue in the action could be made, and is therefore not defective for failing to deny every allegation in the answer. *Miller v. Brumbaugh*, 7 Kan. 343, 353.

MATERIAL ALTERATION.

Any change in the personality, number, or relations of the parties to an instrument is, as a general rule, a "material alteration." *Texas Printing & Lithographing Co. v. Smith* (Tex.) 14 S. W. 1074, 1075; *Sneed v. Sabinal Mining & Milling Co.* (U. S.) 71 Fed. 493, 495, 18 C. C. A. 213.

A material alteration of an instrument is any alteration which causes it to speak a language different in effect from that which it originally spoke. *Foxworthy v. Colby*, 89 N. W. 800, 64 Neb. 216, 62 L. R. A. 393; *Murray v. Klinzing*, 29 Atl. 244, 64 Conn. 78.

A material alteration sufficient to avoid an instrument must be an alteration which will change the legal meaning and effect of the instrument. *Organ v. Allison*, 68 Tenn. (9 Baxt.) 459, 462.

A material alteration of a promissory note by the holder thereof is not only an alteration made with intent to defraud, but any material alteration, however innocently made. *Eckert v. Pickel*, 13 N. W. 708, 709, 59 Iowa, 545.

Any alteration which changes (1) the date; (2) the sum payable either for principal or interest; (3) the time or place of payment; (4) the number or the relation of the parties; (5) the medium or currency in which payment is to be made, or which adds a place of payment where no place of payment is

specified; or any other change or addition which alters the effect of the instrument in any respect—is a material alteration. *Ann. Codes & St. Or.* 1901, § 4527; *Rev. Codes N. D.* 1899, § 1053.

Changing amount of principal.

Where a note for \$1,000 was given for money borrowed by the principal, and afterwards, with the consent of the payee, but without the consent of the surety, the note was altered by the principal, and raised to \$1,500, which the payee thereupon lent the principal, the alteration was material as to the surety, discharging him from all liability. *Batchelder v. White*, 80 Va. 103, 108.

Changing consideration of deed.

The necessity of a consideration in a deed is to prevent a trust resulting in favor of the grantor, and one valuable consideration does this as well as another. Changing the amount of the consideration does not cause a deed to speak a language different in its legal effect. Such an alteration is not a material one. *Murray v. Klinzing*, 29 Atl. 244, 64 Conn. 78 (citing *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661; *Meeker v. Meeker*, 16 Conn. 387; *Vose v. Dolan*, 108 Mass. 155, 11 Am. Rep. 331).

Adding or changing interest.

An alteration is material when it changes the legal effect of the contract; changes the contract in a material particular. An alteration making a bond bearing a higher rate of interest than it otherwise would have borne is material. *Dobyns v. Rawley*, 76 Va. 537, 545.

An alteration by merely adding the words "with interest" is a material alteration. *Fay v. Smith*, 83 Mass. (1 Allen) 477, 478, 79 Am. Dec. 752; *Neff v. Horner*, 63 Pa. (13 P. F. Smith) 327, 331, 3 Am. Rep. 555.

Changing medium of payment.

The unauthorized insertion of the word "gold" before the word "dollars" in an instrument after its execution and delivery is a material alteration. *Foxworthy v. Colby*, 89 N. W. 800, 64 Neb. 216, 62 L. R. A. 393.

Adding "more or less."

The unauthorized alteration of a contract by the insertion of the words "more or less" in the description of the property to be conveyed is an alteration avoiding the contract, where it was for sale of a certain number of acres at a fixed price per acre. *Sherwood v. Merritt*, 53 N. W. 512, 83 Wis. 233.

Changing number of bond.

The alteration of a number of one of a series of negotiable bonds of the common-

wealth, not required by law to be numbered, which does not change the tenor of the bond so as to affect either in substance or in form the written contract or proof thereof, is not a material alteration. *Commonwealth v. Emigrant Industrial Sav. Bank*, 98 Mass. 12, 16, 93 Am. Dec. 128.

Changing payee.

When a note is given by a corporation to a manager's wife for money due him, an alteration of the note so as to make it payable to the manager is a material one. *Sneed v. Sabinal Min. & Mill. Co.* (U. S.) 71 Fed. 493, 495, 18 C. C. A. 213.

Adding surety.

It is not a material alteration which will discharge a surety on a note where the principal, before the delivery to the payee, without the knowledge or consent of the surety, obtains the signature of another person as co-surety. *Ward v. Hackett*, 14 N. W. 573, 579, 30 Minn. 132, 14 Am. Rep. 187.

Changing time of payment.

A material alteration of a promissory note by the payee or holder, such as will discharge the maker, etc., is any change which alters the contract of the parties who have signed the instrument, whether increasing or diminishing their liability. The substitution of a later date delaying the time of payment is a material alteration. *Mersman v. Werges*, 5 Sup. Ct. 65, 66, 112 U. S. 139, 28 L. Ed. 641.

MATERIAL DEFENDANT.

A "material defendant," within a statute requiring bills in a certain class of suits to be filed in the district court in which the defendants or material defendant resides, is one who is really interested in the suit, and against whom a decree is sought. *Lewis v. Elrod*, 38 Ala. 17, 21. One whose interest is antagonistic to complainants, and against whom relief is prayed. *Waddell v. Lanier*, 54 Ala. 440, 442. A necessary or indispensable party, as distinguished from one who is merely a proper party. *Harwell v. Lehman, Durr & Co.*, 72 Ala. 344, 346. Not a mere nominal or proper party, but a defendant who is a necessary party, really interested, and against whom a decree is sought. *Brierfield Coal & Iron Co. v. Gay*, 17 South. 618-620, 106 Ala. 615.

MATERIAL EVIDENCE.

Evidence offered in the cause, or a question propounded, is material when it is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case. *Porter v. Valentine*, 41 N. Y. Supp. 507, 508, 18 Misc. Rep. 213 (citing Black, Law Dict.).

MATERIAL FACT.

The simple question to be tried on the general issue is whether the material facts alleged in the declaration are true. By "material," in this connection, is not meant "of legal sufficiency," but whether they constitute a part of the plaintiff's case as he presents it. *Adams v. Way*, 32 Conn. 160, 168.

The words "material facts," when used in an instruction, should be explained to the jury, and their application defined. *Digby v. American Cent. Ins. Co.*, 3 Mo. App. 603.

The "material facts," within a statute requiring the attachment affidavit to state the material facts, are the allegations which must produce in the mind of the court a conclusion that a ground for the attachment exists. The statement that the defendant is hiding and concealing property and rights in action is insufficient, as being too general. *Sandheger v. Hosey*, 26 W. Va. 221, 223.

Rev. St. c. 130, § 23, as amended by Laws 1859, c. 101, § 1, providing that, "in all writs of attachment issued under the provisions of this chapter, it shall be competent for the defendant, by answer verified by his affidavit, to deny the existence, at the time of making the affidavit required to be annexed to the attachment, of the material facts stated therein, whether such facts be stated upon the knowledge or belief of the defendant or otherwise," means the nonresidence or fraudulent acts of the defendant; that is, such facts as the law says may be stated on the belief of the person making the affidavit. *Davidson v. Hackett*, 5 N. W. 459, 466, 49 Wis. 186.

A misrepresentation by a person that he had paid the greater part of a judgment against him on his warranty of soundness of a slave sold by him is not a misrepresentation of a material fact, a material fact being a fact which is substantially the consideration of the contract. *Lyons v. Stephens*, 45 Ga. 141, 143.

A justice's certificate that a statement of facts contained all the testimony on which the cause was tried below is not sufficient to satisfy the requirements of 2 Hill's Code, § 1423, requiring such statement of facts to contain all the material facts in the cause or proceeding, since there may be other material facts in the case besides the testimony—for example, the rulings of the court on excluded testimony. *State v. Carey*, 30 Pac. 729, 4 Wash. 424; *Schlaechter v. Miller*, 30 Pac. 745, 4 Wash. 463.

In insurance law.

A "material fact," as the term is used in the law of insurance is defined by Mr. Angell to be "a fact which, if communicated to the underwriter, would induce him either to decline an insurance altogether, or not to ac-

cept it unless at a higher premium." *Boggs v. American Ins. Co.*, 30 Mo. 63, 68.

A material fact is any fact, the knowledge or ignorance of which would naturally influence the insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of insurance. *Clark v. Union Mut. Fire Ins. Co.*, 40 N. H. 333, 338, 77 Am. Dec. 721.

The term "material," as used with reference to statements in an application for insurance, means every fact which increases the risk, or which, if disclosed, would have been a fair reason for demanding a higher premium. To render a statement in an application for life insurance material, it is not necessary that the death was in fact produced by a cause connected with the representation. *Murphy v. Prudential Ins. Co.*, 55 Atl. 19, 22, 205 Pa. 444.

A fact is material to the insurance risk when it naturally and substantially increases the probability of the event upon which the policy is to become payable. Materiality of a fact in insurance law is subjective. It concerns rather the impression which the fact claimed to be material would reasonably and naturally convey to the insurer's mind before the event, and at the time the insurance is effected, than the subsequent actual cause or connection between them, or the probable cause or effect and the event. Thus it is by no means conclusive upon the question of the materiality of a fact that it was actually one link in a chain of causes leading to the event, and, on the other hand, it does not disprove that a fact may have been material to the risk, because it had no actual subsequent relation to the manner in which the event insured against did occur. A fair test of the materiality of a fact is found, therefore, in the answer to the question whether a reasonably careful and intelligent man would have regarded the fact communicated at the time of effecting the insurance as substantially increasing the chances of the loss insured against. The best evidence of this is to be found in the usage and practice of insurance companies in regard to raising the rates or in rejecting the risk on becoming aware of the fact. If the rates are not raised in such a case, it may be inferred that reasonably careful men do not regard the fact as material. If the rates are raised, or the risk rejected, then they do. *Penn Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co.*, 72 Fed. 413, 428, 19 C. C. A. 236, 38 L. R. A. 33.

MATERIAL INJURY.

Chancellor Kent, in his Commentaries (3 Comm. 429), states that streams of water are intended for the use and comfort of man; and it would be unreasonable, etc., to debar

any riparian proprietor from the application of water for domestic, agricultural, or manufacturing purposes, provided the use be made under the limitation that he do no material injury to his neighbor below him, who has an equal right to the subsequent use of the same water. Held, that the words "material injury," as so used, ought not to be taken literally, unless the words be impressed with a signification, the equivalent of a substantial deprivation of capacity in a lower proprietor to employ the water for useful purposes. The adjective "material" is prefixed to "injury," and the words seem to have reference to the enjoyment of the use by the inferior owner, not to his mere abstract right to the use as against others than riparian owners, and to intimate that he cannot complain of a reasonable exercise of the use by another who possesses the general right in common with himself. The employment by Kent of the words "material injury" implies that every diminution is not an injury, and it excludes, where water is reasonably used above for irrigation, mere sentiment, or the consideration of a diminution from the natural flow so far merely as such flow pleases the eye or gratifies a taste for the beautiful. *Lux v. Haggin*, 10 Pac. 674, 756, 69 Cal. 255.

MATERIAL ISSUE.

A material issue, in the common-law sense, is one which is decisive of the cause, but, as applied to an equity pleading, a material issue is an issue upon the fact which has some bearing upon the equity sought to be established, and not an issue decisive of the whole case. *Wooden v. Waffle* (N. Y.) 6 How. Prac. 145, 151.

MATERIAL NEW MATTER.

The phrase "material new matter," in a statute authorizing a party to a judgment to file a complaint for a review for errors appearing in the proceedings, or for material new matter discovered since the rendition of the judgment, means material new facts—facts discovered after the rendition of the judgment, material to a just determination of the case. *Hornady v. Shields*, 21 N. E. 554, 555, 119 Ind. 201.

MATERIAL REPRESENTATION.

Under Acts 1875, § 21, providing that an officer of a corporation organized under the act should be liable for all the debts of the corporation contracted while he is an officer thereof, where the report signed by him is false in a material representation, it is held that a report containing the names of two persons as stockholders, stating the amount of their stock as actually paid up, where in fact such persons were not stockholders at all,

is false in a material representation. *Brandt v. Godwin*, 3 N. Y. Supp. 807, 808.

MATERIAL SIGNATURE.

The signature to a receipt on a money order is a material signature, within the meaning of the law against forging any material signature on a money order. *United States v. Long* (U. S.) 30 Fed. 678, 679.

MATERIAL VARIANCE.

A variance between the allegation and proof which ought not to have misled the adverse party to his prejudice is not a material variance. *Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co.*, 11 Pac. 515, 522, 5 Utah, 3.

No variance between the allegations in a pleading and the proof shall be deemed material unless it has actually misled the adverse party, to his prejudice, in maintaining his action upon the merits. *Clark's Code* N. C. 1900, § 269; *Southmayd v. Southmayd*, 5 Pac. 318, 319, 4 Mont. 100; *Carter v. Baldwin*, 30 Pac. 595, 95 Cal. 475.

A material variance between the proof and the information arises when an acquittal of the defendant under the information would be no bar to a further prosecution for the same offense. *People v. Terrill*, 64 Pac. 894, 895, 132 Cal. 497.

The true rule is that, if the variance between the allegation of a pleading and the proof does not change the sense in any way, it is not a material variance; but it is not to be understood that, when a contract alleged to have been forged is set forth in the indictment in words and figures, any other contract is admissible, the legal effect of which is the same as that set forth in the terms of the indictment; but when, in the indictment, a word found in the instrument proved is omitted therefrom, or when a word is inserted in the instrument described which is not in the instrument proved, then the variance is unimportant. Therefore, in an information for forging a promissory note, the insertion of the word "to" in the name recited, which word is omitted in the note proved, is not a material variance, where this does not affect the meaning. *People v. Phillips*, 11 Pac. 493, 495, 70 Cal. 61.

MATERIALITY.

"Materiality," with reference to evidence, does not have the same signification as "relevancy." *Pangburn v. State* (Tex.) 56 S. W. 72, 73.

"Materiality" means the property of substantial importance or influence, especially as distinguished from formal requirement (*Bouvier*); substantial as opposed to formal (*Johnson*). A stipulation consenting in writ-

ing to the introduction of certain depositions, "so far as the same are material," reserved only the question of the influence of the evidence upon the controversy between the parties—whether the evidence tendered was of substance, as affecting the matter in dispute. Such stipulation ignores all formal requirements, all technical objections, with respect to pleading. *David Bradley Mfg. Co. v. Eagle Mfg. Co.* (U. S.) 57 Fed. 980-986, 6 C. C. A. 661.

The intrinsic and essential meaning of "materiality to the risk," of representations by the insurer in respect to property to be insured, and the true test of such materiality, are that such representations affect and influence the actions of the insurer in taking or refusing the risk, or in the amount of premiums to be paid. Chief Justice Marshall, in *Columbia Ins. Co. v. Lawrence*, 27 U. S. (2 Pet.) 47, 7 L. Ed. 335, defines the materiality so clearly, and in language so terse and yet so comprehensive, that it may well be adopted by the courts as the very best expression of it that can be made: "Generally speaking, insurances against fire are made in the confidence that the assured will use all precautions to avoid the calamity insured against which would be suggested by his interest. The extent of this interest must always influence the underwriter in taking or rejecting the risks, or in estimating the premiums. So far as it may influence him in these respects, it ought to be communicated to him. Underwriters do not rely so much upon the principles as on the interest of the assured, and it would seem, therefore, to be always material that they should know how far this interest is engaged in guarding the property from loss." *Ryan v. Springfield Fire & Marine Ins. Co.*, 1 N. W. 426, 429, 46 Wis. 671.

MATERIALLY.

"Materially" is defined as substantially, essentially, really. *Grand Rapids Hydraulic Co. v. American Fire Ins. Co.*, 53 N. W. 538, 539, 93 Mich. 396.

As used in an instruction in an action on a fire policy that the act of plaintiff materially increased the risk, the word "materially" means substantially, essentially, really. *Grand Rapids Hydraulic Co. v. American Fire Ins. Co.*, 53 N. W. 538, 539, 93 Mich. 396.

In an action for personal injuries, the court instructed the jury that, if the plaintiff materially contributed to the injury by his own carelessness or negligence, he could not recover, but, if he did not materially contribute to such injury, he might recover. The instruction was held erroneous; the court saying that if the trial court had informed the jury that for the plaintiff to contribute in any degree to the injury by his own negligence would have been material, and would defeat his recovery, the use of the

word "material" would have been harmless, though unnecessary. Without this explanation, the jury would naturally understand the court as informing them that the plaintiff might have been guilty of a degree of negligence which was not material, and notwithstanding which he might recover. One of the meanings of the term "materially" is "in an important degree." *Webst. Dict.* And this is the meaning which would be properly attached to it as used in the instructions. They very clearly import that there might be a degree of negligence on the part of the plaintiff contributing to the injury which was not important, and would not defeat his right to recovery; that if he did not, by carelessness on his part, contribute in an important degree to the injury, he might recover. *Arts v. Chicago, R. I. & P. R. Co.*, 38 Iowa, 293, 296.

MATERIALMAN.

As contractor, see "Contractor"; "Original Contractor"; "Subcontractor."

As mechanic, see "Mechanic."

The word "materialman," as used in the act relating to mechanics' liens, shall be construed to include all persons by whom any materials are furnished in or for building, altering, improving, repairing, erecting, ornamenting, or putting in any house, building, machinery, wharf, or other structures. *Comp. Laws Mich.* 1897, § 10,738.

Materialmen are "gentlemen in trade who do not follow the business of building or contracting to build homes for others, but who keep for sale the various materials and commodities which enter largely into buildings, and completion of them." *Curlett v. Aaron* (Del.) 6 *Houst.* 477, 478.

A lumberman furnishing lumber to contractors and builders, who were to erect an elevator for third persons, is a materialman, and not a subcontractor, within *Ky. St.* § 2463, giving a lien to a person furnishing material in the erection of a building by contract with a subcontractor, and hence a person furnishing lumber to such lumber dealer is not entitled to a lien. In *Phil. Mech. Liens* (3d Ed.) § 51, it is said that a lumber dealer employed merely to furnish lumber, whether manufactured or not, is not a contractor for the erection of a building, or any division of it. He is a materialman merely. *Hightower v. Bailey*, 56 S. W. 147, 149, 108 *Ky.* 198, 49 L. R. A. 255, 94 *Am. St. Rep.* 350.

MATERIALS.

See "Building Materials"; "Mixed Materials."

As to what constitutes furnishing of materials, see "Furnish."

The word "material," according to Webster, imports the substance matter of which anything is made, so that the statement in a petition that a debt was contracted for materials furnished was sufficient under a statute requiring the items composing the debt to be stated. *Pendleton v. Franklin*, 7 N. Y. (3 Seld.) 508, 512.

"Material," as used in 3 Stat. 42, fixing a license tax for stills employed in distilling spirits from domestic material, "means the raw or original material from which the spirituous liquor is produced, and not the product of the raw material." *United States v. Tenbroek* (U. S.) 28 Fed. Cas. 33, 34.

Under a statute giving a lien to any person who shall perform any labor or furnish any material for a building, the word "material" means the manufactured material furnished by delivering it on the premises, and in condition to go into the building, and does not mean merely the raw material, such as the ore in the mines, or the trees out of which the lumber is made. *Grand Island Banking Co. v. Koehler*, 78 N. W. 265, 267, 57 *Neb.* 649.

A conveyance of land to a railroad "for materials" shows that it was intended that the railroad should use the soil upon it for the purposes of the railroad in the limit of its boundaries, but it is not a reasonable construction of its import to claim that it was designated to be used to an extent that would destroy and injure the land of the adjoining owner. *Ludlow v. Hudson R. R. Co.* (N. Y.) 6 *Lans.* 128-131.

Boiler and engine.

A steam engine and boiler sold and delivered to a corporation, and not necessary to keep the company going, are not materials furnished, within Code, § 1255, providing that mortgages of incorporate property shall not exempt the property from execution in satisfaction of judgments for materials furnished such incorporation. *James v. Greenville Lumber Co.*, 29 S. E. 358, 122 N. C. 157.

Books of lottery.

Rev. St. c. 142, which authorizes magistrates to issue warrants to search for and seize lottery tickets or "materials for a lottery" unlawfully made, provided, or procured for the purpose of drawing a lottery, includes books kept in relation to the proceedings respecting a lottery. *Commonwealth v. Dana*, 43 *Mass.* (2 Metc.) 329, 337.

Bottles, corks, etc.

Imported bottles, corks, and tinfoil re-exported as cases or covers for beer made in this country are not materials used in the manufacture of articles manufactured or purchased in the United States, within the meaning of Tariff Act 1890, § 25, entitling an exporter to a drawback of the duties paid

on such material. *Beadleston v. United States* (U. S.) 104 Fed. 295.

Cars and transportation facilities.

A contract referring to all works, materials, and plant in use in or about the construction or operation of a railroad does not necessarily include rolling stock. In fact, rolling stock is usually not referred to as materials. *Central Trust Co. v. Condon* (U. S.) 67 Fed. 84, 92, 14 C. C. A. 814.

"Material includes everything of which anything is made." *Bouv. Law Dict.* And coal cars in a mine are materials, within Code Ala. 1886, § 3018, giving a lien for materials furnished for any building or improvement on land which includes the mine. *Central Trust Co. v. Sheffield & B. Coal, Iron & Ry. Co.* (U. S.) 42 Fed. 106, 110, 9 L. R. A. 67.

"Materials," as used in Act Pa. 1826, relating to the erection of a certain canal, and directing the commissioners appointed for that purpose to commence the construction of the canal and to ascertain the value of materials required for the canal or the works thereof, the dams, locks, feeders, or any works appurtenant, etc., and also Act Pa. 1828, providing for the commencement of a railroad, and directing the commissioners to receive releases for the damages to the owners of land by reason of the road passing through the land, or the taking of materials to construct the same, etc., includes those things which are component parts of the road or canal, necessary for their completion in all their parts. It does not include the means or facilities for transportation on them afterwards. *Baring v. Erdman* (U. S.) 2 Fed. Cas. 784, 788.

Coal and wood.

Coal furnished an electric light company, which was necessary to run the concern and keep it going, was "materials furnished," within Code, § 1781, giving to laborers and mechanics a lien on the property for materials furnished. *James v. Greenville Lumber Co.*, 29 S. E. 358, 122 N. C. 157 (citing *Pocahontas Coal Co. v. Henderson Electric Light & Power Co.*, 118 N. C. 232, 24 S. E. 22).

A statute giving priority to claims for material furnished for the purpose of keeping a railroad in repair or running it includes such supplies as are consumed by it in its operation—such as wood and coal. *Poland v. Lamolille Valley R. Co.*, 52 Vt. 144, 180.

Depot equipment.

The word "materials," within the meaning of Rev. St. Mo. § 3200, giving a lien to persons who furnish materials for a railroad company, includes only those things which pass into the permanent structure of the

road, and includes letter presses, scales, trucks, etc. *Central Trust Co. v. Texas & St. L. R. Co.* (U. S.) 27 Fed. 178, 179.

House.

The term "materials," in a statute giving mechanics' liens for materials furnished in the construction and repair of any building, wharf, or other superstructure, includes a house purchased to constitute a part of a larger structure. *Selden v. Meeks*, 17 Cal. 128, 131.

Illuminating and lubricating oils.

In Sanb. & B. Ann. St. § 3314, as amended, providing that every person who, as principal contractor, architect, etc., furnishes any material in or about the erection, construction, protection, or removal of any machinery erected or constructed, etc., shall have a lien for such material, "material" should not be construed to include lubricating oil sold to be, and actually used, on mill machinery. Such oil may protect such machinery against the effects of friction, and thus preserve it from injury. The statute seems to go on the principle that materials used and labor performed on machinery, which enhance its value and become a part of such machinery, should be entitled to a lien. It is clear that the statute does not embrace everything used in operating the machinery, and which tends to preserve it. *Standard Oil Co. v. Lane*, 44 N. W. 644, 75 Wis. 636, 7 L. R. A. 191.

Rev. St. Mo. § 3200, which provides that all persons who shall furnish ties, fuel, bridges, or materials to a railroad company shall have a lien, etc., means something which goes into the permanent structure of the road, and does not include lubricating and illuminating oils. *Central Trust Co. v. Texas & St. L. R. Co.* (U. S.) 23 Fed. 703, 704.

Iron and ties of railroad.

A statute according a priority to claims for services rendered or materials furnished for the purpose of keeping a railroad in repair or running it means such supplies as are indispensable in making repairs on the road or its equipment, and as are annexed to the property and become part of it, such as iron, ties, and lumber. *Poland v. Lamolille Valley R. Co.*, 52 Vt. 144, 180.

Loss of time, etc.

The term "materials," in a mechanic's lien statute authorizing such liens for material furnished, etc., does not include loss of time for men, or delay, risk, and inconvenience to contract work. *Lee v. Brayton*, 26 Atl. 256, 18 R. I. 232.

Machinery and tools.

A hammer, shovel, hoe, chisel, mallets, etc., though necessary implements for laborers, are not materials for which a lien will

He. May & Thomas Hardware Co. v. McConnell, 14 South. 768, 769, 102 Ala. 577.

The term "materials," in a statute giving a lien to materialmen for materials sold to be used in constructing certain improvements, means materials which become a part of the completed work, and does not include tools of trade, as picks, shovels, etc. **Gordon Hardware Co. v. San Francisco & S. R. Co.** (Cal.) 22 Pac. 406.

The term "material," in Code, § 1255, providing that mortgages upon the property of a corporation shall not exempt its property from an execution for material furnished the corporation, does not include a dynamo used in an electric light and power plant. If so, there would be no security for creditors who might lend reasonable amounts of money upon manufacturing plants. **General Electric Co. v. Morganton Electric Light & Power Co.** 30 S. E. 314, 315, 122 N. C. 599.

A slate company's charter, providing that the stockholders should be individually liable for debts due mechanics, workmen, etc., and for materials furnished, refers to that only which forms part of the products of the company, and does not include lumber furnished for the erection and construction of a derrick used in hoisting slate from the quarry. **Moyer v. Pennsylvania Slat Co.**, 71 Pa. (21 P. F. Smith) 293, 298.

In a statute giving a lien to any one who performs any work or labor or furnishes any material in digging or constructing a well, the word "material" does not include a machine which plaintiff rented to the contractor, and which was used by such contractor in boring a well. When plaintiff hired the machine to the contractor, to all intents and purposes it became the latter's machine, and the renting of such machine to the contractor was not furnishing material for such well. **McAuliffe v. Jorgenson**, 82 N. W. 706 707, 107 Wis. 182.

"Materials for building," in statutes giving a mechanic's lien to any one who shall build or repair, in whole or in part, a house, fixtures, or improvements, or shall furnish materials in such building or repairing, do not include the furnishing of machinery to be used in a building for manufacturing purposes. **East Tennessee Iron Mfg. Co. v. Bynum**, 35 Tenn. (3 Sneed) 268, 269, 65 Am. Dec. 56.

Tools and appliances used in raising a building so that another story may be built thereunder are not materials furnished to be used in the construction, alteration, or repair of the building, within the meaning of the lien law, but are mere tools and appliances used by the workmen for the purpose of facilitating the work. **Allen v. Elwert**, 44 Pa. 823, 826, 29 Or. 428.

Under a statute giving to one who furnishes any material, machinery, or fixtures

for any improvement on land a lien on such improvement and the land on which it is situated, there is no lien for wrenches or belting furnished, in no way attached to the real estate, or a necessary part to the machinery which is thus attached. **Meek v. Parker**, 63 Ark. 367, 369, 38 S. W. 900, 58 Am. St. Rep. 119.

Material for temporary use.

Materials furnished for or about the erection of a building, within the meaning of a mechanic's lien law giving a lien for materials furnished for or about the erection or construction of a building, do not include lumber to be used merely for the purpose of erecting scaffolding for the laying of brick upon the building, though furnished upon the credit of the building. **Oppenheimer v. Morrell**, 12 Atl. 307, 308, 118 Pa. 189.

"Material furnished," as used in Comp. St. c. 54, art. 2, § 2, giving liens for material furnished in the construction, repair, etc., of a railroad, includes lumber, posts, building paper, and laths sold by dealers in lumber to a subcontractor engaged in building a railroad, and delivered by him to be used in the erection of shanty boarding houses or stables on or near the line of road for the use of the men and animals employed and used by such subcontractor in and upon such work. **Stewart-Chute Lumber Co. v. Missouri Pac. Ry. Co.**, 44 N. W. 47, 49, 28 Neb. 39, 44.

Money or supplies for vessel.

Rev. St. 1846, tit. 26, c. 122, § 1, providing that every ship, boat, or vessel used in navigating the waters of the state shall be subject to a lien for all debts contracted by the master, owner, agent, or consignee thereof on account of supplies furnished for the use of such ship, boat, or vessel on account of work done or materials furnished by mechanics, tradesmen, or others in or about building, repairing, fitting, furnishing, or equipping such ship, boat, or vessel, cannot be construed to include supplies, means, and money in the building, fitting, and furnishing of a vessel. **Lawson v. Higgins**, 1 Mich. (Man.) 225, 226.

Opera house equipment.

"Material for the improvement of real estate," as used in Code, § 1979, authorizing a lien to one who furnishes material for the improvement of real estate, includes scenery and other articles constituting the stage and scenic outfit of an opera house, and authorizes a lien to one furnishing the same. **Waycross Opera House Co. v. Sossman**, 20 S. E. 252, 253, 94 Ga. 100, 47 Am. St. Rep. 144.

A statute giving a lien on a building for labor and material used in the erection, alteration, or repair thereof, and extending such lien to materials for plumbing, gas

fitting, paper hanging, and paving, does not include materials used for upholstering an opera house. *McCartney v. Buck* (Del.) 8 Houst. 34, 12 Atl. 717, 720.

Paints and oils.

The word "materials" is constantly and commonly used to designate any article employed in the erection and completion of buildings. It includes paints and oils as clearly as it includes lumber, sash, doors, blinds, and other things commonly called "building material." *Ellis v. Cochran*, 28 S. W. 243, 244, 8 Tex. Civ. App. 510.

House painters are within the provisions and protection of the statutes which give a lien upon buildings to those who furnish labor or materials for the erecting or repairing thereof. If the builder protects the walls of his house from the action of the elements by covering them with a coat of paint or stucco, he has used these materials in erecting his house. *Martine v. Nelson*, 51 Ill. 422, 423.

Paper, ink, cuts, etc., of publishing company.

The term "materials," as used in Code, § 1255, providing that mortgages by corporations shall not exempt their property from executions on judgments for labor or materials furnished, does not include paper, ink, cuts, and the like, furnished to a publishing company. Such articles, not being attached to or such as to enhance the value of the property mortgaged, are not within the spirit or letter of the section. *Antietam Paper Co. v. Chronicle Pub. Co.*, 20 S. E. 366, 115 N. C. 143; *Boston Safe-Deposit & Trust Co. v. Hudson* (U. S.) 68 Fed. 758, 762, 15 C. C. A. 651.

Parts of tank.

The term "material," as used in a statute giving a mechanic's lien for material furnished in the construction of a building, etc., should be construed to include the parts of a large tank which plaintiff shipped at his factory to defendant's land, and which were there put together with oakum, pitch, and hoops. *Parker Land & Improvement Co. v. Reddick*, 47 N. E. 848, 849, 18 Ind. App. 616.

Powder, fuses, etc.

The term "materials," in the statute giving a lien for materials furnished in the construction of a railroad, is not limited to materials which actually enter into and form a part of the railroad, but includes any materials necessary for its construction, and which are in fact used or consumed in building the railroad, and therefore a lien may arise for giant powder thus consumed. *Rapauno Chemical Co. v. Greenfield & N. Ry. Co.*, 59 Mo. App. 6, 10; *Giant Powder Co. v. Oregon Pac. R. Co.* (U. S.) 42 Fed. 470, 471, 8 L. R. A. 700.

The term "materials," in a statute giving a lien for timber or other materials to be used in or about a mine, includes powder, steel, and candles furnished for the use of the mine. *Keystone Min. Co. v. Gallagher*, 5 Colo. 23, 25, 28.

The term "materials in building," in mechanic's lien law giving a lien for materials used in building, includes powder and fuses necessarily used in excavating a foundation for a building required to be excavated by a building contract. *Hazard Powder Co. v. Byrnes* (N. Y.) 21 How. Prac. 189.

The charter of a slate company, providing that the stockholders should be individually liable for debts due mechanics, etc., and for material furnished, relates to that only which forms part of the products of the company, and does not include powder and fuse used in blasting the slate. *Moyer v. Pennsylvania Slate Co.*, 71 Pa. (21 P. F. Smith) 293, 298.

Rights of way.

The furnishing of rights of way is not the furnishing of "materials," within Barb. & C. Ky. St. 1894, § 2492, relative to mechanics' liens upon railroads, providing that all persons who perform labor, who furnish labor, materials, etc., shall have a lien on such railroad for such labor, materials, etc. *Richmond & I. Const. Co. v. Richmond, N., I. & B. R. Co.* (U. S.) 68 Fed. 105, 113, 15 C. C. A. 289, 34 L. R. A. 625.

Sod.

"Material furnished for the construction, improvement, or repair of a public improvement," within the meaning of Rev. St. § 8193, includes sod furnished to a public park. *Fox v. Wunker*, 18 Ohio Cir. Ct. R. 610, 611.

Stock of goods, etc.

The tools or implements, materials, stock, and fixtures of a debtor, necessary for carrying on his trade or occupation, which are exempted from execution by St. 1855, c. 264, does not include the stock of goods, scales, and measures, horse, wagon, and harness of a shopkeeper in the country. The clause in this section which exempts from attachment the tools and implements of the debtor has never been so construed as to embrace that class of persons who are engaged merely in the business of buying and selling articles of merchandise. On the contrary, it has always been considered as having been intended specially for the benefit of those to whom, on account of their peculiar pursuits and avocations, tools and implements are essential to make their labor available, and to enable them to complete the work which they undertake to perform. *Wilson v. Elliot*, 73 Mass. (7 Gray) 69, 70.

Wagon.

The term "tool, implements, materials, stock, or fixtures" necessary for carrying on a debtor's business, which are exempted from execution in the statute, does not include a wagon, with patent couplings attached, used by the owner in carrying on his business of selling patent couplings. *Gibson v. Gibbs*, 75 Mass. (9 Gray) 62.

MATRIMONIAL COHABITATION.

"Matrimonial cohabitation" means the living together of a man and woman ostensibly as husband and wife, and from such cohabitation sexual intercourse is presumed. *Cox v. State*, 23 South. 806, 807, 117 Ala. 103, 41 L. R. A. 760, 67 Am. St. Rep. 166.

"The general definition of 'matrimonial cohabitation' is the living together of a man and woman ostensibly as husband and wife. This does not necessarily require the announcement further than it is given by the appearances of the purpose of the parties." *Wilcox v. Wilcox* (N. Y.) 46 Hun, 32, 37.

Matrimonial intercourse distinguished.

"Matrimonial cohabitation," as used in distinction from "matrimonial intercourse," signifies a living together in the same house without copulation. *United States v. Musser*, 7 Pac. 389, 390, 4 Utah, 153.

Matrimonial cohabitation is the living together of two persons legally joined as husband and wife. The term "matrimonial cohabitation" is not synonymous with, and does not mean the same, in any sense, as "matrimonial intercourse." The former may be enforced by the court, but the latter cannot be. *Forster v. Forster*, 1 Hagg. Consist. 144; *United States v. Cannon*, 7 Pac. 369, 375, 4 Utah, 122.

MATTER.

See "Immaterial Matter"; "Local Matters"; "New Matter."
Other matters, see "Other."

The term "matter," as used in law, means a fact or facts constituting a whole or a part of a ground of action or defense. *Nelson v. Johnson*, 18 Ind. 329, 332.

"Matter," as used in Code, § 2405, providing that no judgment shall be arrested, annulled, or set aside for any matter not previously objected to, if the complaint contained a substantial cause of action, means some substantial or essential thing other than a matter of form. *Douglas v. Beasley*, 40 Ala. 142, 147.

Gen. St. 1878, c. 49, providing that the jurisdiction acquired by any probate court over a matter or proceeding is exclusive of

that of any other probate court, except when otherwise provided by law, should be construed to include the administration of an estate. *Culver v. Hardenbergh*, 32 N. W. 792, 797, 37 Minn. 225.

Tayl. St. 1323, § 84, providing that any cause or matter in the county court may be removed to the circuit court in case the county judge shall be interested in the controversy, includes a proceeding for contempt. *Lamonte v. Ward*, 36 Wis. 558, 563.

As things secondary to subject.

The word "matters," as used in Const. art. 4, § 19, which provides that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, indicates things which are secondary, subordinate, or incidental to the subject, which means the chief thing about which legislation is had. *State v. Arnold*, 38 N. E. 820, 821, 140 Ind. 628; *State v. Roby*, 41 N. E. 145, 151, 142 Ind. 168, 33 L. R. A. 213, 51 Am. St. Rep. 174; *State v. Gerhardt*, 44 N. E. 469, 475, 145 Ind. 439, 33 L. R. A. 813.

Subject synonymous.

In the constitutional provision that every act shall embrace but one subject and matters properly connected therewith, it is held that the words "subject" and "matter" are as nearly synonymous as it is possible for two English words to be, and that they both are used simply to avoid repetition; the only difference between them being created by the offices which they are respectively made to perform in the clause in question. It is quite evident, says the court, that the word "subject" is here used to indicate the chief thing about which a legislation is had; and "matters," the things which are secondary, subordinate, and incidental. *Clarke v. Darr*, 60 N. E. 688, 690, 156 Ind. 692.

MATTER IN AVOIDANCE.

See "Avoidance."

MATTERS IN BANKRUPTCY.

Rev. St. U. S. § 711, providing that the federal court shall have exclusive jurisdiction of all matters in bankruptcy, means things treated of or affected by the legislation on the subject of bankruptcy. *Brewster v. Dryden*, 6 N. W. 16, 18, 53 Iowa, 657.

The phrase "matters and proceedings," as used in the statute vesting exclusive jurisdiction in the courts of the United States in matters and proceedings in bankruptcy, includes the collection of the assets of the bankrupt. The great purpose of the act is to relieve the debtor from his past indebtedness, and to pay his debts with the assets

he returns. Many of these assets are choses in action, and unless they can be collected, there can be no complete administration of the assets. *Dodd v. Middleton*, 63 Ga. 635, 637.

MATTER IN CONTROVERSY.

The phrase "matter in controversy," as used in a statute giving a right of appeal where the matter in controversy does not exceed or is equal in value to a certain sum, means that which is the essence and substance of the judgment, and by which the party may discharge himself. *Lewis v. Long* (Va.) 3 Munf. 136, 154; *Buckner v. Metz*, 77 Va. 107, 125. The subject of litigation, the matter for which suit is brought, and upon which issue is joined. *Harman v. City of Lynchburg* (Va.) 33 Grat. 37, 39. The amount demanded in the declaration where the action is one sounding in tort. *Hancock v. Barton* (Pa.) 1 Serg. & R. 269. The term is synonymous with "amount or value" and means the amount or value of the matter in controversy. *Smith v. Giles*, 65 Tex. 341, 343. It does not include the damages allowed by law by the district court on the affirmation of a judgment of a county court. *Melson v. Melson's Adm'r* (Va.) 2 Munf. 542.

MATTER IN DEMAND.

The "matter in demand," which determines the jurisdiction of the court, is determined by the declaration as to the amount thereof, and not by the amount which the evidence shows. *Newtown v. Danbury*, 3 Conn. 553, 558. The amount claimed in the ad damnum clause of the declaration is to govern, except where it clearly appears on the face of the declaration or bill of particulars that the debt or damage actually claimed is necessarily too small to confer jurisdiction. *Hunt v. Rockwell*, 41 Conn. 51, 54; *Sullivan v. Vail*, 42 Conn. 90, 92. It does not necessarily mean a money demand, but means the pecuniary value of the matter in controversy. *Blakeslee v. Murphy*, 44 Conn. 188, 195. With reference to the action of partition between tenants in common, it means property sought to be apportioned or sold, and the value of the property is the test of the jurisdiction. *Fowler v. Fowler*, 50 Conn. 256, 258.

Under a statute giving a justice of the peace jurisdiction of actions where the matter in demand does not exceed \$200, it is held that the matter in demand, as used in the statute, means the plaintiff's cause of action, or, in other words, the claim which the plaintiff brings his suit for the purpose of enforcing. *Page v. Warner*, 44 Atl. 67, 68, 71 Vt. 180.

The matter in demand, in an action on a note, shall be the amount of the note, deducting indorsements; and, in actions on

book account, the matter in demand shall be the debtor side of the plaintiff's book. *V. S. 1894, 1041.*

MATTER IN DISPUTE.

All matters between the parties or in dispute, see "All."

By "matter in dispute" is meant the subject of litigation—the matter for which the suit is brought and upon which issue is joined, and in relation to which jurors are called and witnesses examined. *Lee v. Watson*, 68 U. S. (1 Wall.) 337, 339, 17 L. Ed. 557; *Smith v. Adams*, 9 Sup. Ct. 566, 568, 130 U. S. 167, 32 L. Ed. 895; *Cowell v. City Water-Supply Co.* (U. S.) 96 Fed. 769, 772; *Turner v. Southern Home Building & Loan Ass'n* (U. S.) 101 Fed. 308, 313, 41 C. C. A. 379; *Dumphy v. Guindon*, 13 Cal. 28, 30; *Davis v. Webb*, 46 W. Va. 6, 9, 33 S. E. 97; *Gallagher v. Asphalt Co. of America* (N. J.) 55 Atl. 259, 269.

In an action on a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed and its amount, as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment at its conclusion, must be considered. *Lee v. Watson*, 68 U. S. (1 Wall.) 337, 339, 17 L. Ed. 557; *Turner v. Southern Home Building & Loan Ass'n* (U. S.) 101 Fed. 308, 313, 41 C. C. A. 379.

The matter in dispute cannot exceed the amount for which the court in which the suit is pending when the removal is asked may give judgment. Anything beyond that is not in dispute in that suit, evidently. It is not sufficient that the parties have a larger dispute concerning the matter of which we might acquire jurisdiction, if embodied in some other suit, by original process or by removal; but it is to the very value or sum of the matter in dispute involved in that particular suit sought to be removed, which is the jurisdictional fact on a motion to remand. *New York Imp. & P. Co. v. Milburn Gin & Machine Co.* (U. S.) 35 Fed. 225, 228.

The term "matter in dispute" means matter in dispute in civil cases, not criminal cases. *United States v. More*, 7 U. S. (3 Cranch) 159, 173, 2 L. Ed. 397; *Chapman v. United States*, 17 Sup. Ct. 76, 77, 164 U. S. 436, 41 L. Ed. 504.

The term "matters in dispute," as used in a rule of a building society requiring matters in dispute between the society and any member thereof to be referred to arbitration, means matters in dispute between the society and its members as members, and not in any other capacity. Where a building society lent money to a member on a mortgage of leasehold property, and the party covenanted to observe the rules of the society, and also to pay the rent reserved by

the lease, and the trustees of the society sued for breaches of both covenants, part of the plaintiff's claim was not a matter in dispute between the society and the defendant as member, but only as creditor, so that the question need not be referred to arbitration. *Morrison v. Glover*, 4 Exch. 430, 444.

In an action to enjoin the use of a contract of marriage, and obtain its cancellation as a forgery and fraud, the contracted marriage would be the matter in dispute. *Sharon v. Terry* (U. S.) 36 Fed. 337, 347, 1 L. R. A. 572.

As aggregate amount of judgment.

Where a bill was filed by several distributees of an estate to compel the payment of the money alleged to be due them, and a decree was rendered in their favor, the aggregate amount which defendant was decreed to pay was as to him the "matter in dispute," in determining the jurisdiction of the court on appeal, and not the particular sum to which each was entitled when the amount due was distributed among them. It was perfectly immaterial to the appellant how it was being shared. He had no controversy with either of them on that point, and the dispute as to the shares was among themselves, and not with him. *Shields v. Thomas*, 58 U. S. (17 How.) 3, 4, 15 L. Ed. 93.

As amount demanded.

The matter in dispute is the thing demanded, and not the thing found. *Wilson v. Daniel*, 3 U. S. (3 Dall.) 401, 404, 1 L. Ed. 655; *McKee v. Ellis*, 2 La. Ann. 163, 167.

The words "matter in dispute" do not refer to the disputes in the country, or the intentions or expectations of the parties concerning them, but to the claim presented on the record to the legal consideration of the court. What the plaintiff thus claims is the matter in dispute, though that claim may be incapable of proof, or only in part well founded. The settled rule is that until some further judicial proceedings have taken place, showing on the record that the sum demanded is not the matter in dispute, that sum is the matter in dispute in an action for damages. *Kanouse v. Martin*, 56 U. S. (15 How.) 197, 207, 14 L. Ed. 660.

Interest subsequently accrued.

The "matter in dispute" means the amount due at the institution of the suit, and does not include the interest which accrued subsequently, *ex mora*, by the judicial demand. *Mason v. Oglesby*, 2 La. Ann. 793, 794.

Costs.

The costs of a suit form no part of the matter in dispute. *Dumphy v. Guindon*, 13 Cal. 28, 30.

As value of property affected.

In a proceeding to set aside certain conveyances as fraudulent and a cloud upon a plaintiff's title, the matter in dispute is the value of the land. *Simon v. House* (U. S.) 46 Fed. 317, 318.

The matter in dispute may be determined by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment. Thus a suit to quiet title to parcels of real property, or to remove a cloud therefrom by which their use and enjoyment by the owner are impaired, is brought within the cognizance of the court, under the statute, only by the value of the property affected. So, in a case embodying the right to office, the amount of the salary attached to it is considered as determining the value of the matter in dispute. *Smith v. Adams*, 9 Sup. Ct. 566, 568, 130 U. S. 167, 32 L. Ed. 895.

MATTER IN ISSUE.

The matter in issue in determining a question of *res judicata* has been defined as "that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleading." *King v. Chase*, 15 N. H. 9, 17, 41 Am. Dec. 675; *Vaughan v. Morrison*, 55 N. H. 580, 588, 592; *Smith v. Town of Ontario* (U. S.) 4 Fed. 386, 390; *Reynolds v. Stockton*, 11 Sup. Ct. 773, 778, 140 U. S. 254, 35 L. Ed. 464; *Kitson v. Farwell*, 132 Ill. 327, 338, 23 N. E. 1024, 1025.

By the term "matters in issue" must be included not only the object of the suit or the particular right or defense sought to be recovered or established, but all the facts material to the issue from which such object or remedy, cause of action, or defense was deduced. *Guthell v. Goodrich*, 66 N. E. 446, 448, 160 Ind. 92.

"Matters in issue" may be defined as that ultimate fact or state of facts in dispute upon which the verdict or finding is predicated. *Lublin v. Stewart, Howe & May Co.* (U. S.) 75 Fed. 294, 300. If the declaration on its face shows the special matter relied upon by the plaintiff, and the same is denied by the defendant's plea, it will show the matter in issue. *Kitson v. Farwell*, 23 N. E. 1024, 1026, 132 Ill. 327.

MATTER OF AGGRAVATION.

A statement that certain facts may be proved as matter of aggravation may merely convey the idea that such proof would authorize an increase in actual damages, and not that it would justify an award of exemplary damages. *Southern Ry. Co. v. O'Bryan*, 45 S. E. 1000, 1001, 119 Ga. 147.

MATTER OF FACT.

The term "matters of fact," used in Const. art. 6, § 19, declaring that judges shall not charge juries with respect to matters of fact, includes the facts contested or in some degree sought to be established by the evidence. An instruction, in proceedings to condemn private property for the construction of a sewer, that there was no evidence to show any necessity to take the defendant's property, and adding that the jury were not obliged to find for the defendant, but might find to the contrary, was a charge with respect to matters of fact. *City of Santa Ana v. Gildmacher*, 65 Pac. 883, 885, 133 Cal. 395.

A charge that the evidence in a criminal case is sufficient upon which to convict of a charge in an indictment is a charge with respect to the "matter of fact," within the provision of the statute that the court shall not charge juries with respect to matters of fact. *Commonwealth v. Lawless*, 103 Mass. 425, 431.

MATTER OF FORM.

In pleadings the term "matters of form" is used to designate the established mode of expression or practice; a fixed way of proceeding. If the right of the party pleading sufficiently appear to the court, although the pleadings did not conform to the established mode of procedure, a pleading is said to be defective in matter of form; but if the right does not sufficiently appear to the court the pleading is defective in matter of substance. *Lake Shore & M. S. Ry. Co. v. Kurtz*, 37 N. E. 303, 306, 10 Ind. App. 60.

In a statute providing that if, in any action duly commenced within the time allowed, the writ shall not be abated, or the action be otherwise avoided or defeated, for any matter of form, the plaintiff may commence a new action within one year, "matter of form" means technical defects in the form of the action, pleadings, or proof, or variances between one and the other. *Meath v. Mississippi Levee Com'rs*, 3 Sup. Ct. 284, 287, 109 U. S. 268, 27 L. Ed. 930.

A statute giving a plaintiff who has seasonably commenced an action which has failed for matter of form a year after such failure in which to commence a new action for the same cause should be construed to include a prosecution of a cause of action in the name of one person when it should have been done in the name of two persons. The section was not intended and does not apply to the effect of changing the jurisdiction in which a new action may be brought and prosecuted. It only gives further time under the circumstances specified in which to bring another better perfected action in the proper jurisdiction. *Goff v. Robinson*, 15 Atl. 339, 342, 60 Vt. 633.

The plaintiff's assignee in bankruptcy commenced an action in his own name to enforce a claim, and failed because it was brought in the name of the wrong party; the present plaintiff then and now being the owner, having purchased it of the assignee. Held, that the failure was for matter of form, within Rev. Laws, § 973, whereby a claim is saved from the operation of the statute of limitations. *Premo v. Lee*, 56 Vt. 60.

In indictment.

Matter of form in an indictment includes all matter beyond the statement of every fact necessary to be proven, as the order of arrangement or the precise words, unless particular words alone will convey the proper meaning. *State v. Amidon*, 58 Vt. 524, 525, 2 Atl. 154.

Anything that forms a part of the description of the crime is not a matter of form. *United States v. Conant* (U. S.) 25 Fed. Cas. 591, 593, 9 Cent. Law J. 129, 131.

Objections to an indictment that 48 persons were summoned as grand jurors, that the names of such persons were not drawn by the clerk as required by the rules, that one of the grand jurors was a nonresident, and that several of them were not possessed of the proper property qualification, are objections of mere matters of form, in the absence of a showing that the accused was prejudiced thereby. *United States v. Tusca* (U. S.) 28 Fed. Cas. 234.

The informal averments in an indictment under Rev. St. § 3894 [U. S. Comp. St. 1901, p. 2659], prohibiting the mailing of letters and circulars concerning lotteries, of the facts necessary to show the illegal quality of the writing mailed by the accused, are mere matters of form, cured by a verdict. *United States v. Noelke* (U. S.) 1 Fed. 426, 431.

MATTER OF PROCEDURE.

See "Procedure."

MATTER OF RECORD.

A matter of record is matter properly enrolled or recorded in the places provided therefor by law. *Croswell v. Byrnes* (N. Y.) 9 Johns. 287.

MATTER OF SUBSTANCE.

As used in Act April 19, 1867, § 22, providing that no person shall without a license canvass any county or corporation for the purpose of buying or offering to buy, or shall actually buy, any matters of substance for man or beast, or any beverage, or for any clothing, etc., the term "matters of substance" comprehends "all articles or things,

whether animal or vegetable, living or dead, which are used for food, whether they are consumed in the form in which they are bought from the producer, or are only consumed after undergoing a process of preparation, which is greater or less, according to the character of the article." *Sledd v. Commonwealth* (Va.) 19 Grat. 813, 822.

In pleadings the term "matters of form" is used to designate the established mode of expression or practice; a fixed way of proceeding. If the right of the party pleading sufficiently appear to the court, although the pleadings did not conform to the established mode of procedure, a pleading is said to be defective in matter of form; but if the right does not sufficiently appear to the court the pleading is defective in matter of substance. *Lake Shore & M. S. Ry. Co. v. Kurtz*, 37 N. E. 303, 306, 10 Ind. App. 60.

Within the rule that matters of substance in an indictment cannot be amended, the statement of every fact necessary to be proven to make the act complained of a crime is a matter of substance. The omission of the words "contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the state," is not a matter of substance. *State v. Amidon*, 2 Atl. 154, 155, 58 Vt. 524.

MATTERS CIVIL.

See "Civil Matters."

MATTERS OF ACCOUNT.

Code, §§ 1724, 1725, providing that in all matters in which matters of account are in controversy the court may, on the application of either party, direct a reference to two or more competent persons, not exceeding three, as referees, to state and report an account between the parties and the amount that may be due from either party to the other, should be construed to include an action on a tax collector's bond to recover a balance declared to be due the county, and shown by a statement of his accounts with the county for two years. *Marlar v. State*, 62 Miss. 677, 681.

MATTERS OF ADMINISTRATION.

See "Administration."

MATTERS OF CONTRACT.

Const. 1874, art. 7, § 40, giving justices of the peace jurisdiction in "matters of contract," where the amount involved does not exceed \$300, includes a suit for unliquidated damages, when the suit is founded upon contract. *Koch v. Limberling*, 18 S. W. 1040, 55 Ark. 547 (citing *Stanley v. Bracht*, 42

Ark. 210; *Bullinger v. Marshall*, 70 N. C. 520; *Baltimore & O. Telegraph Co. v. Lovejoy*, 48 Ark. 301, 3 S. W. 183).

MATTERS OF DETAIL.

An agreement for the reorganization of a railroad company, by which a committee was appointed to whom was committed the regulation of matters of detail, meant not merely such matters as regarded the formal execution of the provisions of the agreement, but also such alterations in the terms of the agreement itself, not changing the plan, as might be deemed necessary or advisable to effectuate the object. *Lehigh Coal & Navigation Co. v. Central R. Co. of New Jersey*, 34 N. J. Eq. (7 Stew.) 88, 90.

MATTERS OF PROBATE.

The words "matters of probate," as used in the Constitution, vesting jurisdiction of matters of probate in the superior court, include the ascertainment and determination of the persons who succeed to the estate of a decedent, either as devisees, or legatees, as well as the amount or portion of the estate to which each one is entitled, and also the construction or effect to be given to the language of a will, but do not include a determination of claims against the heir or devisee for his portion of the estate arising subsequent to the death of the ancestor, whether such claim arises by virtue of his contract or in invitum; nor is the determination of conflicting claims to the estate of an heir or devisee, or whether he has conveyed or assigned his share of the estate, a matter of probate. *Martinovich v. Mariscano*, 70 Pac. 459, 137 Cal. 354.

MATURED.

A judgment is "matured," within 2 Rev. St. 1876, p. 62, § 57, requiring a set-off to be matured at the time it is pleaded, though the time of stay of execution has not expired. *Hays v. Boyer*, 59 Ind. 341, 344.

Under statutes authorizing counties to refund all "matured and maturing indebtedness," counties have authority to refund county warrants, as well as other indebtedness, without referring the matter to the vote of the people. *Society for Savings v. Pratt County Com'rs* (U. S.) 82 Fed. 573, 574.

MATURITY.

See "Apparent Maturity"; "At Maturity."

"Maturity," when applied to commercial paper, means the time when the paper becomes due and demandable. *Gilbert v.*

Sprague, 88 Ill. App. 508, 509 (quoting Bouv. Law Dict.; Cent. Dict.).

"Maturity," as used in a promissory note, payable on a certain day, with interest after maturity, means the day fixed for payment, and not after the expiration of the days of grace. *Wheless v. Williams*, 62 Miss. 369, 371, 52 Am. Rep. 190.

"Maturity," as used in an insurance policy, stating that it is written for the benefit of the insured, if living at the maturity thereof, refers to the maturing of the policy during the lifetime of the insured. *Union Central Life Ins. Co. v. Woods*, 37 N. E. 180, 181, 11 Ind. App. 335.

In will.

The word "maturity," as used in a will, providing for the disposition of the remainder if issue of testatrix die before maturity, means maturity in law, or when such issue shall have reached majority. *Cruikshank v. Cruikshank*, 80 N. Y. Supp. 8, 11, 39 Misc. Rep. 401.

In a clause of a will by which, on certain contingencies, the expenses of educating a legatee and bringing him up to maturity shall be paid out of that part of the testator's estate given and devised to the legatee, the word "maturity" may well be held to import maturity of mind and character, the combined result of age and education. The term "maturity" is not synonymous with legal majority. *Condict's Ex'rs v. King*, 13 N. J. Eq. (2 Beasl.) 375, 380.

In a will bequeathing money to a certain beneficiary in trust during her minority, and directing that, when of lawful age, the aforesaid sum shall be paid over to her, but in case of her death before maturity then it shall go to other designated beneficiaries, the word "maturity" means the same thing as the testator had before expressed by the words "lawful age." *Carpenter v. Boulden*, 48 Md. 122, 129.

MATZOON.

The word "matzoon" is the Armenian name for fermented milk. *Dadiriian v. Theodorian*, 15 Misc. Rep. 300, 302, 37 N. Y. Supp. 611.

MAXIMUM.

The railway consolidation act of 1845, providing that, when a railway is carried over a turnpike road by a bridge, the width of the arch shall leave thereunder a clear space of not less than 35 feet, and that, if the road, being less than 35 feet, is widened at any time, the railway company shall be bound to widen the bridge, not exceeding

the width of the road as widened or the "maximum width herein," means that, if the average available width is more than 35 feet, the road may be narrowed to that width under the arch, but, if it is less, the arch may be made of the same width as the road, or, if the road is widened, the arch must be widened, not to exceed 35 feet. *Reg. v. Pigby*, 14 Adol. & E. (N. S.) 687, 698.

The term "maximum rates," in Const. art. 19a, § 1, empowering the Legislature to pass laws establishing reasonable maximum rates and charges for the transportation of passengers on railroads, means the maximum rate which the company is to be permitted to charge under a given state of circumstances. The Legislature is authorized, in addition to establishing a maximum rate for a single fare, to establish a rate at which mileage books shall be established. *Smith v. Lake Shore & M. S. Ry. Co.*, 72 N. W. 323, 332, 114 Mich. 460.

MAY.

Webster defines the word "may" to be an auxiliary verb, qualifying the meaning of another verb by expressing ability, contingency, possibility, or probability. *Home Ins. Co. v. Peoria & P. U. Ry. Co.*, 78 Ill. App. 137, 140.

An agreement to deliver to certain parties "all the plank we may saw at our mill during the ensuing winter" should not be construed to require the owners of the mill to saw all the plank they would be able to saw during the next winter. The words are not promissory in their nature, except so far as relates to the delivery of plank which they saw during the winter; nor do they import a promise or undertaking to saw any particular quantity during the winter. *Wemple v. Stewart* (N. Y.) 22 Barb. 154, 160.

Two insurance companies entered into a contract by which one company agreed to insure the other on all its risks in certain states and exonerate it from all losses; the losses, if any, to be payable at such times and in such manner as the latter company may pay. Held, that the words "may pay," as used in the agreement, should be construed to mean "liable to pay." *Appeal of Fame Ins. Co.*, 83 Pa. 396, 397.

Where a deed conveying certain lands to a railroad company for right of way, after the strip conveyed, added that such company "may be further entitled to an extra additional width of 70 feet on the south side of said railroad," the words "may be" should be read as "shall be," and the 70 feet were conveyed by such deed. *Long Island R. Co. v. Conklin* (N. Y.) 32 Barb. 381, 387; *Id.*, 29 N. Y. 572, 578.

Authority indicated.

In a deed reciting that the grantor has remised, released, etc., all title which he has in and to a lot of land, in such manner as he may, and to the extent that he has heretofore acquired title thereto, etc., "may" should be construed in its potential sense, and has a direct reference to the grantor's power or authority to convey. The expression "in such manner as he may" grammatically refers to and qualifies the verbs "has remised, released," etc.; that is, the grantor has remised, released, etc., the premises in such manner as he may, or, in other words in such manner as he is authorized to. The grantor being a Catholic priest and superior general of a certain congregation, the expression "in such manner as he may" probably refers to limitations on his power to dispose of real property imposed by the rules of the order of which he was superior general. *Torrence v. Shedd*, 112 Ill. 466, 478.

The word "may," in an instruction in a personal injury case that the jury may allow plaintiff for pain, inconvenience, or impairment of enjoyment for such time as the same may continue in the future as shown by the evidence, is capable of being construed by the jury to mean "might," and therefore authorized them to allow plaintiff for pain, inconvenience, and impairment of the enjoyment which the evidence showed might continue in the future, which was merely possible, not for what the evidence showed was reasonably certain to continue. Such an instruction is erroneous. *Ford v. City of Des Moines*, 75 N. W. 630, 631, 106 Iowa, 94.

"May recover," as used in Gen. St. 1867, c. 210, § 10, providing that witnesses entitled to certain fees may recover such fees, means that the party may be entitled to recover; hence it gives the party the right to maintain suit therefor and recover such costs as liquidated damages if he is successful in the action. *Robertson v. Northern R. R.*, 63 N. H. 544, 548, 3 Atl. 621.

A devise to certain infants, which directed that their mother on certain conditions "may be permitted to occupy" the premises until the children became of age, does not make her right of possession subordinate to that of the executors or dependent on their permission; but the obvious design and meaning of the clause is that her right to the possession should depend solely on the performance by her on the prescribed conditions, and that on the performance of such conditions her right of possession should become absolute and paramount to that of the executors. *Snowhill v. Snowhill*, 23 N. J. Law (3 Zab.) 447, 454.

Futurity indicated.

An agreement to credit on certain notes any amount that the promisor may receive

from a certain company over and above a certain sum applies only to money subsequently received, and has no reference to the money which had previously been paid. *Greene v. Robinson*, 41 Conn. 470, 471.

As permissive or mandatory.

May, as permissive or mandatory, when used in statutes, see "May (In Statutes as Permissive or Mandatory)."

The word "may," in admiralty rule 11, providing that, when any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon due appraisalment, to be had under the direction of the court, upon the deposit, etc., is not to be construed in a mandatory sense, but as leaving to the court a discretion which may be rightly exercised under peculiar circumstances, and the rule clearly should not be applied in those cases where the object of the suit is not the enforcement of any money demand, or to secure any payment of the damages, but to take possession of and forfeit the vessel herself, in order to prevent her departure upon any lawful expedition in violation of the neutrality laws of the United States. *The Mary N. Hogan* (U. S.) 17 Fed. 813, 814.

A life insurance policy, providing that, after three or more installments have been paid upon it, it may be surrendered within a certain time after default in payment for a paid-up nonparticipating bond, implies and creates an option upon the part of the assured. *Wells v. Vermont Life Ins. Co.*, 62 N. E. 501, 502, 28 Ind. App. 620, 88 Am. St. Rep. 208.

In a letter from merchants to commission agents, directing the disposition of certain goods and providing that the latter may invest a certain amount of the proceeds in silk at certain prices, etc., but, if silk should be obtainable below such prices, tea might be substituted, "may" should be construed as directory, and as not leaving the matter to the discretion of the agent. *Entwistle v. Dent*, 1 Welsb. H. & G. 812.

Instances are very common where the word "may" is used as a synonym for "shall" or "must." The word is usually construed as being mandatory, rather than permissive, when a statute prescribing rules of procedure declares that in a certain event the court "may" act in a certain way. To warrant a different interpretation in such cases, it should clearly appear from other provisions of the statute that the exercise of the power conferred was intended to be discretionary. It will be construed "must" in equity rule No. 92, providing that the court may render judgment for any balance due on foreclosure of a mortgage above the proceeds of the sale. *Northwestern Mut. Life Ins. Co. v. Roby* (U. S.) 77 Fed. 374, 375, 23 C. C. A. 196.

Same—Instructions.

In an instruction, in a prosecution for murder, that if the jury believe that the defendant's mother in her lifetime was insane, and that insanity is hereditary, they may take that fact into consideration in determining the question of the defendant's insanity at the moment of the shooting, the word "may" will be construed in its permissive sense, thus rendering the instruction erroneous, since the word "must" should have been used in the place of the word "may." *People v. Tuczkewitz*, 43 N. E. 548, 553, 149 N. Y. 240.

Where the statute invests the jury, in an action to recover against a carrier for failure to deliver goods intrusted to it for carriage, with a discretion to allow or disallow interest accordingly as they see fit, an instruction that, if the jury find for the plaintiff, they may add interest, the word "may," as so used, implied permission to the jury to allow or disallow interest as they saw fit, and cannot be construed as used in a mandatory sense. *Hall v. Wabash R. Co.*, 80 Mo. App. 463, 471.

"May," as used in an instruction that the jury may consider the interest of a party to the action as affecting his credibility as a witness, instead of "should" consider, will not be considered as error; the words "may" and "should" in such connection being sufficiently similar and synonymous. *Chicago & E. R. Co. v. Meech*, 45 N. E. 290, 293, 163 Ill. 305.

Same—Trusts.

"May," as used in a statute, means "must" or "shall" in those cases only where the public are interested, and the public or third persons have a claim *de jure* to have the power exercised; but, when used in a private trust, it is optional with the trustees whether the act will be done. *Newburgh & C. Turnpike Road Co. v. Miller* (N. Y.) 5 Johns. Ch. 101, 113.

A proviso, in a settlement of funds then existing in the form of personal security, that the trustees "shall and may" pay out such funds in the purchase of lands, is to be construed as giving the trustees an election either to continue the fund in personal security or to purchase lands therewith. *Stamper v. Miller*, 3 Atk. 212.

Same—Wills.

The word "may," as used in a will giving property to a person who should not have power to sell, but "may" leave the same to her children, is precatory only, and not obligatory. When the testator says that she "may" leave the land to her children, he merely expresses a hope or desire that she may so leave it. *McIntyre v. McIntyre*, 16

Atl. 783, 784, 123 Pa. 323, 10 Am. St. Rep. 529.

A will providing that the life tenant shall make at her death distribution of what remains, and also referring to that which is requested to be done, as such disposition of the "property that may at her death remain," will be construed to show that the testator contemplated and intended that his widow, the life tenant, might or would expend all or a part of the money derived from a sale of the property under a power given her in the will, and implies that distribution was to be made of only what she had not disposed of and used. *Coulson v. Alpaugh*, 45 N. E. 216, 217, 163 Ill. 298.

"May," as used in a will, providing that if necessary the interest on a certain sum may be expended for support of testator's widow, should be construed in the sense of "must" or "shall." *Ellis v. Aldrich*, 47 Atl. 95, 97, 70 N. H. 219.

Possibility indicated.

The word "may" means "to be possible." *Owen v. Kelly*, 6 D. C. 191, 193.

The use of the word "may," in a requested instruction in a felony case that the circumstances, no matter how strong, are insufficient to authorize a conviction if they can be reasonably reconciled on the theory that the defendant may be innocent, is erroneous as calculated to lead the jury to believe that the word "may" is used with the force and meaning of the words "might possibly." *Thomas v. State*, 17 South. 460, 106 Ala. 19.

In Laws 1885, c. 342, § 24, subd. 6, providing for the discharge of a mechanic's lien and filing a bond conditioned for the payment of any judgment which may be rendered against the property, "may" should be construed in its natural meaning of "possible," making the provision read "any judgment possible to be rendered," which may be amplified to any judgment to which the property otherwise might have been liable. *Copley v. Hay*, 12 N. Y. Supp. 277, 278, 16 Daly, 446.

MAY (In Statutes as Permissive or Mandatory).

The word "may," according to its ordinary construction, is permissive, and should receive that interpretation, unless such construction would be obviously repugnant to the intention of the Legislature, or would lead to some other inconvenience or absurdity. *Medbury v. Swan*, 46 N. Y. 200, 201.

"The question whether the word 'may' is to be construed as mandatory or discretionary has been much discussed, but the general rule is that the ordinary meaning of

the word is that there is involved a discretion, and it is to be construed in a mandatory sense only where such construction is necessary to give effect to the clear policy and intention of the Legislature; that where there is nothing in the connection or the language or in the sense or policy of the provision to require an unusual interpretation, it will be given its ordinary meaning; and that where, by the use in other provisions of the statute of mandatory words, it appears that the Legislature intended to distinguish between these words and 'may,' 'may' will not be construed as imperative. In the case of *People v. City of Syracuse*, 59 Hun, 258, 12 N. Y. Supp. 890, affirmed by the court of appeals 128 N. Y. 632, 29 N. E. 146, Judge Martin states the general rule that 'such exposition ought to be adopted as shall carry into effect the true intent and object of the enactment. The ordinary meaning of the word, which is permissive, ought to be adopted, and must be presumed to be intended, unless it would manifestly defeat the object of the provision.' And after a full review of the authorities he says: 'The decisions holding that permissive words should sometimes be construed as mandatory have been based upon the supposed intent of the Legislature. While general expressions have been used which, when taken alone, might seem to indicate that the word "may," or words of similar import, should be construed as mandatory when the public interest or the rights of individuals are involved, independent of any question of legislative intent, still, when the cases are examined, it will be seen that such construction has prevailed only in cases where the statute under consideration, when taken as a whole and viewed in the light of surrounding circumstances, indicated a purpose on the part of the Legislature to enact a law mandatory in its character.'" *Morse v. Press Pub. Co.*, 75 N. Y. Supp. 976, 981, 71 App. Div. 351.

Whether the word "may" in a statute is to be construed as mandatory and imposing a duty, or merely as permissive and conferring discretion, is to be determined in each case from the apparent intention of the statute as gathered from the context, as well as the language of the particular provision. *Colby University v. Village of Canandaigua* (U. S.) 69 Fed. 671, 673; *Kansas Pac. Ry. Co. v. Reynolds*, 8 Kan. 623, 628; *Kemble v. McPhail*, 60 Pac. 1092, 1093, 128 Cal. 444; *Inhabitants of Worcester County v. Schlesinger*, 82 Mass. (16 Gray) 166, 163; *People v. Sanitary Dist. of Chicago*, 56 N. E. 953, 956, 184 Ill. 597; *State v. Withrow* (Mo.) 24 S. W. 638, 641; *Leavenworth & D. M. R. Co. v. Platte County Court*, 42 Mo. 171, 174.

'The word 'may' in a statute will be construed to mean 'shall' whenever the rights of the public or third persons depend on the exercise of the power or the performance of the duty to which it refers, and such is its

meaning in all cases where the public interests and rights are concerned, or a duty is imposed on public officers, and the public or third persons have a claim de jure that the power shall be exercised.'" *People v. Commissioners of Highways*, 22 N. E. 596, 597, 130 Ill. 482, 6 L. R. A. 161; *Kane v. Footh*, 70 Ill. 587, 590; *Fowler v. Pirkins*, 77 Ill. 271, 273; *Gillinwater v. Mississippi & A. R. Co.*, 13 Ill. (3 Peck) 1, 3; *Schuyler County v. Mercer County*, 4 Gill, 20; *State ex rel. Jones v. Laughlin*, 73 Mo. 443, 449; *Columbus & C. R. Co. v. Mowatt*, 35 Ohio St. 284, 287; *Hayes v. Los Angeles County*, 33 Pac. 766, 768, 99 Cal. 74; *Havemeyer v. Superior Court of City and County of San Francisco*, 24 Pac. 121, 126, 84 Cal. 327, 10 L. R. A. 627, 18 Am. St. Rep. 192; *McLeod v. Scott*, 26 Pac. 1061, 1065, 21 Or. 94; *Nave v. Nave*, 7 Ind. 122, 123; *Bansemmer v. Mace*, 18 Ind. 27, 32, 81 Am. Dec. 344; *Ex parte Lester*, 77 Va. 663, 673; *Newburgh & C. Turnpike Road Co. v. Miller* (N. Y.) 5 Johns. Ch. 101, 105, 9 Am. Dec. 274; *New York & E. R. Co. v. Coburn* (N. Y.) 6 How. Prac. 223, 224; *Medbury v. Swan*, 46 N. Y. 200, 201; *Provisional Municipality of Pensacola v. Lehman* (U. S.) 57 Fed. 324, 332, 6 C. C. A. 349; *Lovell v. Wheaton*, 11 Minn. 92, 101 (Gil. 57, 60); *Cutler v. Howard*, 9 Wis. 809, 311; *Market Nat. Bank of New York v. Hogan*, 21 Wis. 317, 319; *Blair v. Murphree*, 2 South. 18, 19, 81 Ala. 454; *In re McCort*, 34 Pac. 456, 457, 52 Kan. 18.

The true rule of construction is that the word "may" as used in a statute, "is to be taken as meaning 'must' or 'shall' only in cases where the public interest and rights are considered, and where the public or third persons have claimed de jure that the right shall be exercised. In other cases the enactment is not imperative, but left to sound discretion.'" *Seiple v. Borough of Elizabeth*, 27 N. J. Law (3 Dutch.) 407; *Phelps v. Hawley* (N. Y.) 3 Lans. 160, 166; *Id.*, 52 N. Y. 23, 26; *Adrian v. Supervisors of New York* (N. Y.) 12 How. Prac. 224, 230; *Inhabitants of Monmouth v. Inhabitants of Leeds*, 76 Me. 28, 31; *Low v. Dunham*, 61 Me. 566, 569; *Furbish v. Kennebec County Com'rs*, 44 Atl. 364, 368, 93 Me. 117; *Inhabitants of Veazie v. Inhabitants of China*, 50 Me. 518, 526; *Supervisors of Rock Island County v. United States*, 71 U. S. (4 Wall.) 435, 446, 18 L. Ed. 419; *Blake v. Portsmouth & C. R. R.*, 39 N. H. 435, 437; *Phelps v. Lodge*, 55 Pac. 840, 841, 60 Kan. 122; *Gillinwater v. Mississippi & A. R. Co.*, 13 Ill. (3 Peck) 1, 3; *People v. Highway Com'rs*, 22 N. E. 596, 597, 130 Ill. 482, 6 L. R. A. 161; *Bean v. Simmons* (Va.) 9 Grat. 389, 391; *Elliott v. Hutchinson*, 8 W. Va. 452, 459; *Stoeckle v. Lewis* (Del.) 38 Atl. 1059, 1062; *Commonwealth v. Marshall* (Pa.) 3 Wkly. Notes Cas. 182, 186.

The word "may," as used in a statute, is only to be construed as mandatory for the

purpose of sustaining or enforcing a right, but not to create one. *State ex rel. Gazzalo v. Hudson*, 13 Mo. App. 61, 66; *State ex rel. Kyger v. Holt County Court Justices*, 39 Mo. 521, 524; *Ex parte Banks*, 28 Ala. 28, 35.

The word "may" in a statute is sometimes used in a mandatory, and sometimes in a directory and permissive, sense. It has always been construed to mean "must" or "shall" whenever it can be seen that the legislative intent was to impose a duty, and not simply a privilege or discretionary power, and where the public is interested, and the public or third person have a claim *de jure* to have the power exercised. But it is only where it is necessary to give effect to the clear policy and intention of the Legislature that it can be construed in a mandatory sense, and where there is nothing in connection with the language or in the sense and policy of the provisions to require an unusual interpretation, its use is merely permissive and discretionary. It is said by a learned writer that the rule that "may" is to be interpreted as "shall" or "must" is not by any means uniform. Its application depends on what appears to be the true intent of the statute. *Downing v. City of Oskaloosa*, 53 N. W. 256, 257, 86 Iowa, 352 (citing *Sedg. St. & Const. Law*, 438); *San Angelo Nat. Bank v. Fitzpatrick*, 30 S. W. 1053, 1054, 88 Tex. 213; *Minor v. Mechanics' Bank of Alexandria*, 26 U. S. (1 Pet.) 46, 7 L. Ed. 47; *Kelly v. Morse*, 3 Neb. 224, 228.

"It is well settled in statutory interpretation that the word 'may' may be read 'shall.' In *Rock Island County Sup'rs v. United States*, 71 U. S. (4 Wall.) 435, 18 L. Ed. 419, after a summary of the authorities on the subject Mr. Justice Swayne says: 'The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the act before us or in equivalent language, whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the Legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty.'" *Village of Kent v. United States* (U. S.) 113 Fed. 232, 237, 51 C. C. A. 189.

Whenever it is provided that a corporation or officer "may" act in a certain way, or it shall be lawful for them to act in a certain way, it may be insisted on as a duty

for them to act so, if the matter is devolved on a public officer and relates to the public or third persons. Where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall." Where the act to be done affects no third persons, and is not clearly beneficial to them or the public, the words "may do an act" or "it shall be lawful to do it," do not mean "must," but rather indicate an intent in the Legislature to confer a discretionary power. *Mason v. Fearson*, 50 U. S. (9 How.) 248, 259, 13 L. Ed. 125.

"May," when used in a statute to confer power on public bodies or officers to do a thing, and the public have an interest that the things be done, or an individual has a claim *de jure* that the power should be exercised, it imposes a duty on the public body or officer, and is to be construed as imperative. If the rights and interests of the public are not concerned, or private persons have no lawful claim and interest in the exercise of the power, the word "may," by which the power is conferred, should receive its ordinary meaning, and it should be construed as conferring a discretionary power on the officer or public body. *Buffalo Plank Road v. Commissioners of Highways of Lancaster* (N. Y.) 10 How. Prac. 237, 238; *Hall v. Wabash R. Co.*, 80 Mo. App. 463, 470.

When used in statutes, "may" will be construed as "shall," when necessary for the sake of justice or public good. *People v. Livingston County Sup'rs*, 68 N. Y. 114, 116, 119; *People v. Ostego County Sup'rs*, 51 N. Y. 401, 406; *Malcom v. Rodgers* (N. Y.) 5 Cow. 188, 193, 15 Am. Dec. 464; *Shaeffer v. Jack* (Pa.) 14 Serg. & R. 426, 429; *Johnston v. Pate*, 95 N. C. 68, 70; *Kemble v. McPhail*, 60 Pac. 1092, 1093, 128 Cal. 444; *Follmer v. Nuckolls County Com'rs*, 6 Neb. 204, 209; *Steines v. Franklin County*, 48 Mo. 167, 178, 8 Am. Rep. 87; *Winsor Coal Co. v. Chicago & A. R. Co.* (U. S.) 52 Fed. 716, 719; *Rex v. Barlow*, 2 Salk. 609; *Mitchell v. Duncan*, 7 Fla. 13, 21; *Douglass v. Cline*, 75 Ky. (12 Bush) 608, 649; *Territory v. Nelson*, 2 Wyo. 346, 359.

The word "may," though merely permissive in form, may be construed as mandatory when a public duty is involved. *Kennedy v. City of Sacramento* (U. S.) 19 Fed. 580, 583.

The word "may" in a statute should be construed as meaning "shall" where the rights of the public are involved. *Edwards v. Hall*, 30 Ark. 31, 36.

"May" should be construed in a statute to mean "shall" wherever the rights of third persons or the public good requires. *State, to Use of Neal, v. Saline County Court*, 48 Mo. 390, 8 Am. Rep. 108.

Where a private right requires a thing to be done, the word "may" is generally construed to mean "shall." *People v. Livingston County Sup'rs*, 68 N. Y. 114, 116, 118; *City of New York v. Furze* (N. Y.) 3 Hill, 612, 615; *State v. Buffalo County Com'rs*, 6 Neb. 454, 463; *Central Vermont Ry. Co. v. Royalton*, 4 Atl. 868, 872, 58 Vt. 234.

"May," when used with "shall" in a statute, declaring that one "may and shall" do a certain thing, is construed as mandatory. *Quinn v. Wallace* (Pa.) 6 Whart. 452, 463; *Commonwealth v. Gable* (Pa.) 7 Serg. & R. 423, 425; *Central New Jersey Land & Imp. Co. v. City of Bayonne*, 28 Atl. 718, 714, 56 N. J. Law (27 Vroom) 297.

Acknowledgment of mortgage.

"May," as used in Rev. St. 1874, § 2, providing that a mortgage may be acknowledged before a justice of the peace of the town or district where the mortgagor resides, is imperative, and means "must" or "shall." *Ticknor v. McClelland*, 84 Ill. 471, 475.

Abatement of nuisance.

As used in Code, § 3331, providing that in cases of nuisance an action may be brought in which "the nuisance may be enjoined and abated," the word "may" will be held as directory only, and on recovering damages for a permanent nuisance plaintiff is not entitled as a matter of right to an injunction or an order for abatement. *Downing v. City of Oskaloosa*, 53 N. W. 256, 257, 86 Iowa, 352.

Abatement of writ.

Where a statute provides that a defective writ may be abated, it should be construed as meaning that such writ must be abated, and excludes the idea of any other mode of taking advantage of the defect. *Nabors v. Nabors* (Ala.) 2 Port. 162, 169.

Administration of estates.

The word "may," in a statute which declares that the executor, etc., may cause the will to be brought before the court of common pleas, is to be construed to mean "must," and a will can be proved in no other way. "May" means "must" in all those cases where the public are interested, or where a matter of public policy, and not merely of private right, is involved. *Swazey's Lessee v. Blackman*, 8 Ohio (8 Ham.) 5, 18.

In a statute granting power to a trust company to accept the appointment of executor or trustee under a will, and of administration, and providing that the surrogate may, at the request of any party interested in the estate, grant letters of administration on said estate to such company, the word

"may" should not be construed as "shall," and the act does not impose the duty upon the surrogate imperatively to make such appointment, when requested by a party interested. In *re Goddard's Estate*, 94 N. Y. 544, 551.

In Rev. St. c. 98, § 9, providing that the county court may remove an executor for certain specified causes, "may" should not be construed to mean "must" or "shall," but simply in its discretionary sense, as giving a discretionary power of removal, which is not compulsory upon the court, even though one of the causes may exist. *Cutler v. Howard*, 9 Wis. 309, 311.

The word "may," as used in Wag. St. p. 102, § 5, providing that any person may exhibit his demand by serving on the executor or administrator a notice in writing, stating the amount and nature of his claim, with a copy of the instrument of writing or account upon which the claim is founded, and such claim shall be considered legally exhibited from the time of serving such notice, should be construed in the sense of "must"; such being its construction where the Legislature meant to impose a positive duty, and not to give discretion. *Spaulding v. Suss*, 4 Mo. App. 541, 551.

The word "may," when used in a statute, may be construed to mean "must." Such is its meaning in Code Civ. Proc. § 1836, providing that the court may award costs against executors for unreasonably resisting or neglecting the payment of claims against the estate. *Brainerd v. De Graef*, 61 N. Y. Supp. 953, 954, 29 Misc. Rep. 560.

Rev. St. 1874, p. 118, c. 3, § 80, providing that, when another party is in possession of goods, chattels, etc., of a deceased person, the court may hear testimony of such executor or administrator, and other evidence offered by either party, and make such order in the premises as the case may require, invests the court with a discretion, and the court is not compelled as a matter of arbitrary law to make any specific order. *People v. Abbott*, 105 Ill. 588, 592.

Act 1819 provided that the court shall have power at any time afterwards to revoke such order, referring to the commission of an estate of a decedent to the sheriff. Code, p. 542, § 10, enacted subsequently, declared that "the court may, however, at any time afterwards, revoke such order." Held that, while the old law used the word "shall" and the new the word "may," the word "may" should be construed as having the same meaning as the word "shall," inasmuch as the court could have no right to refuse probate to the executor. *Hutchesson v. Priddy* (Va.) 12 Grat. 85, 95.

Under Rev. St. § 6191, providing that, if any sum of money shall remain in an ad-

ministrator's hands for six months, he may apply for an order of the probate court permitting him to invest such sums for the benefit of the heirs, it is held that the word "may" means "must," and imposes upon the administrator the duty of investing such sums. *In re Thornton's Estate*, 5 Ohio Dec. 151.

"May," as used in Code Ala. 1876, § 2438, providing that an executor or administrator may complete and gather a crop commenced by the decedent, does not mean "must." It confers on the personal representative the option of completing and gathering the crop, and does not make it his absolute duty to do so. *Loeb v. Richardson*, 74 Ala. 311; *Blair v. Murphree*, 2 South. 18, 19, 81 Ala. 454.

Same—Sale of real estate.

The word "may," in every act imposing a duty means "shall." So it is held that under Acts 1868-69, p. 267, c. 113, subc. 5, § 1, providing that, when the personal estate of a decedent is insufficient to pay debts, etc., the executor or administrator may apply to the superior court by petition to sell decedent's real property for the payment of debts, it is held that the word "may" means "must." *Pelletier v. Sanders*, 67 N. O. 261, 262.

In a statute providing that, whenever any executor or administrator shall sell any lands subject to any lien or charge thereon, he may take a bond of the purchaser thereof, with sufficient sureties, etc., "may" is to be construed in a mandatory, and not in a permissive, sense. *Sparrow v. Kelso*, 92 Ind. 514, 517.

Annulment of marriage.

"May," as used in statutes providing that courts may decree the nullity of a void marriage, means "must." *Appleton v. Warner* (N. Y.) 51 Barb. 270, 272.

Appeal.

In Act 1874, providing that an appeal from judgment of the county court against land for taxes may be taken to the Supreme Court, "may" is not imperative, and does not repeal by implication the provisions of the revenue act of 1873, which gives an appeal in such cases to the circuit court. *Fowler v. Pirkins*, 77 Ill. 271, 273.

As used in Const. art. 5, § 18, providing that writs of error and appeals may be allowed under such regulations as may be prescribed by law, the word "may" is used in its permissive sense, and not in its mandatory sense of "must" or "shall." *McClain v. Williams*, 73 N. W. 72, 73, 10 S. D. 332, 43 L. R. A. 287, 289.

Where a statute provided that, when an appeal is taken in term time, it may be made returnable to the first Tuesday in any month during the term, it was held that the

term "may" in the statute was not mandatory. *Webb v. Robbins*, 77 Ala. 176.

The word "may" in a provision of a city charter to the effect that 60 days' neglect to pass upon a claim presented to a city council may be taken as a disallowance for the purposes of an appeal, and the word "may" in the provision to the effect that upon the disallowance of a claim the claimant may appeal, must be construed in a sense exclusive, so that, when the right of appeal is perfect, it must be exercised within the time provided by the charter. *Mason v. City of Ashland*, 74 N. W. 357, 358, 98 Wis. 540.

In Prac. Act (Laws 1877, p. 153) § 90, providing that any party in an attachment proceeding shall be permitted to remove the same to the Supreme Court by appeal or writ of error, provided that such appeal may be prayed for at any time within 20 days after the rendition of the judgment, order, or decree, "may" means "shall." The statute is mandatory, and not directory. The word "may" means "shall" whenever the rights of the public or a particular person depend on the exercise of the power or the performance of the duty to which it refers. *James v. Dexter*, 112 Ill. 489, 491.

The word "may," as used in the charter of the city of Appleton (Laws 1876, c. 47, § 28), which provides that, when any claim of any person against the city shall be disallowed in whole or in part by the common council, such person may appeal from the decision of the council disallowing such claim to the circuit court, by causing a notice of such appeal to be served on the clerk of said city within 30 days after the making of such decision, applies to the time, as well as the manner, of making such appeals, and is so construed that the appeal must be taken within 30 days after the making of the decision, if taken at all. *Fleming v. City of Appleton*, 12 N. W. 462, 463, 55 Wis. 90.

"May," as used in Act March 21, 1890, § 9, providing that in condemnation proceedings either party may appeal within 30 days, should be construed to mean "must." *Seattle & M. R. Co. v. O'Meara*, 29 Pac. 835, 4 Wash. St. 17.

Appraisal of damages and sale of impounded animal.

In a statute providing that after impounded animals have been restrained four days the person impounding may apply for an appraisal of damages and for a sale or appraisal of the animal, the term "may" is not mandatory, but permissive. *Drew v. Spaulding*, 45 N. H. 472, 477.

Arbitration.

The word "may," as used in Gen. St. c. 57, tit. 28, § 873, declaring that the court may require actual notice to be given to

either party to an arbitration, where it appears necessary and proper, before proceeding to act on the award, is used in its ordinary, popular sense, and is not to be construed as synonymous with "must," since such construction would defeat the very object and intent of the Legislature, which doubtless was to leave it to the court to say in each particular case whether notice should be given or not. The words, "when it appears necessary and proper," found in the context, would be meaningless, if the mandatory construction was adopted. *Kelly v. Morse*, 3 Neb. 224, 228.

The word "may," as used in Arbitration Law, § 15, providing that the award may be returned at any term or session of the court that may be held within the time limited by the submission, does not mean "must" or "shall." *Lovell v. Wheaton*, 11 Minn. 92 (Gil 57, 60).

Attachment and garnishment.

In the statute, providing that in attachments against nonresidents the court "may order a notice of the attachment to be inserted in some newspaper," etc., the Legislature did not use the word "may" in the sense of "shall." It intended to leave it discretionary in the court to give the notice there referred to, and failure, therefore, to order and give such notice, does not render an attachment erroneous. *Ridley v. Ridley*, 24 Miss. (2 Cushm.) 648, 657.

The word "may," in a statute providing that declarations in attachment may be filed at the first term of the court to which the attachment is made returnable, is equivalent to "must." *Levy v. Millman*, 7 Ga. 167, 170.

In a statute providing that the garnishee may, if required by plaintiff, be examined orally in the presence of the court, the term "may" means "must," for the reason that a third person is interested by right in the enforcement of its provisions. *Ex parte Cincinnati, S. & M. Ry. Co.*, 78 Ala. 258, 259.

The word "may," in Act March 20, 1845, extending the attachment execution law, so as to subject the rights and credits of solvent corporations to the same process as the rights and credits of other debtors, and providing that all such process "may" be proceeded in to final judgment and execution in the same manner and under the same rules and regulations as are directed against corporations by the provisions of Act June 16, 1836, relating to executions, is to be construed as meaning "must," as the remedy given by the statute is new and wholly statutory, and, if pursued at all, must be pursued as the statute directs. *Reed v. Penrose's Ex'rs* (Pa.) 2 Grant, Cas. 472, 501.

The word "shall," in a statute requiring that notice of attachment against a debtor

who has not been found or summoned shall be inserted four weeks in some newspaper, was held incapable of being construed to mean "may." *State v. Click*, 2 Ala. 26, 28.

When the word "may" is used in a statute in conferring power on a court, officer, or tribunal, and the public or a third person has an interest in the execution of the power, the exercise of it becomes imperative; and hence Hill's Code, § 154, providing that the sheriff may deliver any of the property attached to the defendant, or any other person claiming it, on the giving of a certain undertaking, is to be construed as mandatory, and when a sufficient undertaking is tendered to the sheriff by one claiming attached property it is his duty to accept it and deliver the property. *Kohn v. Hinshaw*, 20 Pac. 629, 631, 17 Or. 308.

Bankruptcy.

Bankr. Act 1867, § 38, provides that the filing of a petition in bankruptcy, either by a debtor in his own behalf or by any one against a debtor, on which an order may be issued by the court or by a register, shall be deemed the commencement of proceedings in bankruptcy. Held, that the words "may be issued" should be construed to mean "shall be issued." *In re Patterson* (U. S.) 18 Fed. Cas. 1315, 1316.

Rev. St. c. 162, § 12, reads: "For a sufficient cause the judge may allow a further time or times to the creditors, not exceeding in the whole two years from the date of the original commission, in which case the notice originally ordered shall be renewed, and such further notice given as the judge shall order." Upon general principles the word "may," in this section, relating as it does to the duty of a public officer, the security of private rights, and the promotion of justice, is to be construed as if it were "shall," and the section is to be understood as requiring the judge of probate to extend the commission of insolvency, not exceeding two years in the whole from its date, whenever upon application thereafter a sufficient cause shall be shown to exist. *Bufford v. Johnson*, 34 N. H. 489, 492.

Commencement of action.

"May," as used in Rev. St. 1893, c. 82, § 4, providing that any person, having filed a claim for a lien as provided in the section, may bring a suit at once to enforce the same, etc., does not mean "shall," but merely allows the petitioners to bring suit at once, if the debt was then due. *Dawson v. Black*, 36 N. E. 413, 148 Ill. 484.

Where authority is conferred to perform an act which the public interest demands, "may" is generally regarded as imperative, and to mean "must." As used in Civ. Code 1853, § 8, providing that civil actions can only be commenced within the periods prescribed

in the act, but that where, in special cases, a different limitation is prescribed by statute, the action may be commenced accordingly, the word "may" is to be construed as "must," as it could never have been intended that a party might have the election either to be governed by the general limitation or that laid down in relation to special cases. *Columbus, S. & C. R. Co. v. Mowatt*, 35 Ohio St. 284, 287.

Contempt.

Code Civ. Proc. § 10, providing that contempt committed in the presence of the court may be punished summarily, does not mean that an offender must be so punished; but the court may discharge him, and wait until further proof is presented in a legal and formal manner. *People v. Barrett*, 9 N. Y. Supp. 321, 326, 56 Hun, 351.

Under Code Civ. Proc. § 1219, providing that, if a contempt of court consists in an omission to perform an act which is in the power of the person to perform, he may be imprisoned until he has performed it, it is held that where a defendant in a pending action refused to give his deposition before the judge of the court in which the action was pending, and the witness could not be coerced to give his deposition except by commitment, the word "may" must be construed to mean "must." *Crocker v. Conrey*, 73 Pac. 1006, 1008, 140 Cal. 213.

Continuance.

In a statute providing that on the filing of the affidavit prescribed therein the court may continue the suit, "may" should be construed to mean "shall"; it not being discretionary with the court to refuse or grant the continuance. *Chicago Public Stock Exchange v. McClaughry*, 36 N. E. 88, 89, 148 Ill. 372; *St. Louis & S. E. R. Co. v. Teters*, 68 Ill. 144, 147.

Act March 31, 1885, which allows a sheriff, sued for damages for wrongful seizure of property, to make the principal and surety on any indemnity bond given to secure him against such damages parties defendant, and providing that, where application for such addition is made, a continuance may be granted to obtain service upon the parties added, gives the sheriff an absolute right to have the cause continued, if he desires to bring in the signers of the indemnity bond, and the court cannot refuse his application, if he brings himself within the terms of the law. *Rains v. Herring*, 68 Tex. 468, 5 S. W. 369, 371.

Control of corporations.

As used in Rev. St. c. 146, § 23, providing that any corporation whose power may expire by express limitation or otherwise may continue to be a body corporate for the space

of three years thereafter for the purpose of prosecuting and defending suits, the word "may" should be construed to mean "must." *Blake v. Portsmouth & C. R. R.*, 39 N. H. 435, 437.

The word "may," as used in Laws Mo. 1837, p. 15, declaring that it shall be the duty of the railroad commissioners to see that all schedules of rates adopted by the common carriers are reasonable and just, and they may on complaint of any person, or on their own motion without complaint, make inquiry from time to time and determine whether the schedule of rates prepared and adopted by any common carrier is reasonable and just, should be construed as "shall." Where rights of third persons are involved, or the public good requires it, the word "may" is to be regarded as mandatory. *Winsor Coal Co. v. Chicago & A. R. Co.* (U. S.) 52 Fed. 716, 719.

The word "may" will be construed as imperative in Code Civ. Proc. § 565, providing that on the dissolution of any corporation the court, on application of a creditor or a stockholder, may appoint one or more persons as receivers thereof. *Havenmeyer v. Superior Court*, 24 Pac. 121, 126, 84 Cal. 327, 10 L. R. A. 627, 18 Am. St. Rep. 192.

Costs.

In St. 13 & 14 Vict. c. 61, § 13, providing that if, in certain actions, the plaintiff shall make it appear to the court that the action was brought for a cause in which concurrent jurisdiction was in the superior courts, or for which no complaint could have been entered in any such county court, or that the said cause was removed from a county court on certiorari, the court may thereupon direct that plaintiff shall recover his costs, "may" is permissive, and not imperative. *Jones v. Harrison*, 3 Eng. Law & Eq. 579, 583.

The word "may," as used in Code, § 317, as amended by Acts 1852, providing that security for costs may, in the discretion of the court, be required by an executor, administrator, or trustee in suits brought by them, etc., should not be construed in its imperative sense. The words "in its discretion," as used in the statute, show that the word "may" is used in its permissive sense. *Darby v. Condit*, 8 N. Y. Super. Ct. (1 Duer) 599, 600.

In construing a statute providing that in actions commenced in the common pleas, when "it appears on the face of the complaint or by other legitimate pleadings verified by affidavit that the title to real estate is in issue, the case shall be transferred to the circuit court," and that "if the cause of transfer appear in the complaint the plaintiff shall pay all costs in the common pleas, except the summons and its service," also that

"the decision of the common pleas ordering the transfer shall be final, but the circuit court may tax all costs made in the former court, except the summons and its service, to the party procuring such transfer without sufficient cause," the court held that the word "may" gave some latitude of discretion in deciding as to the taxation of costs in each case that might arise under the clause in which such word "may" occurs, and that it should not be construed in the sense of "shall." *Allen v. Wells*, 22 Ind. 118, 121.

"May," as used in the Code, providing that in certain cases the court may admit plaintiff to prosecute as a poor person, is used in the sense of "must," so that the power is equivalent to duty. *Shapiro v. Burns*, 27 N. Y. Supp. 980, 981, 7 Misc. Rep. 418.

In St. 13 & 14 Vict. c. 61, providing that where less than £20 is recovered in an action in the superior courts, and it shall be made to appear to the satisfaction of the court, or a judge at chambers, that the action was of the description therein specified, the court or judge may thereon by rule or order direct that the plaintiff shall recover his costs, the word "may" is imperative, and does not leave the matter of granting costs discretionary in cases falling within the statute. *Crake v. Powell*, 10 Eng. Law & Eq. 329, 331; *MacDougall v. Paterson*, 7 Eng. Law & Eq. 510, 515.

"May," as used in Code Civ. Proc. § 1836, providing that the court may award costs on recovery on a claim rejected by the executor, where a consent to a determination of the claim at the settlement of the executor's accounts is not filed, means "shall." *Carter v. Barnum*, 53 N. Y. Supp. 539, 24 Misc. Rep. 220 (citing *Ely v. Taylor*, 42 Hun, 205; *Brinker v. Loomis*, 43 Hun, 247).

"May," as used in Code, art. 91, § 1, providing that if any security or any counter security of an executor or administrator, or any person interested in the estate of any such security or counter security, shall conceive himself in danger of suffering from the securityship, he may apply to the orphans' court which granted the administration, and such court may require the party to give counter security, to be approved by the court, etc., should be construed as "must"; the word "may" being mandatory, and not permissive. "The court has no discretion in the matter of requiring counter security." *Sifford v. Morrison*, 63 Md. 14, 16.

Where the statute provides that the guardian of an infant plaintiff shall be responsible for the costs of the action when they are adjudged against such infant, and that "payment thereof may be enforced by attachment," the statute does not confer a mere discretionary power on the court to

grant such attachment, but gives the party a right thereto. The word "may" in statutes has always been held to be imperative, and equivalent to "must" or "shall," whenever the public or third persons have a claim de jure that the power should be exercised. *Grantman v. Thrall* (N. Y.) 31 How. Prac. 464, 466.

Courts.

As used in Laws 1858, p. 441, c. 282, providing that the court of special sessions may be held by three of the police justices, who shall sit alternately, except that one of their number may be selected to preside, etc., "may" should be construed to have been used in its imperative sense, and to mean "shall." In *re Devine* (N. Y.) 11 Abb. Prac. 90, 93.

Depositions and evidence.

In a statute regulating the practice in actions for divorce, and providing that plaintiff may examine the witnesses orally in court or take their deposition, a privilege is given to the parties litigant for their benefit or convenience, which they may exercise or not in their discretion. *Bansemmer v. Mace*, 18 Ind. 27, 32, 81 Am. Dec. 344 (citing *Newburgh & C. Turnpike Co. v. Miller* [N. Y.] 5 Johns. Ch. 101).

"Where a statute provides that a court under a given circumstance may make a specified order, it sometimes imposes an absolute duty to make the order. In such cases it is said 'may' is construed to mean 'shall.' Where the intention is, not only that the court may make the order, but also that the suitor may of right demand it, the right of the suitor implies a duty of the court." But the use of the words "in his discretion," in a provision in a statute that the judge may in his discretion make an order allowing the examination of witnesses to perpetuate testimony, precludes the construction of the word "may" in other than a mere permissive sense. In *re Carter*, 3 Or. 293, 296.

In Rev. St. 1843, p. 842, § 68, providing that depositions may be taken in like manner as in suits at law, and section 67 providing that complainant may take depositions in 30 days after subpoena served, the statute not relating to public rights, but giving merely a privilege to the parties for their benefit or convenience, the word "may" will have its regular meaning. *Nave v. Nave*, 7 Ind. 122, 123.

Demand for damages.

In Act 1874, providing that demand of damages for stock killed by a railroad may be made of any ticket agent or station agent of such railway company, "may" is used in its permissive sense, as giving to the owner of the stock an additional privilege and increased facility in the collection of his claim;

and hence a demand made upon the general superintendent of a railway company is sufficient. *Central Branch Ry. Co. v. Ingram*, 20 Kan. 66, 70.

Determination of punishment.

As used in Laws 1860, c. 508, entitled "An act in relation to police and courts in the city of New York," and providing that whenever any larceny shall be committed in said city or county by stealing, taking, and carrying away from the person of another, etc., the offender may be punished as for grand larceny, etc., "may" should be construed as merely giving permission to punish the offender as for grand larceny, and not as being imperative, or in the sense of "shall." *Williams v. People*, 24 N. Y. 405, 409.

In construing a statute providing that the court may commute the punishment in capital cases from death to imprisonment for life in the penitentiary, where the jury in their verdict state that they are of the opinion that there are mitigating circumstances in the case, the court said: "It is true that the word 'may' is sometimes held to have the same sense or to mean the same thing as the word 'shall,' and it will be so interpreted whenever the obvious reason or intention of the statute requires that it should be so understood; the general rule being that the words of a statute are to be taken in their natural and ordinary signification and import." And the court held that the word "may" in this case should be understood as permissible merely, and granting to the court a discretionary power. *Lewis v. State*, 40 Tenn. (3 Head) 127, 149.

Under the statute, which leaves to the jury a discretion to inflict punishment of imprisonment in the penitentiary or fine and imprisonment in the county jail, it is not error to inflict the minor punishment, where the accused was convicted under an indictment charging him with a felonious assault; a felony being defined as an offense for which the party may be imprisoned in the penitentiary. *Johnston v. State*, 7 Mo. 183, 185.

The word "may," as used in an act providing that a person convicted under an ordinance may be compelled to work on the streets, is used in the permissive sense. In *re McCort*, 34 Pac. 456, 457, 52 Kan. 18.

Detachment of territory from village.

As used in Hurd's Rev. St. 1897, p. 289, c. 24, par. 206, providing that, whenever the holders representing a majority of the area of any land embraced in any village and on the borders thereof shall petition the trustees of the village to detach such territory, the trustees may by ordinance detach such territory, etc., "may" should be construed to

mean "must" or "shall," so that the trustees have no discretion in the matter. *Young v. Carey*, 56 N. E. 960, 961, 184 Ill. 613.

Discharge on bail.

The word "may," as used in Laws 1878, p. 162, providing that if a defendant in a criminal charge is not indicted or tried, etc., the court may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action is continued, should be construed in its permissive sense, and not as meaning "shall" or "must." *Ex parte Lowrie*, 7 Pac. 493, 494, 4 Utah, 177.

Dismissal of action.

"May," as used in Code, § 3312, providing that, when there has been no proceeding in a cause for five years, the court in its discretion may dismiss, and "may direct the order to be published in such newspaper as it may designate," is not to be construed "shall," as the public has no interest in such a publication, and no party has a claim as of right to such a publication. *Echols' Ex'r v. Brennan*, 87 S. E. 786, 787, 99 Va. 150.

Code, § 32, providing that the complaint must be filed within 10 days after the summons is issued or the action may be dismissed means that the authority of the court to dismiss the action rests in sound legal discretion. The phrase "may be dismissed" is not the language of a command, nor of a penalty, and is not to be construed as meaning "shall be dismissed." *Knight v. Fisher*, 25 Pac. 78, 79, 15 Colo. 176.

The word "may," in a statute providing that the court may dismiss the complaint, with costs in favor of one or more of the defendants, in case of unreasonable neglect on the part of the plaintiff to proceed in the action against the defendant or defendants served, is to be construed in a permissive sense, not as meaning "must" or "shall," and therefore gives the court a discretion, even in case of unreasonable neglect. *Perkins v. Butler* (N. Y.) 42 How. Prac. 102, 105.

"May," as used in a statute in furtherance of justice, means "shall," and was so used in Act Feb. 27, 1894, amended by Act Feb. 26, 1896, providing that, in case of misjoinder of parties, the court may order the action to abate as to the party improperly joined and proceed against the others. *Lee v. Mutual Reserve Fund Life Ass'n*, 33 S. E. 556, 557, 97 Va. 160.

Civ. Code, § 397, providing that an action "may be dismissed," without prejudice to a future action, by the court, where the plaintiff fails to appear on the trial, should be construed to read "shall be dismissed."

Kansas City, W. & N. W. R. Co. v. Walker, 32 Pac. 365, 50 Kan. 739.

In a statute regulating the practice in justices' courts, and providing that, "saving the right of a defendant who has filed a set-off or counterclaim to proceed to trial, though the plaintiff failed to appear or dismiss his action, judgment may be rendered against the plaintiff, dismissing his action, with costs, but without prejudice to a new action for the same cause, if the plaintiff fails to appear and prosecute his action," the word "may" should be construed as if it were "shall." In other words, if the defendant demands a dismissal, the justice must enter it, and in such case he can do no more than dismiss it. It is the plaintiff's right that he shall do no more. Buena Vista Freestone Co. v. Parrish, 34 W. Va. 652, 655, 12 S. E. 817, 818.

Disqualification of judge.

Under Const. art. 5, § 16, providing that, when a judge is disqualified, the parties interested may by consent appoint another to try the case, or upon their failing to do so a competent person may be appointed to try the same in such manner as may be prescribed by law, an imperative duty is not placed on the Legislature to provide for the appointment of a special judge, but it was the intention of the section merely to enlarge the power of the Legislature, so as to enable it to provide for the appointment of such judge. San Angelo Nat. Bank v. Fitzpatrick, 30 S. W. 1053, 1054, 88 Tex. 213.

Education.

In construing Pol. Code, § 1775, providing that the board of education may without examination grant county certificates to the holders of life diplomas of other states and teachers holding certain other specified diplomas, on the claim of a teacher who held a diploma such as was specified that the word "may" in such provision of the law should be construed as "must," and that the board could be compelled by mandamus to grant such certificate, the court said: "We cannot see that the legislative intent was to impose a duty upon the board of education to grant certificates under the stated circumstances, but it is made quite plain that it was the intent of the Legislature to extend to the board a privilege or a discretionary power as to issuance of this class of certificates. Ordinarily there is a great difference in the meaning of the words 'may' and 'must' and this statute will have effect, and a broad effect, by giving this word 'may' its common and ordinary meaning." Kemble v. McPhail, 128 Cal. 444, 446, 60 Pac. 1092, 1093.

Where a statute provided "that the board of education may establish a separate

school for the education of negroes, if deemed advisable by them," was so amended as to simply provide that the board may establish such separate school, thus omitting the language which expressly left the matter to the discretion of the board, the word "may" should be construed as "must," and as imposing the duty upon the board to establish such separate school. State v. Duffy, 7 Nev. 342, 363, 8 Am. Rep. 713.

Where a statute contained a form of certificate to be issued to teachers, and also prescribed what facts the certificate must state, and then added that the certificate may be drawn in such form, the word "may" should not be construed as meaning "must," and a certificate which contains all the facts required by the statute is sufficient, though it is not drawn in the statutory form. Union School Dist. No. 6 v. Sterricker, 86 Ill. 595, 597.

When used in a statute which distinguishes between provisions which are mandatory and those which are discretionary, "may" will not be construed as "must," and as used in Laws 1894, c. 671, § 7, providing for compulsory school attendance, and that the district shall appoint one or more attendance officers, and may make rules and regulations, will be held to have been used in its discretionary meaning. Reynolds v. City of Little Falls, 53 N. Y. Supp. 75, 79, 33 App. Div. 88.

The word "may," in Act March 17, 1854, which provides that in case of any vacancy in the board of trustees of any school district the same may be filled by taxable inhabitants of the district, was not designed to exclude other modes of filling a vacancy which existed when the statute was passed. State v. Patterson, 32 N. J. Law (3 Vroom) 177, 180.

Elections.

As used in a statute providing that the board of election canvassers may dispatch a messenger to the inspectors of election who made the returns, commanding them to complete the returns in the manner specified by law in case of omissions or improper certificates, etc., the word "may" should be construed to mean "must." Nor is it necessary for a person to be a lawyer in order to know that the word "may" in such a statute imports an absolute obligation. Any one would so read it and construe it who had sufficient intelligence to comprehend that the preservation of our system of free government is impossible, unless the will of the people, lawfully expressed through the ballot box, is respected and obeyed; and therefore the commissioners or canvassers would not be entitled to throw out returns by reason of defects, in their discretion, but it was their plain duty to send a messenger and

have the returns corrected. *Rich v. Board of State Canvassers*, 59 N. W. 181, 184, 100 Mich. 453; *State v. Board of State Canvassers*, 36 Wis. 498, 506.

In a statute relative to town meetings, and providing that special meetings may be convened when the selectmen shall deem it necessary, or on application of 20 inhabitants qualified to vote in a town meeting, the word "may" should be construed as mandatory, inasmuch as the statute evidently intended to give to 20 voters a right to ask for a town meeting. *Lyon v. Rice*, 41 Conn. 245, 248.

Enforcement of mechanic's lien.

As used in a statute providing that a mechanic's lien may be enforced by attachment, "may" should be construed to have the same meaning as the word "shall," and is therefore imperative, and suit must be by attachment. *Barnes v. Thompson*, 32 Tenn. (2 Swan) 313, 317.

Grant of licenses.

Under Act March 6, 1882, providing that the court may grant a liquor license, the court must grant it in a proper case. *Ex parte Lester*, 77 Va. 663, 673.

"May" is imperative in *Sess. Acts 1899*, p. 9, providing that on due application to the county court, and production of a receipt of the license fees prescribed, the county court may give a license to sell liquors to the applicant of the character and for the term his receipt may call for. *McLeod v. Scott*, 26 Pac. 1061, 1065, 21 Or. 94.

The word "may," as used in a statute providing that the county court shall grant a liquor license if the applicant shall bring himself within the requirements, and that the circuit court may grant it on appeal, should be construed in its mandatory sense. It means that the circuit court shall have the jurisdiction to do so, and must do so if the applicant brings himself within the requirements. The word "may" is sometimes construed as mandatory, and sometimes as permissive, as will best carry into effect the true intent and object of the Legislature. Generally it is construed as mandatory when the Legislature means to impose a positive duty, or when the public is interested, or where third persons have a claim, that the act shall be done. *Leigton v. Maury*, 76 Va. 865, 870.

"May," as used in statutes, is only to be construed as mandatory for the purpose of sustaining or enforcing a right, but never to create one; and as used in *Gen. St. 1805*, c. 98, § 4, relating to the issuing of licenses to keep dramshops, and providing that, if the court shall be of the opinion that the applicant is a person of good character, the court may grant a license for six

months, is not mandatory, but leaves the granting of the license discretionary with the court. *State ex rel. Kyger v. Holt County Court Justices*, 39 Mo. 521, 524.

In *Code 1849*, p. 443, c. 96, § 3, and *Id.* p. 207, c. 38, § 4, authorizing the granting of a license to keep a house of entertainment, and providing that if the court be of the opinion that the applicant is sober and of good character, and will probably keep a house orderly and such as the law requires, it may grant such license, "may" is used in its popular sense—that is, in its permissive sense—and is employed to grant an authority coupled with a discretion, which discretion from its very nature does not admit of its being reviewed by an appellate tribunal, and hence there is no appeal from the exercise thereof, or from an order granting or refusing to grant such a license. *Ex parte Yeager (Va.)* 11 Grat. 655, 658.

"May," as used in *Acts 1896*, c. 378, § 5, providing that any graduate of a regular college of dentistry may, at the discretion of the examining board, be registered without being subjected to an examination, should be construed in a permissive sense, because it is expressly coupled with discretion, which negatives the possibility of its use in a mandatory sense. *State v. Knowles*, 45 Atl. 877, 878, 90 Md. 646, 49 L. R. A. 695.

The word "may," as used in the Nebraska statute providing that municipal authorities may grant a license for the sale of intoxicating liquors, does not show that the Legislature intended to empower municipal authorities with an unrestrained discretion to discriminate without cause or reason between applicants for liquor licenses, granting to one and refusing another capriciously and whimsically, but rather it was the intention, when it was determined to license the traffic, to determine the right of those applying to engage in the business under recognized rules and laws, and for causes and reasons applying to all alike, and in the exercise of legal discretion, subject to review by appeal to a district court. The word "may" applies more directly to the right of local authorities to refuse a license altogether, or, within the legal discretion of the licensing board, to grant to all of those who bring themselves within the law and the rules and ordinances enacted for the licensing and regulation of the traffic. *State v. City of Alliance*, 91 N. W. 387, 391, 65 Neb. 524.

Grant of franchise or privilege.

Ordinarily the word "may" implies permission only, but often it is construed to be mandatory. As used in *P. L. 1893*, p. 241, providing that, when the municipal authority grants authority for the use of poles to be located in the public streets with wires, it

may prescribe the manner in which and the places where such poles shall be located, and the manner in which wires shall be strung thereon, "may" is mandatory. *Kennelly v. Jersey City*, 30 Atl. 531, 532, 57 N. J. Law (28 Vroom) 293, 26 L. R. A. 281.

As used in Act Nov. 5, 1849, providing for a general system of railroad incorporations, and reciting that 13 or more persons intending to organize under this act may present a petition praying the Legislature to determine whether the construction of the proposed road will be of sufficient public use to justify the taking of private property for its construction, "may" means "must" or "shall," and where the public interests and rights are concerned, and when the public or third persons have a claim *de jure*, that the power should be exercised. *Gillinwater v. Mississippi & A. R. Co.*, 13 Ill. (3 Peck) 1 3.

"May," as used in the charter of a log driving company, providing that the company may drive all logs and other timber in a certain stream, is construed as permissive, and not imperative. *Weymouth v. Penobscot Log Driving Co.*, 71 Me. 29, 38.

In an act incorporating a bank, and providing that the capital stock may consist of \$500,000, the ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions, and as it was by no means clear from the section that the Legislature contemplated that there should be a capital of \$500,000, on which the bank was to commence or carry on its operations, it will be held that the word was directory only, and not mandatory. *Minor v. Mechanics' Bank of Alexandria*, 26 U. S. (1 Pet.) 46, 63, 7 L. Ed. 47.

Indictment.

In Comp. Laws, § 7244, providing that, when an offense is committed by the use of different means, the means may be alleged in the alternative in the same count, "may" will not be held to mean "must," but used in its ordinary permissive sense. *State v. Hall*, 84 N. W. 766, 767, 14 S. D. 161.

Under a statute providing that "the indictment must charge but one crime, and in one form only, except that where the crime may be committed by the use of different means, the indictment may allege the means in the alternative," defendant having been indicted under a charge of maliciously killing deceased "by then and there beating her with his fists, and by choking her, and by pushing and dragging her into the water, and holding her under the water, whereby she was drowned," etc., he insisted that the word "may," as used in the statute, should be construed as "must," and that, the indictment having failed to allege the means in the al-

ternative, it was demurrable. The court held that where the means used were not known the alternative might be used, but where such means used were known it was incumbent on the prosecuting officer to so allege the fact in the indictment, and that in this case, the means being known to the grand jury, it was proper to allege them conjunctively; for it may have been, in consequence of the alleged beating and choking of the deceased, the defendant was enabled to drag her to and hold her under water until life was extinct, and if such was the case all these acts constituted the means by which the deed was accomplished. *State v. Flester*, 50 Pac. 561, 562, 32 Or. 254.

As used in Rev. St. 1889, § 3944, providing that every person who shall be a principal in the second degree in the commission of any felony, or who shall be an accessory to any murder or other felony before the fact, shall, on conviction, be adjudged guilty of the offense in the same degree and may be charged, tried, convicted, and punished in the same manner as the principal in the first degree, the word "may" cannot be construed to mean "shall." The indictment may either allege the matter according to the fact, or charge both the principal and accessory as principals in the first degree. *State v. Schuchmann*, 83 S. W. 35, 38, 133 Mo. 111.

Insurance.

The word "may," as used in an act of incorporation providing that it shall and may be lawful for an insurance company to set apart a fund to be held and pledged for the payment of annuities and losses on lives, is not to be construed as requiring the company to set aside such a fund, but gives the company an option to do so. *Verplanck v. Mercantile Ins. Co. (N. Y.)* 1 Edw. Ch. 83, 91.

Interest on damages.

The word "may," as used in Rev. St. c. 96, § 20, providing that the court may allow interest on the damages given in the action from the time the verdict was returned to the time of rendering judgment thereon, means "must," as it could not have been the intention of the Legislature to grant a power to the court merely discretionary to allow interest on a verdict in one case and disallow it in another, according as it might seem to the court to be equitable. *Forbes v. Inhabitants of Bethel*, 28 Me. (15 Shep.) 204, 209.

Inventory of wife's property.

The word "may," as used in Comp. Laws, § 2503, providing that an inventory of the separate property of a wife may be made out and signed by her, and recorded, and

will be notice of the title of the wife, is evidently used in its ordinary sense, and not as meaning "must." *Anderson v. Medbery* (S. D.) 92 N. W. 1089, 1090.

Jurisdiction.

The word "may," in a federal statute providing that suits, actions, and proceedings against certain associations "may" be had in any circuit, district, or territorial court of the United States, was held to have been used in a permissive and not a mandatory sense, and therefore the statute does not give an exclusive jurisdiction to such courts. *Continental Nat. Bank v. Folsom*, 3 S. E. 269, 272, 78 Ga. 449; *Fresno Nat. Bank v. Superior Ct.*, 24 Pac. 157, 158, 83 Cal. 491.

The word "may," in federal statutes which provide that suits, actions, and proceedings against any association under the title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases, is used in a permissive sense, and is not inconsistent with the provisions of Rev. St. U. S. § 5136, which declares that banks specified in the statute may sue and be sued, complain and defend, in any court of law or equity as fully as natural persons. It is true that in the construction of statutes the word "may" is sometimes construed as meaning "must," in order to carry out the intention of the framers and the object of the law; but such a construction in this case might lead to a great practical inconvenience, and would evidently be inconsistent with the object of the provision in question. *Talmage v. Third Nat. Bank of City of New York*, 91 N. Y. 531, 537; *Cooke v. State Nat. Bank of Boston* (N. Y.) 50 Barb. 339, 3 Abb. Prac. (N. S.) 339, 341; *Id.*, 52 N. Y. 96, 105, 11 Am. Rep. 667.

In Laws 1878, c. 186, § 56, providing that from judgments in actions where a recovery of less than \$200 was demanded the appeal shall be to the county court, and from judgments in actions where \$200 or more was demanded appeals may be taken to the General Term of the Supreme Court, "may," should be construed to mean "must." *Mitchell v. Pike* (N. Y.) 17 Hun. 142, 143.

As used in a statute conferring jurisdiction on certain courts in the matter of the suspension or removal of an attorney, "may" will be construed as "shall," as the matter concerns justice and the public good. *State ex rel. Jones v. Laughlin*, 73 Mo. 443, 449.

Lease and sale of public lands.

In a statute declaring that pasture lands, or agricultural lands not timbered, belonging to the state school fund, may be leased by the

state land board in suitable quantities for stock and ranch purposes, for not less than 4 cents per acre per annum, the word "may" was construed to be mandatory; the court saying, "The word 'may' in this connection was undoubtedly used in the sense of 'shall.'" *Smissen v. State*, 9 S. W. 112, 118, 71 Tex. 222.

In Const. art. 7, § 6, directing that the proceeds of the sale of school lands shall be held by the counties in trust for the benefit of the public schools therein, and be invested in certain securities specified, or in such other securities and under such restrictions as may be prescribed by law, the term "under such other restrictions as may be prescribed by law" means that the Legislature may throw restrictions around the investment, and not that it was bound to do so before the power could be exercised. The word "may" ordinarily signifies permission, and not command. It was not intended to make it mandatory upon the Legislature to provide for an investment in such other securities, but to confer power upon it to make such a provision. *Boydston v. Rockwall County*, 86 Tex. 234, 239, 24 S. W. 272, 274.

As used in 2 Batts' Rev. St. art. 4218y, providing that isolated and detached sections of public free school lands may be sold without actual settlement at one dollar per acre, the word "may" should be construed in its literal sense; that is to say, as a word merely conferring a power upon the commissioner to sell the land therein specified at one dollar per acre, and not as making it obligatory upon him to do so. The word "may" was used in the ordinary sense of permission. *Weber v. Rogan*, 57 S. W. 940, 941, 94 Tex. 62.

Parties.

Act 1898, providing that in a suit for the abatement of a liquor nuisance the owner of and all persons interested in the building, as well as the keeper, may be made parties to the proceedings, is not mandatory, but leaves it to the discretion of the state's attorney whether to join the owner and others as parties or not. *State v. Massey*, 47 Atl. 834, 836, 72 Vt. 210.

In 2 Rev. St. (7th Ed.) p. 1405, § 21, providing that all suits, actions, or proceedings brought or prosecuted by or on behalf of a banking association may be brought or prosecuted in the name of the president, "may" is not equivalent to "must," but is permissive only, allowing the association to sue in its corporate name, as well as in the name of its president. *Columbia Bank v. Jackson*, 4 N. Y. Supp. 433.

In construing Rev. St. § 2401, providing that "upon the disability of a party the court may allow the action to continue by or against his personal representative or

successor in interest, and upon any other transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted for him," the court said: "This is almost identical with the provisions of the Codes of the state, holding that the word 'may' is permissive, and not mandatory. We apprehend that the undisputed rule is that the court may grant the application in its discretion, which may not be subject to review, except for its abuse. The matter certainly should be within the discretion of the trial court, in order to protect the rights of all the parties, or of those to whom they may have been transmitted, either by death, devise, assignment, or transfer. Certainly, if the Legislature had intended that the application for the substitution should be granted as a matter of right, the usual and proper words 'shall,' 'will,' or their equivalents, would have been used." *Smith v. Harrington*, 27 Pac. 803, 805, 3 Wyo. 503.

Rev. St. 1881, § 2520, provides that courts shall have the power of permitting any person as next friend to prosecute any suit in any minor's behalf. Section 256 declares that, when it appears that the next friend is incompetent or irresponsible, the court may remove him and permit some suitable person to be substituted. Held, that the word "may," as used in section 256, is used in its permissive and not its mandatory sense. *Budd v. Rutherford*, 30 N. E. 1111, 1112, 4 Ind. App. 386.

The ordinary signification of the word "may" is permissive and not mandatory. Where a statute directs the doing of a thing for the sake of justice or public good, the word "may" has been held to mean "shall"; but where the subject-matter of the action in no wise concerns public justice or public good, but relates merely to the rights of two individuals, the courts should, where the meaning and intent of the Legislature is doubtful, resort to the suggestion of the subject-matter or of the statute when it was passed. According to this rule the word "may," in Code Civ. Proc. § 2340, providing that the committee of the property of a lunatic may maintain in his own name any action or special proceeding which the lunatic might have maintained if the appointment had not been made, should not be construed to mean "must" or "shall," but should be given its ordinary signification. *Skinner v. Tibbitts* (N. Y.) 13 Civ. Proc. R. 370, 374.

The word "may," in a statute providing that an administrator's bond may be put in suit in the name of the party injured, is not used in an imperative sense; the object of the statute being simply to confer upon certain persons the privilege of suing

in their own names. It is a question in which no public right or interest is involved, or in which any third person has any claim *de jure* that the power should be exercised, and it is entirely discretionary with the parties to whom the privilege is extended whether to avail themselves of it or not. *Annamson v. Nash*, 24 Ala. 279, 281.

Under a statute providing that, "in case of the death or other disability of the party, the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow or compel the action to be continued by or against the personal representatives or successor in interest," an action cannot be continued after the death of a party without the consent of the court, and this consent the court, for equitable reasons and in the exercise of a sound legal discretion, may withhold. *Cavanaugh v. Scott*, 54 N. W. 328, 329, 84 Wis. 93.

In construing a statute providing that, "in an action against the sheriff or other officer for the recovery of property taken under execution, and replevin by the plaintiff in such action, the court may, upon application of the defendant and of the party in whose favor the execution was issued, permit the latter to be substituted as the defendant," the court said that the permissible words used in that section conferred on the court a sound legal discretion to grant or refuse the application. *Sifford v. Beaty*, 12 Ohio St. 189, 194.

In a statute providing that where, during the pendency of an action, the title of the plaintiff passes by his death to those next in interest, they may be substituted, the word "may" cannot be construed as "must," and requiring such substitution, but it is optional with such successor in interest to be substituted and proceed with that action, or to commence a new one. *Reitz v. Thomas*, 13 Pa. Co. Ct. R. 315, 317.

In a statute providing that, where the plaintiff in an action of ejectment shall sell his title to the property involved, the purchaser may prosecute the action, the word "may" should not be construed as mandatory, and as requiring him to prosecute the suit brought by the former owner, but he may sue out a writ to recover the premises in his own name. *Longbine v. Piper*, 70 Pa. 378, 380.

In a statute providing that, "where two or more defendants shall be jointly indicted for any offense, any one defendant may be tried separately," the word "may" does not mean "shall," but leaves the question of severance in the discretion of the trial court. *Caldwell v. State*, 34 Ga. 10, 18.

Under a statute relating to mechanics' liens, and providing that in all suits under

the act the parties to the contract shall, and all other persons interested in the matter in controversy and in the property charged with the lien may, be made parties, but such as are not made parties should not be bound by any proceedings, the word "may" is permissive, not mandatory, so that the owner of a building on which a mechanic's lien is sought to be enforced is not a necessary party. *Schaeffer v. Lohman*, 34 Mo. 68, 73.

"May," as used in *Scates' Comp. St. p. 948, § 42*, providing that all penalties for the failure of a railroad to sound a whistle or ring a bell on its engines at any road crossing, one half of which goes to the informer and the other half to the state, may be sued for the failure by the state's attorney and in the name of the people of the state, cannot be construed to mean "shall." "May" should be construed to mean "shall" in all cases where the public have an interest, or a duty is imposed on public officers, and also where a public or private individual has a claim *de jure* that the power should be exercised; but in this case the public do not alone have a right to the penalty, unless they shall first sue for its recovery. If an informer sues, he acquires an equal right with the public. *Chicago & A. R. Co. v. Howard*, 38 Ill. 414, 417.

The word "may," in statutes which provide that when any married woman shall carry on any business, and any right of action shall accrue to her therefrom, she may sue on the same as if she were unmarried, is used in a mandatory sense—that is, as "shall" or "must"; hence the husband has no right to institute suits in his own name as trustee for the enforcement of such rights. *Rockwell v. Clark*, 44 Conn. 534, 536; *Rumsey v. Lake* (N. Y.) 55 How. Prac. 339, 341; *Hill v. Duncan*, 110 Mass. 238, 239.

"May," as used in Code, § 439, providing that, if either party die after judgment, their representatives may be made parties, and such judgment may be entered as ought to be given against the representatives, will be construed to mean "must" or "shall." *Havens v. Pope*, 62 Pac. 533, 539, 10 Kan. App. 299 (citing *Halsey v. Van Vliet*, 27 Kan. 479).

The word "may" is often construed to mean "shall," where the obvious meaning of the statute or instrument requires it; and it was used in this sense in St. 1830, c. 477, § 22, which declares that all actions founded on any contract made with the warden in his official capacity may be brought by or against the warden for the time being, and any actions for injuries done or occasioned to the real or personal property belonging to the state and appropriated to the use of the state prison, or being under the management of the warden thereof, may be

prosecuted in the name of the warden for the time being. Hence the state of Maine cannot maintain an action in the state of Massachusetts on a contract made with the warden of its state's prison in his official capacity. *State of Maine v. Gould*, 52 Mass. (11 Metc.) 220, 224.

Act 1797, declared the assignment of bonds, bills, etc., good in law, and that the assignor of any such may maintain an action of debt in his own name. "It is alleged that the word 'may' was cautiously selected to secure the subsisting rights of assignees to instruments assigned, or, in other words, to give to the assignees an additional right of action. I do not think this correct. The Legislature annexed the now legal right of the assignee to his then equitable one, and empowered him, like all other creditors, to sue in his own name for his own debt, but by no means exempted him from the general rules established for the regulation of others." *Reed v. Bainbridge*, 4 N. J. Law (1 Southard) 351, 357.

Code, § 12, provides that any person "may be made a defendant" who has or claims any interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. Held that, according to *Bliss*, Code Pl. §§ 96, 97, this provision is a mere statement of the old equity rule authorizing all persons materially interested in the subject of the suit to be made parties, either plaintiffs or defendants, and that the phrase "may be made a defendant" should be treated as imperative or directory, according to the nature of the person's interest. *Allen v. Tritch*, 5 Colo. 222, 226.

Pleading.

"May," as used in Code, § 177, providing that a defendant may, by leave of the court granted on motion, make a supplemental answer alleging facts material to the case occurring after the former answer was put in, is permissive. *Medbury v. Swan*, 46 N. Y. 200, 201.

Where a statute provided that after the filing of the declaration the defendant may plead, etc., it was held that the term "may" did not mean "shall," but was used in its permissive sense. *Bolling v. Town of Petersburg* (Va.) 3 Rand. 563, 579.

In the provision of 2 Rev. St. p. 455, § 34, that "all matters of defense, except the statute of limitations, set-off, and matter in abatement, may be given in evidence without plea," the word "may" is not synonymous with "shall," but is permissive merely, and leaves the party's right to interpose a plea, if he wish to do so, unimpaired. *Cross v. Pearson*, 17 Ind. 612, 615.

The word "may," in a statute providing that, where a corporation is a party to a suit, the verification may be made by an officer thereof, is to be construed in a permissive sense, and not as meaning "must," and therefore such verification may be made by an attorney of the corporation. *Market Nat. Bank of New York v. Hogan*, 21 Wis. 817, 319.

In a statute providing that the court may order a lien claim amended whenever it shall appear that such order can be justly made, the court is not obliged to grant an application to amend, but must consider the application in the exercise of its sound judgment. *Bartley v. Smith*, 43 N. J. Law (14 Vroom) 321, 325.

As used in a statute providing that at any time before final decree a defendant may be allowed to file his answer, the term "may" is imperative, and means "shall," and where an answer is filed before the final decree the court has no right to refuse to receive it. *Welsh v. Solenberger*, 8 S. E. 91, 92, 85 Va. 441; *Radford v. Fowlkes*, 8 S. E. 817, 821, 85 Va. 820; *Bean v. Simmons* (Va.) 9 Grat. 389, 391 (citing *Drage v. Brand*, 2 Wils. 377; *Roles v. Rosewell*, 5 Term R. 538; quoted and approved *Elliot v. Hutchinson*, 8 W. Va. 452, 459).

The word "may," as used in Rev. Laws § 2131, providing that in an action of attachment by an executor or administrator the defendant may plead in off-set the claims he has against the deceased, should be construed to mean "shall." *Sabin v. Kelton*, 54 Vt. 283, 286.

The word "may," as used in Code, § 177, providing that a supplemental answer may be allowed on motion, whenever the facts forming the ground of the answer have occurred since the answer was put in, or where the defendant was ignorant of them at the time of pleading the first answer, means "must." *Drought v. Curtis* (N. Y.) 8 How. Prac. 56, 57.

In a statute providing that the court may, in furtherance of justice and on such terms as may be proper, amend any pleading or proceeding by adding or striking out the name of any party, etc., and providing that the court shall in every stage of the action disregard any error or defect in the pleading or proceeding which shall not affect the substantial rights of the parties, "may" is synonymous with the term "shall" as used in the statute. *Cooke v. Spears*, 2 Cal. 409, 412, 56 Am. Dec. 348.

St. 8 & 9 Wm. III, c. 11, § 8, enacting that, in actions on any penal sum for non-performance of covenants, the plaintiff may assign as many breaches, etc., and, if judgment shall be given for him on *nil dict*, he may suggest on the roll as many breaches

as he shall think fit, on which shall issue a writ to the sheriff to summon a jury and to assess the damages, is compulsory on the plaintiff, and he cannot enter up a judgment for the whole penalty on a judgment by default, as he might have done at common law. *Roles v. Roswell*, 5 Term R. 538.

Where "may" was used in a statute introducing a new mode for assigning breaches in debt on penalty for the performance of covenants, and declaring that plaintiff may assign his breaches, and the jury shall assess damages for the breach assigned, this after much discussion was settled to be compulsory, and that it is not in the power of the court to refuse to proceed under this new regulation, and, if he proceeds otherwise, his judgment is erroneous. *Shaeffer v. Jack* (Pa.) 14 Serg. & R. 426, 429.

In construing a statute providing that "the demurrer shall distinctly specify the grounds of objection to the pleadings," and "unless it does so it may be disregarded," the Supreme Court at an early date held that the word "may" in this connection means "should," and that the court will only look to the objections specified. *Roberts v. Bartlett*, 26 Mo. App. 611, 615 (citing *McClurg v. Phillips*, 49 Mo. 316; *Alnutt v. Leper*, 48 Mo. 321).

"May," as used in Act 1838, declaring that declarations founded on attachments may be filed at the first term of the court to which the same shall be returned, should be construed to mean "must." The word "may" in a statute is to be construed to mean "must" or "shall" when such statute concerns the public interest or affects the rights of third persons. *Birdsong v. Brooks*, 7 Ga. 88, 89.

The term "may," in a statute relative to the action of replevin, and providing that it may be alleged in the declaration, with requisite certainty of time, place, and value, that the defendant received the property, etc., is held to be mandatory, so that the facts mentioned must be alleged. *Pirani v. Barden*, 5 Ark. (5 Pike) 81, 85.

Process.

In 1 Wag. St. c. 63, § 42, providing that "all penalties imposed upon railroad companies by this chapter may be sued for in the name of the state of Missouri, and, if such penalty be for a sum not exceeding \$100, then such suit may be commenced before a justice of the peace, and may be commenced by serving the summons on any director of such company," the word "may" was not intended to establish an exclusive method of service, but merely as permissive and additional to the modes of service theretofore authorized. *State, to Use of Clinton County, v. Hannibal & St. J. R. Co.*, 51 Mo. 532, 536.

In Rev. St. §§ 4530, 4546, providing that whenever the wages of any seaman are not paid within 10 days after the time when the same ought to be paid, or any dispute arises between the master and seamen touching wages, the district judge of the district where the vessel shall be, or a justice of the peace, or a commissioner of the circuit court "may summon the master" of such vessel to appear before him and show cause why process should not issue against the vessel, "may" means at liberty to summon; to be permitted to summon. It authorizes the district judge or commissioner to summon the master, but does not require him to do so. It is permissive, not imperative. *The Shelbourne* (U. S.) 30 Fed. 510, 511.

In Rev. Laws, § 2835, providing that the copy of the order of removal of a pauper shall be served on the overseer of the poor, and may be served by a sheriff of the county in which either town is situated or by the constable of either town, "may" should be construed as mandatory, and not as permissive. This special designation of the officers who may serve the process excludes all others. *Town of Granville v. Town of Hancock*, 55 Vt. 323, 324.

Public officers.

In statutes conferring duties on public officers for public purposes, the words "shall" and "may" are ordinarily to be construed imperatively. *Hagadorn v. Raux*, 72 N. Y. 583, 586.

The word "may," when used in a statute relating to duties of a public officer, is tantamount to "shall." *Vason v. City of Augusta*, 38 Ga. 542, 545.

Where the word "shall," in a statute prescribing certain duties of the county court, was expressly changed by amendment to the word "may," the latter word was clearly not intended to be construed in its mandatory sense, but was merely permissive, and vested a discretion in the court. *Allstock v. Page*, 77 Va. 386, 390.

"May," as used in a statute providing that the chief of police shall have power, under such rules as the police board may establish, to suspend, fine, or dismiss any subordinate officer, is used in its primary or permissive sense. *Eslinger v. Pratt*, 46 Pac. 763, 766, 14 Utah, 107.

"May" is construed as "shall" when the manifest purpose of the instrument or statute in which it is used requires it. As used in Acts 1889, c. 63, § 1, which provides that the 22d day of February and other specified days shall be holidays, on which all public offices of the state may be closed and business of every character, at the option of the parties in interest or managing the same, may be suspended, it is merely permissive,

not mandatory. *Elrod v. Gray Lumber Co.*, 22 S. W. 2, 3, 92 Tenn. 476.

When used in statutes "may" is often treated as imposing a duty, rather than as conferring a discretion, or, in other words, to be synonymous with "must." As used in Acts Ex. Sess. La. 1877, p. 47, providing that all the revenues of the city of each year shall be devoted to the expenditures of that year, provided that any surplus of said revenues may be applied to the payment of indebtedness of former years, "may" is permissive, and leaves such application discretionary. *United States v. Thoman*, 15 Sup. Ct. 378, 380, 156 U. S. 353, 37 L. Ed. 450 (citing *Mason v. Fearson*, 50 U. S. [9 How.] 248, 18 L. Ed. 125; *City of Washington v. Pratt*, 21 U. S. [8 Wheat.] 687, 5 L. Ed. 714; *Supervisors v. United States*, 71 U. S. [4 Wall.] 435, 18 L. Ed. 419).

27 Stat. 509, § 15, providing that, if a certain commission shall be of opinion that the restraining and other works already contracted at the mine or mines shall be sufficient to protect the navigable rivers of a certain system, then the owner or owners of such mine or mines may be permitted to commence operations, is mandatory. *North Bloomfield Gravel Min. Co. v. United States* (U. S.) 88 Fed. 664, 673, 32 C. C. A. 84.

In construing a statute providing that ministers of the gospel, district judges, magistrates, or other judicial officers may solemnize marriage, it was said that "it was an established rule of construction that where the word 'may' is thus used, and we refer to a public officer, it is mandatory, and compels him to perform the duty indicated." *Davenport v. Colwell*, 10 S. C. (10 Rich.) 317, 343.

Same—Appointment or removal.

In general acts of Parliament or in private constitutions "shall" and "may" are to be considered imperatively. Where an act provided that, if trustees of a charity were guilty of drunkenness or debauchery, then the governors "shall and may" turn them out, they must remove them, if guilty of the acts specified. *Attorney General v. Lock*, 3 Atk. 164, 166.

The word "may," as used in Sess. Laws 1891, p. 116, § 1, providing that the board of county commissioners, when certain conditions exist, may appoint one or more justices of the peace and one or more constables, will be construed as equivalent to "shall." *Pueblo County Com'rs v. Smith*, 45 Pac. 357, 362, 22 Colo. 534, 33 L. R. A. 465.

Same—Arrest and discharge of prisoners.

"May," as used in St. 1876, c. 17, providing that any person found in a state of intoxication in a public place, or in any place

committing a breach of the peace or disturbing others by noise, may be apprehended by any sheriff, deputy sheriff, constable, watchman, or police officer without a warrant, and kept in custody until he is so far recovered from his intoxication as to render it proper to carry him before a court of justice, and the officer may then make a complaint against him for the crime of drunkenness, is mandatory, and is equivalent to "shall." The words "shall" and "may" are not unfrequently equivalent terms. *Phillips v. Fadden*, 125 Mass. 198, 200.

In a statute providing that whoever is found in a state of intoxication in a public place may be arrested without a warrant by a watchman or police officer, the language is permissive. It gives authority to the officers named to use their discretion as to arresting an intoxicated person found in a public place. It does not compel them at all hazards to arrest such person, but leaves it to their sound judgment to decide whether, under all the circumstances of the particular case, they should arrest the offender. *Commonwealth v. Cheney*, 141 Mass. 102, 104, 6 N. E. 724, 725, 55 Am. Rep. 448.

"May," as used in statutes, is construed to mean "shall" when the obvious purpose and real intention of the law requires it. It was so used in St. 1857, c. 141, § 25, which provides that the jailer may under certain circumstances discharge a prisoner, and imports a duty to be observed, and not a permission to discharge the prisoner at his pleasure. *Inhabitants of Worcester County v. Schlesinger*, 82 Mass. (16 Gray) 166, 168.

Same—Election.

As used in Acts 1870, p. 394, chartering the city of L., and providing that the mayor, with the consent of the council, shall have power to appoint all city officers not ordered by the act to be otherwise appointed, and declaring that the council may by ordinance provide for the election by the qualified voters of any of the officers named in the act, "may" is used, not in the sense of "shall," but "in its ordinary and proper signification, and leaves it to the discretion of the council whether certain offices shall be appointive or not. The word 'may,' when the power concerns the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner—that is, in the manner in which the statute says it may be exercised for the sake of public good—is construed to mean 'shall' but, of course, only when the statute will admit of that construction. If the Legislature clearly used the word 'may' in its proper and ordinary signification, and the general scope and meaning of the act forbids any other interpretation, the courts are not at liberty arbitrarily to disregard legislative intent; otherwise, the courts would be makers, as well

as expounders, of law." *Ball v. Fagg*, 67 Mo. 481, 483.

Same—Fixing salaries.

"May," as used in Act Ind. March 4, 1893, fixing the salaries of judges, etc., which provides that the board of commissioners may fix and allow a certain sum, etc., should be construed in its discretionary sense, and not to mean "shall." *Board of Com'rs of Vigo County v. Davis*, 36 N. E. 141, 142, 136 Ind. 503, 22 L. R. A. 515.

It is a familiar doctrine of the law that "may" often has the meaning of "shall," and in general laws this is the rule. Thus, as stated in *Bouv. Law Dict. tit. "May"*: "Whenever a statute directs the doing of a thing for the sake of justice or popular good, there 'may' is the same as 'shall.'" And again: "'Shall' and 'may,' in general acts of the Legislature, are to be construed imperatively." The word "may," in a statute providing that a trustee may be allowed commissions, is to be construed as meaning "shall." *Campbell v. McCormick*, 1 O. C. D. 281, 284.

Public improvements.

"May," as used in Act March 4, 1878 (St. 1877-78, p. 163), providing that the mayor and common council of a certain city, after opening a certain street therein, may sell the ground of the plaza fronting on either side of the street to parties who own lands around the plaza and between their respective lots and street, and that such owners shall have the privilege of buying such portions of the plaza grounds as are in front of their lots in preference to all others, provided they do so within a certain time, should not be construed to mean "must." The statute does not confer a duty upon the city to sell the lots in question, but simply conferred upon them the power to sell or not to sell, as they should deem best for the interests of the city. *Coopers v. City of San Jose*, 55 Cal. 599, 602.

The word "may," as used in Rev. Ord. 1892, § 569, providing that whenever an improvement of a public street had been directed the board of public improvements may, on application of the owner of abutting property, grant him permission to construct the sidewalk in front of his property, but without such permission no one but the contractor could construct such sidewalk, cannot be construed to mean "shall." That the word "may," in a statute, is sometimes construed to mean "shall," is undisputed. But may does not always mean shall, even when used in a statute conferring power on a public officer. The true rule is this: If, from the whole context, we gather that the statute was designed to impose the act on the officer as a duty to be performed, then the authority to do it is an obligation to do

it. It has been said that when the public welfare demands it, or private acts are affected, then the power to act is a duty to act. But the private interests for the protection of which the power will be construed to be a duty must be such as exist independent of the grant of the power. *State v. City of St. Louis*, 59 S. W. 1101, 1102, 158 Mo. 505.

Primarily, and as ordinarily used in a statute, "may" does not denote the imperative mood of the verb to which it is attached, but merely imports permission, ability, possibility, or contingency, and should never be interpreted or understood as mandatory, except by compulsion of the context in connection with which it is to be read, showing that the Legislature must have used it in that sense (citing *Minor v. Mechanics' Bank*, 26 U. S. [1 Pet.] 46, 64, 7 L. Ed. 47; *Thompson v. Carroll's Lessee*, 63 U. S. [22 How.] 422, 434, 16 L. Ed. 387; *State v. Neuner*, 49 Conn. 232, 233); and as used in *St. 1885*, p. 147, § 6, providing that the city council "may" by ordinance prescribe certain rules as to the mode of executing work on streets, will not be construed in the sense of "shall" or "must." *Santa Cruz Rock Pavement Co. v. Heaton*, 38 Pac. 693, 694, 105 Cal. 162.

In Act April 17, 1854, enacted for the widening of a certain street, and providing that the common council of the city in which the street is situated "may" cause application to be made for the appointment of commissioners, etc., "may" should be construed as meaning "must" or "shall." The words of the statute do not leave it optional with the common council whether to proceed or not, nor indicate that the project had not been conclusively adopted, and its completion peremptorily ordered by the Legislature. The words "shall" or "must" may be substituted for "may" in the interpretation of a statute establishing an improvement and devolving upon any person or persons or a corporation the performance of such acts as may be requisite to insure its completion. *People v. Common Council of City of Brooklyn* (N. Y.) 22 Barb. 404, 412.

"May," as used in an ordinance relating to the construction of sidewalks, and providing that a copy of the resolution may be personally served on residents of the city, "may" will be read as "must," and is mandatory. *Doane v. City of Omaha*, 80 N. W. 54, 58 Neb. 815 (citing *People v. Buffalo County Com'rs*, 4 Neb. 150; *Hurford v. City of Omaha*, Id. 336; *Kennelly v. City of Jersey City*, 30 Atl. 531, 57 N. J. Law, 293, 26 L. R. A. 281; *Brokaw v. Commissioners of Highways of Bloomington Tp.*, 22 N. E. 596, 130 Ill. 482; *Central New Jersey Land & Improvement Co. v. City of Bayonne*, 28 Atl. 713, 56 N. J. Law [28 Vroom] 297).

The term "may" in a municipal charter providing that the common council may regulate and repair streets, is to be construed in a mandatory sense, and therefore it is the duty, and not merely the discretionary power, of the council to keep the streets in repair. *Hines v. City of Lockport* (N. Y.) 60 Barb. 378, 383.

"May," as used in Rev. St. 1889, c. 121, § 71, providing that the highway commissioners, after having given reasonable notice, etc., may remove any fence or other obstruction from the highway, etc., is to be construed as "shall," the statute imposing upon the commissioners the duty to remove obstructions from the public highway. *Peotone & Manteno Union Drainage Dist. No. 1 v. Adams*, 45 N. E. 266, 267, 163 Ill. 428.

In Laws 1837, § 9, providing that, if a certain bridge should not be rebuilt within a certain time, the bridge shall become a public bridge, and may be maintained at the expense of a certain county, "may" means "must," for it is a direction to a public body, not an option to a private person or corporation, in the execution whereof the inhabitants of that county have a pecuniary interest. In fact, the public generally may be said to have such an interest. Where persons or the public have an interest in having the act done by a public body, "may," in such a statute, means "must." *Phelps v. Hawley*, 52 N. Y. 23, 26, 3 Lans. 160, 166.

"May," as used in a city charter providing that the council may limit the time for repairing sidewalks as it shall deem reasonable, is equivalent to "shall." *State v. Richards*, 49 Atl. 858, 859, 74 Conn. 57.

Under Rev. St. c. 121, § 2, giving commissioners of highways charge of bridges, and providing that when a road is obstructed the commissioners may remove such obstruction, the commissioners may be compelled by mandamus to remove an obstruction, the word "may" being construed as "must." *Brokaw v. Commissioners of Highways of Bloomington Tp.*, 22 N. E. 596, 597, 130 Ill. 482, 6 L. R. A. 161.

"May," as used in statutes relating to the duties of public officers directing the doing of a thing for the sake of justice or the public good, means "shall." And in an act providing "that it shall be lawful" for the mayor and aldermen of a city to cause sewers to be made, and to alter and repair the same, the statute being one of public concern, and relating exclusively to the public welfare, though permissive merely in its terms, must be regarded on well-settled rules of construction as imperative and peremptory upon the corporation. *City of New York v. Furze* (N. Y.) 3 Hill, 612, 615.

Where a contract between a city and electric light company provided that the

company shall furnish such light as the city may designate, to be placed at such places as the city might direct, the words "may designate" were not imperative, requiring the city to designate some number, but it was left optional with the city whether or not it would use any light; so that the contract was void for want of mutuality. *El Paso Gas, Electric Light & Power Co. v. City of El Paso*, 54 S. W. 798, 800, 22 Tex. Civ. App. 309.

As used in *Rev. Laws*, § 3381, providing that a turnpike road laid out across a railroad "may" be so made as to pass under or over the railroad, "may" means "shall," and the town cannot construct a highway across a railroad at grade. *Central Vermont R. Co. v. Royalton*, 4 Atl. 868, 872, 58 Vt. 234.

Act May 29, 1889, entitled "An act to create sanitary districts, and to remove obstructions in the Des Plaines and Illinois rivers" (section 23), provides that the sanitary district constructing a channel to carry water from Lake Michigan may correct, modify, and remove obstructions in the Des Plaines and Illinois rivers wherever it shall be necessary so to do to prevent overflow or damage along such rivers, and "shall" remove the dams at Henry and Copperas creek, in the Illinois river, before any water shall be turned into the said canal; also, that if the canal commissioners "find at any time that an additional supply of water has been added to either of said rivers by any drainage district or districts, to maintain a depth of not less than six feet from any dam owned by the state, to and into the first lock of the Illinois and Michigan Canal at La-salle, without the aid of any such dam, at low water, then it shall be the duty of said canal commissioners to cause such dam or dams to be removed." The dams were constructed by the canal commissioners at a great expense, and their destruction would greatly injure navigation. Held, that the word "shall" should be construed as "may," so that the removal of the dams at Henry and Copperas creek by the sanitary district is not mandatory, but depends on the question of necessity, and that it is the duty of the canal commissioners to preserve and protect the dams until the conditions stated result. *People v. Sanitary Dist. of Chicago*, 184 Ill. 597, 604, 605, 56 N. E. 953.

Though instances arise where the word "may" has been construed to be mandatory and of the same effect as "shall," it is nevertheless held that in a statute providing that the General Term "may appoint commissioners to determine whether proposed railroads shall be constructed," etc., the term "may" is not mandatory, but discretionary. *In re Thirty-Fourth St. R. Co.* (N. Y.) 2 How. Prac. (U. S.) 369, 377.

5 Wds. & P.—33

Same—Assessment of benefits.

In 4 Burns' *Rev. St.* § 4275 (*Horner's Rev. St.* 1897, § 7195), providing that the laws relating to assessment for street improvements shall govern the common council in making assessment for the costs of any local sewers and in the construction of any sewers adapted for more than local use, the laws relating to the assessment of benefits in laying out streets shall govern in assessing benefits, provided the assessments "may" be made to run for twenty years, and bonds issued to anticipate them may be issued and payable during a period of twenty years, "may" is used in its ordinary permissive meaning, and hence vested a discretion in the common council to make the assessments for building sewers and the bonds used in anticipation thereof run for a period less than twenty years. *People's Nat. Bank v. Ayer*, 56 N. E. 267, 268, 24 Ind. App. 212.

Portland City Charter, § 121, providing that the city council shall have power to lay necessary sewers, and that the council "may at its discretion" appoint three disinterested persons to estimate the proportionate share of the cost of such sewers, is merely permissive, and it is not necessary to construe the word "may" as "shall" or "must," and the council is not prohibited from making such assessments without the intervention of special assessors. *King Real Estate Ass'n v. City of Portland*, 31 Pac. 482, 483, 23 Or. 199.

As used in Act July 21, 1853, amending an act to provide for the incorporation of companies to construct plank roads, and providing that the commissioner or commissioners "may" assess a person liable to do highway labor living or owning property on the line of any plank road of the state, for the property or road owned by him in or on the line of such plank road, and apportion the amount of highway repair on such plank road as a separate road district, the word "may" does not mean "must"; the power conferred on the commissioners is discretionary, and not mandatory. *Buffalo & B. Plank Road v. Lancaster Highway Com'rs* (N. Y.) 10 How. Prac. 237, 238.

Same—Letting contracts.

"May," as used in *Gen. St.* 954, § 16, providing that the county commissioners may let contracts to the lowest competent bidder for the improvement of such roads as may be of general necessity, should be construed to mean "shall." The rule is well settled that the word "may," where the statutes direct the doing of a thing for the sake of justice or the public good, is the same as "shall," and must be so construed. *Follmer v. Nuckolls County Com'rs*, 6 Neb. 204, 209.

As used in Act Jan. 11, 1860, § 4, providing that county commissioners "may let

contracts to the lowest bidder for the improvement of roads," "may" is used in the sense of "shall," as is always the case when a statute provides that any act for the sake of justice or the public good may be done. *People v. Com'rs of Buffalo County*, 4 Neb. 150, 158.

"May," as used in the act authorizing the appointing of a board of public works in and for the city of Grand Rapids (section 7), providing that in constructing sewers the board shall advertise for sealed proposals to execute the work and for materials, and "may" contract with the lowest responsible bidder, should be construed to mean "shall." What the board is required to do is for the benefit of the public, the object being to invite competition and prevent favoritism and fraud in awarding contracts for public works. *McBrian v. City of Grand Rapids*, 22 N. W. 206, 208, 56 Mich. 95.

Public debts.

"May," as used in 1 Starr & C. St. c. 24, par. 90, providing that municipal authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of the corporation, should be construed to mean "shall." The statute here imposes a duty to make such appropriations. *City of Cairo v. Campbell*, 5 N. E. 114, 115, 116 Ill. 305.

Under the rule that where public authorities are authorized to perform an act for the benefit of the public, or for an individual who has a right to its performance, the word "may" will be interpreted as meaning "must." It is so used in 1 Gen. St. 1897, c. 38, § 78, providing that the council "may" appropriate money and provide for the payment of the debts and expenses of the city. *Phelps v. Lodge*, 55 Pac. 840, 841, 60 Kan. 122.

Under the rule that the word "may" is to be construed as synonymous with "shall" where public interests and rights are concerned, and where the public or third persons have a claim de jure, the power should be exercised. *Gav. & H. Rev. St. p. 64, pt. 1, c. 3, § 7*, providing that the county auditor may draw his warrant upon the treasurer for a sum allowed or certified to be due by a court of record authorized to use a seal, and having jurisdiction beyond that of justices of the peace, or by the board of county commissioners, is mandatory, and the auditor is required to draw warrants in such cases. *State v. Buckles*, 39 Ind. 272, 274.

"May," as used in statutes calling for its exercise to protect the public interests or individual rights, is construed as imperative, and means "shall," as when it is enacted. *State v. Buffalo County Com'rs*, 6 Neb. 454, 463.

"May," as used in the United States legal tender act, providing certain bonds may be paid in coin, should be construed as directory and mandatory, the evident intention of the Legislature being to enable the treasurer to conform to the law as then interpreted by the courts as to the kind of money with which to pay said bonds, and so long as that interpretation prevailed, and no more. *Kellogg v. Page*, 44 Vt. 356, 8 Am. Rep. 383.

As used in Act 1872, c. 156, providing a board of supervisors may allow certain claims for work done and materials furnished, not to exceed the reasonable cost thereof, "may" will be construed to mean "shall." "Here was something contracted to be done for the sake of justice, and in such a case the word 'may' is generally construed to mean 'shall.'" *People v. Livingston County Sup'rs*, 68 N. Y. 114, 116, 119.

In the act relating to the authority of municipal corporations to issue bonds the word "may" shall be directory, and not mandatory. *Pub. St. N. H. 1901, p. 491, c. 43, § 1*.

Public sales.

In St. 1821, c. 60, § 33, providing that upon any judgment in the name or for the benefit of the state a writ of execution in common form shall issue and be directed to the proper officer, and the lands of such judgment debtor may be taken on such execution, and sold at public vendue to the highest bidder, "may" should be construed as mandatory. *Banton v. Griswold*, 50 Atl. 89, 90, 95 Me. 445.

Recovery of public money.

In 1 Rev. St. 349, § 5, as amended by Laws 1866, c. 534, providing that an action may be brought in the name of a town against a supervisor for omitting in his last accounting to render an account of town moneys and securities in his hands, and converting them to his own use, "may" is the equivalent of "shall" or "must." In a general statute conferring powers on public officers for public purposes, the words "shall" and "may" are ordinarily to be construed imperatively. Whenever a mandatory, as distinguished from a discretionary, power is intended to be imposed, "may" is to be construed "must." *Hagadom v. Raux*, 72 N. Y. 583, 586.

In Rev. St. 1871, c. 78, § 15, providing that warrants of distress on judgments legally rendered by county commissioners may be originally issued within two years after judgment, "may" is mandatory on the commissioners, and makes it their duty to issue warrants to enforce such judgments. *Low v. Dunham*, 61 Me. 566 (cited in *Fur-*

Olsh v. Kennebec County Com'rs, 44 Atl. 364, 368, 93 Me. 117).

As used in Gen. St. c. 19, § 15, and St. 1870, c. 227, providing that the city marshal or other police officer or the city treasurer "may" prosecute for all fines and forfeitures which may inure to the city, "may" is equivalent to "shall," and the power to collect such fines is vested exclusively in the officers mentioned. *Commonwealth v. Smith*, 111 Mass. 407.

Sale of corporate stock.

In Gen. St. 1878, c. 34, §§ 409, 410, providing that corporations may by their by-laws determine the mode of selling shares for the nonpayment of assessments, and that an action may be maintained against a subscriber on his subscription, the word "may" evidently means "shall," for "may" means "shall" where public interests or the rights of third parties require it. *Henkel v. Pioneer Savings & Loan Co.*, 63 N. W. 243, 244, 61 Minn. 35 (citing *Gillilan v. Hobart*, 35 Minn. 185, 186, 28 N. W. 222).

Sale of public property.

A statute relating to the exercise of the power of sale of public property by municipal corporations, and reading: "In addition to the powers specifically granted in this title, and subject to exceptions and limitations in other parts of it, cities and villages shall have the general powers enumerated in this section, and the council may provide by ordinance for the exercise and enforcement of the same," means that the council "must provide" by such ordinance. *Kerlin Bros. Co. v. Toledo*, 11 O. C. D. 56, 81.

Setting aside homestead or exemption.

In the statute providing that the court may on its own motion or on petition therefor set apart for the use of the husband or wife the homestead selected, etc., "may" is to be construed to mean "shall"; hence the court has no discretion to refuse an application therefor. *Demartin v. Demartin*, 24 Pac. 504, 595, 85 Cal. 71; *In re Ballentine's Estate*, 45 Cal. 696, 698.

"May," as used in Code Civ. Proc. § 1465, providing that the judge may set aside homestead for a widow, means "shall," the statute being mandatory. *Hoppe v. Hoppe* (Cal.) 36 Pac. 389, 392.

As used in Probate Act, § 123, providing that the court may set apart for the use of the family of the deceased all personal property exempt from execution and the homestead, etc., "may" must be considered as imperative and mandatory, and to mean "shall." *In re Weller*, 11 Nev. 260, 263.

Signing bill of exceptions.

"May," as used in Civ. Code Proc. § 1158, providing that a judge may sign a bill

of exceptions after he ceases to be judge, means "shall" or "must." *Montana Ore-Purchasing Co. v. Lindsay*, 63 Pac. 715, 716, 25 Mont. 24.

Taking affidavits.

"May," as used in 2 Rev. St. p. 284, § 49, providing that affidavits to be read and used in any court of law or equity of record or not of record within the state may be taken before commissioners of deeds, is tantamount to "shall," and makes it the imperative duty of commissioners to take such affidavits. *People v. Brooks* (N. Y.) 1 Denio, 457, 458, 43 Am. Dec. 704.

Taxation.

It is a well-established rule in the construction of statutes that the word "may" is to be construed "shall" whenever, in determining the extent or necessity of an exercise of authority, the interest of the public or of individuals requires such a construction; but such construction is not required and should not be applied under Laws 1844, p. 174, c. 148, providing that the selectmen in the several towns, when for the purpose of building and repairing schoolhouses it shall become necessary, are authorized to make a new invoice of all the property of the district in order to make a just assessment of the taxes necessary to be raised for those purposes. *Rogers v. Bowen*, 42 N. H. 102, 107.

"May," as used in Laws 1872, c. 150, § 98, providing that if the assessors of the city of Kingston, or any or either of them, be interested in property liable to be affected by an assessment for public improvements, or, from any cause, incapable of acting, a common council may appoint in his place a disinterested freeholder to perform the duties of such assessor, should be construed as "must," requiring the common council to appoint a disinterested freeholder in case one of the assessors is interested in the property to be affected by the assessment. *O'Reilly v. City of Kingston*, 21 N. E. 1004, 1007, 114 N. Y. 439.

"May," as used in Laws 1844, c. 250, § 2, providing that the supervisors in New York City may correct any erroneous assessment which might be made by the assessors, means "must." The term "may" means "must" in a statute when a right is given or duty imposed, and it is a strict right of an aggrieved party to have an erroneous assessment corrected, and it is the duty of one who has power to correct it to do so. *Adriance v. Supervisors of City and County of New York* (N. Y.) 12 How. Prac. 224, 230.

The word "may," as used in a statute making it the duty of the sheriff to limit the portion of a tax wrongfully assessed, should be construed to mean "shall," since, when the public interest is concerned, or the

rights of third persons are affected, the two words "may" and "shall" are construed to mean the same thing. *Smith v. King*, 12 Pac. 8, 10, 14 Or. 10.

In a statute providing that "the common council may at any time order the amount erroneously assessed against and collected from any taxpayer to be refunded to him," the language, though in form permissive, is, in legal effect, mandatory. *City of Indianapolis v. McAvoy*, 86 Ind. 587, 590.

Under a statute authorizing the collection of a tax on shares of stock in national banks, requiring the filing of a sworn statement relative to such stock, and providing that such sworn statement may be made for a certain year at any time on or before the 1st day of May, but for subsequent years shall be made within the time required by the statute, the word "may" is construed to mean "must." *Whitney v. Ragsdale*, 33 Ind. 107, 109, 5 Am. Rep. 185.

The word "may" in a statute providing that personal property shall be assessed to the owner where he resides, and that it may be assessed to a trustee or agent, "would seem to authorize the assessing of a part of the personalty in the hands of an agent to the owner himself and another part to the agent, provided the property consists of distinct items capable of separate assessment." *Curtis v. Richmond Tp.*, 23 N. W. 175, 176, 58 Mich. 478.

Same—Collection.

Laws 1871, p. 245, § 64, chartering a city, and enacting that it shall and may be lawful for the city council to sell lands of delinquents for the collection of taxes, makes such sale mandatory, and not directory and discretionary. "The power conferred must be exercised. It is a settled construction that where a public or municipal corporation or body is invested with power to do an act which the public interests require to be done, and has the means of its complete performance placed at its disposal, not only the execution, but the proper execution, of the power may be insisted on as a duty, though the statute conferring it be only permissive in terms." *Hugg v. City Council of Camden*, 39 N. J. Law (10 Vroom) 620, 622 (citing *Grant v. Newark*, 28 N. J. Law [4 Dutch.] 491; *Seiple v. Borough of Elizabeth*, 27 N. J. Law [3 Dutch.] 407; *Mason v. Fearson*, 50 U. S. [9 How.] 248, 259, 13 L. Ed. 125; *Rex v. Hastings*, 1 Dowl. & R. 148; *Rex v. Haverling*, 5 Barn. & Adol. 691).

Same—Exemptions.

In construing the Constitution relating to taxation, providing that "mines and mining claims bearing gold, silver and other precious metals shall be exempt from taxation for the period of ten years from the

date of the adoption of this Constitution and thereafter may be taxed as provided by law," the court said: "We are of the opinion that the word 'may' in the latter part thereof does not mean 'shall'; that is to say, in our judgment the proviso operates first to exempt the property mentioned wholly from taxation for the period of ten years, beginning with the date of the adoption of the Constitution, and, second, to vest in the Legislature a discretionary power to say whether, after the expiration of this period, it shall be subject to taxation or whether the exemption shall be continued." *People v. Henderson*, 21 Pac. 144, 146, 12 Colo. 369.

"May," as used in a statute providing that if there be any persons who by reason of age, infirmity, or poverty may be unable to contribute toward the public charges in the judgment of the assessors the latter may exempt the polls or estate of such person, or abate any part of what they are assessed, is to be construed in a discretionary, and not in a mandatory, sense. "It is true that the word 'may' is sometimes construed as equivalent to 'shall,' but it is only where the context or general purpose of the act or instrument manifestly require it. Here we think that the context and general objects of the act require a different construction, and imply that the word 'may' was used in its ordinary sense as permissive, granting power to the assessors to allow the exemption at the election of those entitled to the benefit of it." *Opinion of Justices*, 28 Masa. (11 Pick.) 538, 543.

Same—Form of tax certificate.

Where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall," and imports a duty equally imperative, and hence the meaning of a provision that a tax certificate may be in the specified form is that it shall be in such form. *Chicago & A. R. Co. v. People*, 45 N. E. 122, 123, 163 Ill. 616.

As used in Laws 1874, c. 1, § 124, providing that a certificate of tax sale may be substantially in the following form, "may" is equivalent to "shall." *Gillfillan v. Hobart*, 28 N. W. 222, 35 Minn. 185.

Same—Levy.

In a statute providing that the county commissioners may levy an additional cash tax for bridge purposes, the word "may" is mandatory where such additional tax is necessary to pay warrants issued for bridges already constructed. *State v. Buffalo County Com'rs*, 6 Neb. 454, 463.

"May," as used in statutes directing the doing of a thing for the sake of justice or the public good, means "shall," and in a statute requiring church wardens and overseers to

make a rate to reimburse the constables it is understood as "shall." *People v. Board of Sup'rs of Otsego County*, 51 N. Y. 401, 406.

"May," as used in Sess. Laws 1887, p. 240, § 7, providing that when a judgment has been rendered against a county no execution shall issue thereon, but the same may be paid by the levy of the tax on the taxable property of the county, is interpreted to mean "must." *People v. Board of Com'rs*, 42 Pac. 1032, 1035, 7 Colo. App. 229.

"May," as used in 14 Car. II, c. 12, providing that the church wardens and overseers may make a rate for the reimbursement of the constables, directs a public duty, and "may" is to be understood as "shall." *Rex v. Barlow*, 2 Salk. 609.

"May," as used in Act Feb. 16, 1863, declaring that the board of supervisors "may, if deemed advisable," levy a special tax to pay a judgment against the county, means that the board "shall" levy the tax, and the language must be regarded as peremptory, and to impose on the board a positive and absolute duty, and not to devolve a mere discretion; since the exercise of the power effects public interest and individual rights which call for its exercise, and the power is not given for the benefit of the board, but for the benefit of the public. *Rock Island County Sup'rs v. United States*, 71 U. S. (4 Wall.) 435, 446, 18 L. Ed. 419.

"May," as used in Laws 1889, c. 475, § 19, amending Laws 1885, c. 26, § 106, limiting the amount of taxes which a city may levy, but providing that for a certain year there shall be included a further sum for the improvement of a certain park, is permissive merely, and not mandatory. *People v. Mayor*, 12 N. Y. Supp. 890, 892, 59 Hun, 258.

In a statute providing that the cost of a courthouse, postoffice, and jail and the land on which they may be, and of keeping the same in good order, shall be chargeable to the county, and may be levied for by the county court, the word "may" should be construed as mandatory. By the statute the county courts are required to make annually an accurate account of every item of indebtedness against them which is payable within the year, and to levy an amount sufficient to pay the same; and when the public interest is concerned, and the public or third persons have a claim *de jure* that the power should be exercised, the word "may" means "must" or "shall." In such a case the county court has no discretion on the subject, but must levy to pay all the charges on the county which may be payable within the year. *Exchange Bank v. Lewis County*, 28 W. Va. 273, 292.

The Supreme Court of the United States in the case of *Rock Island County Sup'rs v.*

United States, 71 U. S. (4 Wall.) 435, 18 L. Ed. 419, hold that when a power or authority is given by statute to public officers in permissive language, as that they "may," if deemed advisable, do a certain act, such as levy a tax for a special purpose, the language will be regarded as peremptory; and the court further declare that the conclusion to be derived from all authorities is that where by statute a power is given to public officers in language permissive in form, if public interests or individual rights call for its exercise, it must be considered as peremptory. What they are empowered to do for the public or a third person the law requires shall be done. *Commonwealth v. Marshall*, 3 Wkly. Notes Cas. 182, 186.

In *Rev. St. Ohio*, § 2683, providing that a village council may levy taxes annually to pay interest on the public debt of the corporation, the word "may" is to be construed as meaning "must." *Village of Kent v. United State* (U. S.) 113 Fed. 232, 237, 51 C. O. A. 189.

Where a city charter provides that the council "may, if it believes that the public good and the best interests of the city require it, levy a tax to pay its bonded debt," and the city has no other means to paying such debt, the discretion thus given cannot, consistently with the rules of law, be resolved in the negative. The rights of the creditors and the ends of justice demand that it should be exercised in favor of affirmative action, and the law requires it. In such cases the power is in the nature of a trust for their benefit. *Galena v. Amy*, 72 U. S. (5 Wall.) 705, 708, 18 L. Ed. 560.

"May," as used in Act 1888, No. 81, § 54, providing that the police jurors of the several parishes may levy a sum for the support of the common schools of their respective parishes, does not mean "must" or "shall." Its meaning is permissive, and not mandatory. *Parish Board School Directors v. Police Jury*, 5 South. 23, 40 La. Ann. 755.

In Laws 1889, c. 475, § 19, amending Laws 1885, c. 26, § 106, providing that the aggregate of the annual city tax of Syracuse shall not exceed a stated sum, provided, however, that in the levy for the year 1889 there may be included for payment in whole or in part the cost of opening and improving a certain avenue, "may" cannot be construed as "shall." The statute is permissive, and not mandatory. "The ordinary meaning of the word which is permissive ought to be adopted, and must be presumed to be intended, unless it would manifestly defeat the object of the provision." *People v. City of Syracuse*, 12 N. Y. Supp. 890, 891, 59 Hun, 258.

In construing Const. art. 202, providing that the taxing power may be exercised by

the General Assembly for state purposes, and by parishes and municipal corporations under authority granted to them by the General Assembly, the court say: "In the case of *State v. Police Jury*, 5 South. 23, 40 La. Ann. 755, identical in principle with the present one, it was claimed that the police jury of a parish was bound to levy such tax, but the court found and held that the word 'may' did not mean 'shall,' but simply meant 'are authorized,' determining, therefore, that the language is directory, and not mandatory." *State ex rel. Board of School Directors v. City of New Orleans*, 7 South. 674, 677, 42 La. Ann. 92.

Same—Refund of illegal taxes.

Where public interest or private right requires that a thing should be done, the word "may" is generally construed to mean "shall," and in *Act March 19, 1899*, providing that any taxes paid more than once, or illegally collected, "may," by the order of the board of supervisors, be refunded, means "shall," and the board has no discretion to allow or reject a claim for taxes actually paid a second time. *Hayes v. Los Angeles County*, 33 Pac. 766, 768, 99 Cal. 74.

Same—Submission of expenditures to voters.

When used in a statute which directs the doing of a thing for the sake of justice or the public good, "may" is construed to mean "shall." Thus the statute of 23 Henry VI says: "The sheriff may take bail." The word as here used is construed to mean "shall," for the sheriff is compellable to do so. It was so used in *Act Feb. 16, 1865*, § 13, which declares that, before any expenditure shall be made by the county courts for the purpose contemplated by the act, the county may, for the purpose of information, submit the amount of the proposed expenditure to the voters of the respective counties at the next special or general election, etc. *Steines v. Franklin County*, 48 Mo. 167, 178, 8 Am. Rep. 87; *Ritchie v. Franklin County*, 89 U. S. (22 Wall.) 67, 74, 22 L. Ed. 825.

The word "may" must be read as "shall" when the context and the spirit of the act in which it is used show that the matter referred to is absolute. And in the *General Railroad Law of 1885*, p. 427, § 30, providing that the court "may" for information cause an election to be held to ascertain the sense of the taxpayers as a subscription to the roll, the word must be interpreted as "shall." *State v. Withrow* (Mo.) 24 S. W. 638, 641 (citing *Leavenworth & D. M. R. Co. v. Platte County Court*, 42 Mo. 171, 174).

The general railroad law (R. C. 1855, p. 427, § 30) provides that the county court may, for information, cause an election to be held to ascertain the sense of the taxpayers as to

a subscription to the stock of railroads. The word "may" in this clause must be interpreted to mean "shall." It is a power given to public officers, and concerns the public interest and the rights of third persons who have a claim de jure that the power shall be exercised in this manner for the sake of justice and the public good. *Leavenworth & D. N. R. Co. v. Platte County*, 42 Mo. 171, 176 (citing *Newburg & C. Turnpike Road Co. v. Miller* [N. Y.] 5 Johns. Ch. 101, 113, 9 Am. Dec. 274; *Blake v. Portsmouth & C. R. R.*, 39 N. H. 435; *Malcolm v. Rogers* [N. Y.] 5 Cow. 188, 193, 15 Am. Dec. 464. Quoted and approved in *State ex rel. Wilson v. Garrouette*, 67 Mo. 454).

Trial.

"The word 'may,' in *Laws 1888*, c. 497, providing that the court may direct that certain causes be placed on the preferred calendar, cannot be construed as 'must,' but gives a discretion to the court, such not being the evident purpose of the Legislature." *Morse v. Press Pub. Co.*, 75 N. Y. Supp. 976, 981, 71 App. Div. 351.

The word "may," when used in a statute authorizing an unusual mode of procedure on the part of a court for the determination of a question, as in *Revision*, p. 756, providing that the probate court may, on the filing of a caveat against the probate of a will, certify the controversy into the circuit court of a county for trial before a jury on the application of the caveator or executors, is not mandatory. It indicates an intention on the part of the Legislature to leave it to the discretion of the court to take such proceedings or not, according to its judgment. *Brothers v. Pickel*, 31 N. J. Eq. (4 Stew.) 647, 648.

In a statute providing that in case of default of a defendant, "if the taking of an account or proof of any fact be necessary to enable the court to give judgment, the court may take the account or hear the proof, or may in its discretion order a reference for that purpose, and, where the action is for the recovery of damages in whole or in part, the court may order the damages to be assessed by a jury," the word "may" is merely directory, leaving it discretionary with the judge to order a jury to assess damages, or to find the facts himself, or order a reference for that purpose. *Ballard v. Purcell*, 1 Nev. 342, 343.

The word "may," in a statute declaring that, on the hearing of the report of commissioners of appraisal in proceedings to take lands for railroad purposes, the court may direct a new appraisal before the same or new commissioners, cannot be construed to mean "shall" or "must," and therefore a party is not entitled to a new appraisal as a matter of right. *New York & Erie R. R. Co. v. Coburn* (N. Y.) 6 How. Prac. 223, 224.

In the statute providing that "when the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the district attorney or other counsel for the people must open and the district attorney may conclude the argument," there can be no reason whatever to construe the word "may" to mean "must," and the district attorney is not required to close the argument of the case in person, but it may be done by the assistant counsel. *State v. Williams*, 42 Pac. 511, 4 Idaho, 502.

The words "in his discretion," in a statute providing that the judge may in his discretion make an order allowing the examination of witnesses to perpetuate their testimony, operates to preclude a construction of the word "may" as meaning "must," and it is discretionary with the court whether or not to grant such an order. *In re Carter*, 3 Or. 293, 296.

"May," as used in Laws 1896, c. 908, § 253, providing that the court may take testimony on certiorari to review an assessment, should be treated as mandatory and read as "must." *People v. Feltner*, 61 N. E. 762, 769, 168 N. Y. 494.

The word "may," as used in Hurd's Rev. St. p. 355, § 47, providing that, upon objection or motion for that purpose, the court in which a special assessment for improvements is pending may in a summary way inquire whether the officer making the report has omitted any property benefited, means "must." *Mercy Hospital v. City of Chicago*, 58 N. E. 353, 354, 187 Ill. 400.

When used in a statute "may" is construed to mean "must" or "shall," when the public interests or rights are concerned, or third persons have a claim de jure that the power shall be exercised. It is so used in Rev. St. c. 3, § 43, relating to the settling of disputed lines between towns, and providing that the court may appoint three commissioners for that purpose. *Inhabitants of Monmouth v. Inhabitants of Leeds*, 76 Me. 28, 31.

In Code 1880, § 2292, providing that when the trial or hearing of any case, civil or criminal, has been commenced and is in progress in any court, and the time for the expiration of the term as prescribed by law shall arrive, the court "may" proceed with such trial or hearing and bring it to a conclusion in the same manner and with the same effect as if the stated term had not expired, "may" means "must." *Whitten v. State*, 61 Miss. 717, 723.

"May," as used in penal statutes, is often equivalent to "must" or "shall," and is so construed whenever important rights of an accused depends on it, or when the context and general purpose of the act manifestly re-

quire it; and it is used in the sense of "must" in Gen. St. 1875, p. 538, § 5, which provides that the accused may challenge peremptorily, when arraigned before the superior court for any offense punishable by death, 20 jurors; for any offense punishable by imprisonment for life, 10 jurors; for any offense for which punishment "may" be imprisonment for less than life, 4 jurors. Hence a party who was accused of crime which might be punishable with imprisonment for life would be entitled, under the second provision of the above act, to challenge 10 jurors. *State v. Neuner*, 49 Conn. 232, 233.

The word "may," as used in statutes, is construed to mean "shall," whenever the rights of the public or of third persons depends on the exercise of the power or the performance of the duty to which it refers. Such is its meaning in all cases where the public alone have an interest or a public duty is imposed upon a public officer, but as used in Act Feb. 3, 1872, § 57, which provides that the court in charging the jury shall only instruct as to the law of the case, and the court "may" at the request of either party require the jury to render a special verdict, etc., it is not used in the sense of "shall" or "must," but merely in a discretionary sense; that is, as conferring discretionary power on the court. *Kane v. Footh*, 70 Ill. 587, 590.

The word "may," as used in Consol. St. 1893, p. 1108, declaring that in every action for the recovery of money only, or specific real property, the jury in their discretion may render a general or special verdict; in all other cases that the court may direct the jury to find a special verdict in writing on all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find on particular questions of fact—should not be construed as synonymous with "shall," so as to render the statute mandatory, but is to be construed in its ordinary sense, rendering the act of the court or the jury discretionary. *Atchison, T. & S. F. R. Co. v. Lawler*, 58 N. W. 968, 969, 972, 40 Neb. 356.

Same—Allowance of jury.

"May," as used in Gen. Laws, c. 136, § 9, which provides that on the petition for an account against a mortgagee an issue of fact may be determined by a jury, is to be taken in a permissive, and not in a mandatory, sense. *Proctor v. Green*, 59 N. H. 350.

The word "may," as used in Code, § 3158, providing that a court may allow a special jury in any case where a jury is required, cannot be construed to mean "must," and hence the granting of a special jury is within the sound discretion of the trial court, and the party is not entitled thereto as a matter of right. *Atlantic & D. R. Co. v. Peake*, 12 S. E. 348, 349, 87 Va. 130.

"May" is construed as "must" only in cases where the Legislature meant to impose a positive and absolute duty, and not merely a discretionary power. Thus, where a statute prescribes that on default in an action for damages the court "may" order the damages to be assessed by a jury, the power was discretionary with the court whether to call a jury or not. *Deane v. Willamette Bridge Co.*, 29 Pac. 440, 443, 22 Or. 167, 15 L. R. A. 614.

Venue.

In Code, § 2178, which provides that an action for the foreclosure of a mortgage of real property may be brought in the county in which the property is situated, "may" is used in a permissive sense, and hence does not prohibit the bringing of an action to foreclose the mortgage in the county where the mortgagor resides, though the land is situated in a different county. *Equitable Life Ins. Co. v. Gleason*, 8 N. W. 790, 791, 56 Iowa, 47.

Code, § 1705, providing that, when a corporation, company, or individual has an office or agency in any county for the transaction of business, any suits growing out of or connected with the business of that office or agency "may" be brought in the county where such office or agency is located as though the principal resided therein, is permissive, and not mandatory. *Dean v. White*, 5 Iowa (5 Clarke) 266, 268.

The Code provided where suits might be brought against a nonresident corporation, when an act was passed providing that suits on insurance policies "may" be brought in the county where the property is situated. This last statute was not restrictive, and did not prevent the bringing of an action against a nonresident insurance company at any place where it was previously authorized to be brought, but was merely permissive, and authorized the policy holder at his option to bring the action in the county in which the insured property was situated. *Carson v. Phoenix Ins. Co. of Hartford*, 41 W. Va. 136, 138, 23 S. E. 552.

As used in the statutes, the word "may" is sometimes held to mean "shall," but this is done only when it is the obvious meaning of the statute to command, and not simply to permit, a particular thing, or to exclude other rights or remedies, and not to grant additional ones to those already existing. As used in Rev. St. c. 124, § 4, which provides that the indictment for polygamy "may" be found and tried in the county where the offender resides or where he is apprehended, it is merely permissive, and not mandatory, and implies an intention not to deprive the court of its existing jurisdiction, but to give it enlarged powers over the same subject-matter. *State v. Sweetsir*, 53 Me. 438, 440.

"May," as used in Pub. St. c. 161, § 2, providing that transitory actions against executors may be brought in any county in which the testator when he died could have sued, is used in its permissive rather than its imperative sense, and does not prevent an action in another county where plaintiff resides when the writ is issued. *Heavor v. Page*, 36 N. E. 750, 161 Mass. 109.

In Rev. St. § 5031, providing that every other action must be brought in the county in which a defendant resides or may be summoned, except actions against an executor, etc., which may be brought in the county wherein he was appointed or resides, in which cases summons may issue to any county, the word "may" should be construed to have been used in a discretionary sense, in view of the use of the word "must" in the section. *Osborn v. Lidy*, 37 N. E. 434, 51 Ohio St. 90.

In Mill. & V. Code, § 3309, providing that a bill of divorce may be filed in the district where the parties resided at the time of their separation, etc., "may" is mandatory, and not merely directory, and has the same force and meaning as "shall." *Walton v. Walton*, 33 S. W. 561, 96 Tenn. 25.

"May" and "shall" are to be read interchangeably, so as to best express the legislative intention; and hence, as used in Code Civ. Proc. § 55, providing that an action against the corporation created by the laws of this state may be brought in the county where it is situated, etc., "may" will be read "shall." *Western Travelers' Acc. Ass'n v. Taylor*, 87 N. W. 950, 952, 62 Neb. 783 (citing *Fowler v. Pirkins*, 77 Ill. 271).

In Act Jan. 3, 1827, providing that any action, local or transitory, in which any county shall be plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant in such action resides, and which requires that all such actions against any county may be commenced and prosecuted in the circuit court of the county against which the action is brought, "may" is to be construed to mean "shall." "The rule is that the word 'may' means 'must' or 'shall' only in cases where the public interests and rights are concerned, and when the public or third persons have a claim de jure that the power should be exercised." *Schuyler County v. Mercer County*, 9 Ill. (4 Gilman) 20, 24.

In Rev. St. 132, § 18, providing that all actions, local or transitory, against any county may be commenced and prosecuted to final judgment and execution in the circuit court of the county against which the action is brought, "may" should be construed in the imperative sense, and to mean "must." *Randolph County v. Ralls*, 18 Ill. (8 Peck) 29, 30; *Board of Sup'rs of Kane County v. Young*, 31 Ill. 194, 197.

In Rev. St. 132, § 18, providing that any action in which a county shall be plaintiff may be commenced in the county in which the defendant resides, the word "may" means "shall," and, when the county sues, the term applies in an imperative, and not a permissive, sense. *Schuyler County v. Mercer County*, 9 Ill. (4 Gilman) 20, 23.

Same—Change of venue.

In Code, §§ 3608, 3609, providing that the trial of any person charged with an indictable offense may be removed to another county on the application of the defendant, duly supported by affidavit, the word "may" should be construed in its permissive sense, and not to create a right. The granting of an application for a change of venue is discretionary with the court, and its refusal is not revisable in the appellate court. *Ex parte Banks*, 28 Ala. 28, 35.

As used in such section "may" cannot be given a mandatory meaning, as the statute cannot be construed as showing an unqualified legal right to a change of venue, but is merely a right to claim it from the enlightened judgment of the court to which the application is made. *Ex parte Banks*, 28 Ala. 28, 35.

"May," as used in Code Civ. Proc. § 56, providing that, where a fair and impartial trial cannot be had in the county where the suit is being held, the court may, on application, change the place of trial, means "must." In *re Brown*, 39 Pac. 469, 472, 2 Okl. 590, 598 *Richardson v. Augustine*, 49 Pac. 930, 932, 5 Okl. 667.

In Code, § 195, par. 1, declaring that the court "may change" the place of trial in certain enumerated cases. "may" should be construed as equivalent to "must" or "shall." *Jones v. Town of Statesville*, 2 S. E. 346, 347, 97 N. C. 86.

Rev. Laws, § 7312, provides that a criminal action prosecuted by indictment "may," at any time before trial is begun, on application of defendant, be removed from the court in which it is pending, whenever it shall appear that a fair and impartial trial cannot be had. Held, that the word "may," as used, must be construed to mean "must," under the general rule of construction of the statutes. *State v. Kent*, 62 N. W. 631, 635, 4 N. D. 577, 27 L. R. A. 686.

"May" is used in the sense of "must" or "shall," in Code, § 56, as amended by Laws 1870, p. 171, § 2, which provides that in certain cases the court may, on application of either party, change the place of trial to some other county, etc. *Kansas Pac. Ry. Co. v. Reynolds*, 8 Kan. 623, 628.

In a statute providing that a judge may grant a change of venue in a criminal case

where it appears that the applicant therefor cannot have a fair and impartial trial in the county in which the indictment is found, the word "may" must be construed as imperative, in order to effect the legislative purpose. *Ex parte Chase*, 43 Ala. 303, 311.

In a statute providing that the court may change the place of trial when the county designated for that purpose is not the proper county, the word "may" means "shall" or "must," as it is construed in every act imposing a duty. *Falls of Neuse Mfg. Co. v. Brower*, 11 S. E. 313, 314, 105 N. C. 440.

"May," as used in the statute providing that on the application of either the plaintiff or defendant the court may change the venue and remove the cause to the court of the county where the lands in dispute are situated, and shall make all necessary rules and orders for the removal of the cause, is not used in a permissive sense, but should be construed as "shall," making the provision mandatory. *Freud v. Rohnert* (Mich.) 92 N. W. 109, 110.

Vacation of injunction.

"May," as used in Rev. St. §§ 5584, 5585, providing that, when an injunction has been granted, the application to vacate or modify it may be made on the petition or affidavits upon which the injunction was granted, or upon affidavits on the part of the party enjoined, with or without answer, and when the application is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff "may" oppose the same by affidavits or other evidence in addition to the evidence on which the injunction was granted, is permissive only, and therefore should not be read "shall." *State v. Budd*, 60 N. E. 988, 989, 65 Ohio St. 1.

Vacation of judgment.

The word "may," in the statute providing that on the filing of a certain affidavit the justice of the peace may set aside the default judgment rendered against defendant in his absence, is to be construed as meaning "must." *Pope v. Pollock* (Ohio) 1 O. C. D. 193.

In Code, § 473, relating to actions in ejectment, and providing that a defendant may, at any time before the execution of such judgment, present a petition, etc., and thereupon the court may, if satisfied of the probable truth of the allegation, suspend the execution of such judgment, etc., "may" means "must." *Johnston v. Pate*, 95 N. C. 68, 70.

MAY BE.

See "As Near as May Me"; "As Nearly as May Be"; "As Soon as May Be."

As exists or is.

As used in Act Cong. 1868, relating to the Louisiana & Missouri River Railroad Company, declaring that it shall be lawful for the county court of any county in which any part of the route of such railroad may be to subscribe to the stock, "may be" is an incomplete expression, and to be construed with reference to the situation of the subject-matter. If used where a railroad being builded was the subject, it would no doubt refer to the presence or existence there of the route, and would be equivalent to the word "exists," or "is built" or "in operation." But when used in reference to a railroad not yet built, located, or surveyed, it might be held to authorize a subscription by any county in which the route might in fact be ultimately located. *Callaway County v. Foster*, 93 U. S. 567, 573, 23 L. Ed. 911.

Rev. St. § 2124, declaring that when any animal is killed by a railway the owner may recover without proof of negligence, except where the accident occurs on any portion of said road that "may be inclosed" by a lawful fence, means no more than that the company should not be held under that section, if, in fact, the road at the point where the accident occurred was inclosed by a lawful fence. It was not intended to restrict its application to cases of injury occurring at points where the companies are required to fence, but is general, giving the right to sue under that section for an injury occurring anywhere on the road, except where it was inclosed by a lawful fence or crossed a public highway. *Radcliffe v. St. Louis & I. M. Ry. Co.*, 2 S. W. 277, 278, 90 Mo. 127.

In an instruction that a witness willfully false in one part of his testimony may be distrusted in his other testimony, the phrase "may be distrusted" is not synonymous with "is to be distrusted" in Code Civ. Proc. § 2061, subd. 3, providing that a witness false in one part of his testimony is to be distrusted in others. A thing that "is" to be "must" be, and not "may" be. *White v. Disher*, 7 Pac. 826, 67 Cal. 402.

Futurity indicated.

In Gen. St. c. 95, § 29, as amended by Act April 2, 1887, providing that all persons, corporations, companies, and individuals are required to furnish to the road overseer of their district the names of persons in their employment when employing ten or more of such who are or may be liable to the payment of a road tax, "may be" can only be construed as meaning in the future, and imposes an impossibility. An employer, in the changes, shifting, and mutations of miners, cannot say he may be at any subsequent time liable to taxation at any particular place. *Pitkin County Com'rs v. Aspen Min-*

ing & Smelting Co., 32 Pac. 717, 718, 3 Colo. App. 223.

The act of Congress of March 3, 1863 (12 U. S. Stat. 808), granting the right of pre-emption to the purchasers of the Suscol rancho, section 5, providing that no entry shall be made of lands reserved and occupied for military, naval, or other public uses, or which "may be designated" for such purposes by the President, referred only to the future, and means such designation as might thereafter be made. *Durfee v. Plaisted*, 38 Cal. 80.

"May be instituted," as used in Act S. C. 1879, entitled "An act to provide the mode of proving bills of the bank to the State Treasurer for taxes and the rules of evidence applicable thereto," and providing that the bills shall be deposited to abide the decision of the court in any proceeding which may be instituted, implies that when the deposit was made proceedings had not been instituted. The tender and deposit of the bills laid the foundation for the authorized proceeding, but did not institute it. *South Carolina v. Gallard*, 101 U. S. 433, 438, 25 L. Ed. 937.

The words "may be," as used in a statute providing that the General Assembly should invest in some safe and profitable manner all such portions of the common school fund as have not heretofore been intrusted to the several counties, and should make provision by law for the distribution among the several counties to be held liable for the preservation of so much of the fund as "may be" intrusted to them, and for the payment of an annual interest thereon, is peculiarly appropriate to express the future and not the past, so that the language employed in the statute cannot have reference to the fund that had already been intrusted to the counties, because it speaks for the future and not for the past. It contemplates a future intrusting of the fund or some part of it to the several counties. *Shoemaker v. Smith*, 37 Ind. 122, 128.

"May be done," as used in Act Jan. 25, 1854, providing that the Monongahela Navigation Company shall not hereafter be liable for damages which "may be done" to property lying in the vicinity of their lines, except as is provided for by the acts of 1836 and 1844, is not equivalent to "may have been done." It is not, philologically or in common parlance, correct to give to the words referred to, standing in the position they do, a past signification. They are in their connection distinctly future, and affect the liability of the company only for damages thereafter done." *Ihmsen v. Monongahela Nav. Co.*, 32 Pa. (8 Casey) 153, 156.

"May be," as used in an order directing the payment of any money which may be due, does not refer exclusively to what was presently due and payable at the date of the

order, but also includes moneys that might thereafter become due and payable under the contract. *Griggs v. City of St. Paul*, 57 N. W. 461, 462, 56 Minn. 150.

As may have been.

"May be," as used in a bond that if the principal shall promptly pay all deposits which may be so deposited with it, etc., will be held to be equivalent to "may have been," and include money already deposited. *Brown v. Wyandotte County Com'rs*, 50 Pac. 888, 889, 58 Kan. 672.

The words "may be made," as used in a lease providing that, on the lessee's being removed from demised premises or dispossessed, he should be paid the value of the buildings and improvements which may be made by him on such lands, should be understood as synonymous with "may have been made," or "shall then be" and remain on such lands. *Van Rensselaer's Heirs v. Penniman* (N. Y.) 6 Wend. 569, 582.

Admiralty rule 57 provides a libel or petition for a limitation of liability, etc., and the proceedings had in any District Court of the United States in which said ship or vessel "may be libeled," etc. Held, that the words "may be libeled" should be construed to include cases in which the vessels "may have been libeled." *The Luckenback* (U. S.) 26 Fed. 870, 871.

MAY HAVE.

Act April 10, 1843, § 1, provides that any naturalized citizen of the United States who "may have" purchased and taken a conveyance for any lands within the state, or to whom any lands "may have" been devised, or to whom they would have descended if he had been a citizen, may continue to hold the same in like manner as if he had been a citizen at the time of such purchase, devise, or descent cast. Held, that the words "may have," as used in the statute, signify that the act is to have a retrospective operation only, and is not intended to have a general application and to operate prospectively. *Heeney v. Trustees of Brooklyn Benev. Soc.* (N. Y.) 33 Barb. 360, 363.

"May have," as used in a mortgage by which the mortgagors agreed to convey any and all other real estate that they own or possess, or any interest that they "may have" in any other real estate, in a certain town, means "may now have," and not "may hereafter have." *Paddock v. Potter*, 31 Atl. 784, 785, 67 Vt. 360.

MAYHEM.

Maim synonymous, see "Maim."

"Mayhem," at common law, is defined by Blackstone as the violently depriving an-

other of the use of such of his members as may render him less able, in fighting, either to defend himself or to annoy his adversary. 4 Bl. 204. The first general comprehensive statute on the subject in England was the statute of Charles the Second, which enacted that "any person who should on purpose, and with malice aforethought, unlawfully cut out or disable the tongue, put out the eye, slit the nose or lip, or cut off or disable any limb or member, or disfigure him in any of the manners with intent to maim or disfigure him, shall be guilty of felony." Since this statute the crime of mayhem includes those injuries only which are therein enumerated. *Foster v. People*, 50 N. Y. 598, 604.

"Mayhem," says Glanville, "signifies the breaking of any bone, or injuring the head by wounding or abrasion. In such case the accused is obliged to purge himself by the ordeal; that is, by the hot iron if he be a freeman, and by water if he be a rustic." *Foster v. People* (N. Y.) 1 Cow. Cr. 508, 514.

Mayhem, at ancient common law, was a violent and unlawful depriving another of the use of a member proper for his use in defending himself, and was punished by a forfeiture of member for member, and was deemed a felony. *Commonwealth v. Newell*, 7 Mass. 245, 247.

Mayhem, at common law, is such a bodily hurt as renders a man less able, in fighting, of defending himself or annoying his adversary; but if the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem. Anciently the judgment against the offender was that he should suffer loss of the same member of which he had deprived his victim. It seems that a specific intent to commit mayhem upon the person dismembered was not necessary at common law to constitute the offense of mayhem, it being said that though the primary intent of the offender be of a higher or more atrocious nature, namely, to kill, and he fails in that attempt and only maims the party, he is nevertheless guilty of mayhem, under the rule of law that if a man intends to commit one kind of felony, and in the prosecution of that commits another, the law will connect his felonious intention with the felony actually committed, though different in species from that he originally intended. And so it is subsequently held, after a citation of authorities supporting this view, and a short history of the legislation upon the subject, that in Tennessee a specific intent to maim is not necessary, under Code, § 5357, providing that a person who unlawfully and maliciously disfigures and maims another shall on conviction be imprisoned, etc. *Terrell v. State*, 8 S. W. 212, 86 Tenn. 523.

In order to establish the offense of mayhem under the statute, it must be shown by

proof of a lying in wait, or of some other act of the accused evincing it, that there was a premeditated design on his part to do the act complained of, and the existence of such design cannot be found simply from the proof of the commission of the act itself. Therefore, where the act is done in the heat of a casual and sudden affray, without any evidence of premeditation, the crime is not established. *Godfrey v. People*, 63 N. Y. 207, 212.

Mayhem, at common law, was not a felony, because there was no judgment of forfeiture either of lands or goods. Not being a felony at common law, it is not one of those offenses for which in Georgia it is necessary for the injured party to prosecute the criminal to conviction or acquittal before he is entitled to his action for damages. *Adams v. Barrett*, 5 Ga. 404, 412.

The offense of "mayhem" is defined by the statute (2 Rev. St. p. 665, § 27) as follows: "Every person who from premeditated design, evinced by lying in wait for the purpose, or in any other manner, or with the intention of killing or committing any felony, shall (1) cut out or disable the tongue; or (2) put out an eye; (3) slit a lip or destroy a nose; (4) cut off or disable any limb or member of another on purpose, on conviction thereof shall be imprisoned," etc. *Tully v. People*, 67 N. Y. 15, 19.

Mayhem consists in the unlawfully depriving a human being of a member of his or her body, or disfiguring or rendering it useless. If any person shall unlawfully cut out or disable the tongue, put out an eye, slit the nose, ear, or lip, or disable any limb or member of another, or shall voluntarily and of purpose put out an eye or eyes, every such person shall be guilty of mayhem, provided that no person shall be found guilty of mayhem where the fact occurred during a fight had by consent, nor unless it appear that the person accused shall have been the assailant, or that the party maimed had in good faith endeavored to decline further combat. *Foster v. People*, 1 Colo. 293, 294.

The special injuries which constitute mayhem are stated by Hawkins as follows: "The cutting off or disabling or weakening a man's hand or finger, a striking out of his eye or fore tooth, are said to be maims; but the cutting off his ear or nose are not esteemed maims, because they do not weaken, but only disfigure him." *Foster v. People* (N. Y.) 1 Cow. Cr. R. 503, 514. See, also, *Scott v. Commonwealth* (Pa.) 6 Serg. & R. 224, 225; *Commonwealth v. Porter* (Pa.) 1 Pittsb. R. 502, 505.

Under a statute providing that any person who shall cut off or disable any limb or member of another shall be guilty of mayhem, it is held that the biting off of an ear is mayhem, although it was not so at com-

mon law, because it did not tend to weaken, but only disfigure, the victim. *Godfrey v. People* (N. Y.) 5 Hun, 369, 376.

Biting off the ear of a human being is mayhem, within Pen. Code, § 203, which makes the disabling or disfiguring of a member of the body of a human being mayhem. *People v. Golden*, 62 Cal. 542.

MAYOR.

As alderman, see "Alderman."

As councilman, see "Councilmen."

As judicial officer, see "Judicial Officer."

Mayor anciently (*præfectus urbi*) "meyr," comes from the British *miret*, i. e., *custodire*; or from the old English word "maier," viz., *potestas*, and not from the Latin "major." The chief governor or magistrate of a city or town corporation. King Richard the First, anno 1189, changed the bailiff of London into a mayor, and from the example John made the bailiff of King's Lynn a mayor, anno 1204. Mayors of corporations are justices of the peace *pro tempore*. The powers and duties of a mayor or other head officer of the corporation depend in general on the provisions of the charter, or the prescriptive uses of the corporation, or the express provisions of an act of Parliament. 4 Jac. Law Dict. 265. "The chief or executive magistrate of a city. It is generally his duty to cause the laws of the city to be enforced, and to superintend inferior officers. But the power and authority which mayors possess, being given to them by local regulations, vary in different places." 2 Bouv. Law Dict. 150. "The chief magistrate of a city or corporation." Bailey, Dict. "Originally, an overseer; a bailiff. The chief magistrate of a city. In America, is the chief judge of the city court," etc. Webster's Dict. *Waldo v. Wallace*, 12 Ind. 569, 577.

"The 'mayor,' anciently 'meyr,' comes from the British verb 'miret,' *custodire*, to guard or protect, or from the old English word 'maier.' The exercise of judicial power by the mayor and alderman of cities is traceable back at least to the commencement of the time of legal memory, or the beginning of the reign of Richard the First. In 1189, the same year that he ascended the throne of England, the monarch took from the portreeve of London all the judicial and other powers which that officer had previously possessed as the head of that city and county corporate, and committed them to two city prefects under the Norman title 'bayliffs,' and shortly afterwards committed the same powers to a new officer, under his present title 'mayor.' By referring to Hushon's Privileges of the City of London, it will be seen that nearly all of the judicial powers conferred by the statutes of this state upon the mayors and aldermen of our cities,

as justices of oyer and terminer, judges of mayors' courts, and other courts of record, and as justices of the peace, are substantially the same powers as those which had been conferred upon the mayor and alderman of London previous to the Revolution, as elective magistrates of that city and county corporate." *People v. City of New York* (N. Y.) 25 Wend. 9, 38.

The mayor is the chief officer of a municipal corporation. He is not only a municipal officer, but he is the chief municipal officer, highest in grade, and the head of the municipal government, and the office of "mayor" of a city or town having more than 2,000 inhabitants is a municipal office within the meaning rendering councilmen and aldermen of cities incompetent to hold any other municipal office during the time for which they were chosen. *Crovatt v. Mason*, 28 S. E. 891, 894, 101 Ga. 246.

Under an act authorizing the acknowledgment of deeds before any mayor, chief magistrate, or officer of the cities, town, or places where the deed was made, it is held that the word "mayor" refers to cities, "chief magistrate" to towns, and "officers" to places. *McIntire v. Ward* (Pa.) 3 Yeates, 424, 426.

MAYOR AND ALDERMEN.

"Mayor and aldermen," as used in Act Sept. 26, 1883, touching the town of Reynolds, and providing in section 15 that the mayor and aldermen of such town shall elect a marshal by ballot, is synonymous with the corporate name and style "Mayor and Council of the Town of Reynolds." *Gostin v. Brooks*, 15 S. E. 361, 89 Ga. 244.

The words "mayor and aldermen" shall mean board of aldermen, except as applied to appointments. *Rev. Laws Mass. 1902*, p. 88, c. 8, § 5, subd. 10.

MAYOR'S COURT.

Const. art. 5, § 11, giving the circuit courts final appellate jurisdiction of judgments or sentences in any mayor's court means any court organized under legislation pursuant to Const. art. 5, § 34, authorizing the Legislature to establish in incorporated towns and cities courts for the punishment of offenses against municipal ordinances. It is not essential that the court should be presided over by a mayor. The term was used to designate the class of courts contemplated by section 34, and which have usually been presided over by a mayor, and called "mayors' courts," in this state. *Ex parte Peacock*, 6 South. 473, 476, 25 Fla. 478.

ME.

A jurat, "Sworn before me," and signed by two justices, might be interpreted by referring the words in the singular number to

each of the justices separately and successively, and was not invalid. *Reg. v. Silkstone*, 2 Adol. & Ml. N. S. 520.

MEADOW.

As to "meadow," John Milton, that great master of our English tongue, understood its ordinary meaning to be a cultivated and tended grass plot, for in *L'Allegro* he speaks of "Meadows trim, with daisies pied,"—and the law writers take the same view. *Black's Law Dictionary* defines "meadow" as a "tract of low or level land producing grass which is mowed for hay." In *Barrows v. McDermott*, 73 Me. 441, 452, the court hold that the word "meadow," in the absence of evidence, means cultivated land growing grass sowed thereon. *State v. Crook*, 44 S. E. 32, 83, 132 N. C. 1053.

1 Laws, 399, entitled "An act regulating the mode of putting pine timber into the Connecticut river," and declaring that all pine timber found flowing in said river without being rafted, or all pine timber which by being put into said river without being rafted or under such control shall be found on the "bank or meadow adjoining said river," meant all the land which the stream had any time covered, and where timber flowing down the river might be left by the water. The word "bank" means an elevation of earth, and the word "meadow" means, among other things, low ground adjacent to streams, and both these may be found on islands which are therefore within the statute. *Scott v. Willson*, 3 N. H. 321, 322.

"Meadow," as used in a colonial ordinance giving a right to free fishing in great ponds, allowing the right to pass through any man's property for that end, providing that no trespass was committed upon the owner's corn or meadow, means tillable, mowing, or grass land, exclusive of uninclosed woodlands. *Barrows v. McDermott*, 73 Me. 441, 450, 451.

"A meadow is in the nature of a permanent improvement, and is not like annual crops. Its value is largely based on the fact that it possesses this character, and is not planted each year." *Vermilya v. Chicago, M. & St. P. Ry. Co.*, 24 N. W. 234, 239, 66 Iowa, 606, 55 Am. Rep. 279.

MEAL

"Meal is the pulverized grain ground but unbolted. The making of meal consists in the simple process of grinding, while flour is both ground and bolted." *Washington Mut. Ins. Co. v. Merchants' & Manufacturers' Mut. Ins. Co.*, 5 Ohio St. 450, 486.

Within the meaning of the statute prohibiting the sale of intoxicating liquors on Sunday, except that the keeper of a hotel

may sell liquor to his guests with their meals or in their rooms, the putting of a sandwich beside a glass of beer when the sandwich is not ordered, and taking it away again without having received any pay therefor, is not serving a meal in good faith, with the drink. Such a meal does not make the purchaser of the drink a guest, in the common acceptance of the word. The court said: "If a traveler who is tired and hungry should stop at a hotel on the Sabbath, and at the usual hour for dinner should go into the dining room, and the only food placed before him was a cheese sandwich, could it be said that the sandwich constituted an ordinary meal? Assume that the guest refused to pay for the meal, and the landlord sued him; would any court hold that the sandwich was a meal? I think not. When a person goes to a hotel that is conducted on the American plan, and orders a meal, he is usually supplied with a variety of food, as bread, butter, meat, vegetables, and tea or coffee." In *re Kinzel*, 59 N. Y. Supp. 382, 684, 685, 28 Misc. Rep. 622; In *re Lyman*, 59 N. Y. Supp. 968, 969, 28 Misc. Rep. 409.

MEAN.

A letter written by defendant, after his discharge in bankruptcy, saying: "When I come to B., I will call and see you;" "I mean right;" "I will also pay something on account," etc.—does not constitute a sufficient promise to render the defendant liable for the debt referred to therein. *Bigelow v. Norris*, 29 N. E. 61, 139 Mass. 12.

MEAN TIME.

Mean or standard time formerly meant the average or standard sun time, as distinguished from local sun time, as shown by a sun dial, which, of course, varies with every change of longitude, and which was never in use in this state, and since the day of railroads is practically obsolete in every civilized country. Hence, under Gen. St. 1894, § 2012, providing for the closing of saloons at 11 o'clock at night, standard time, as now understood, will be used. *State v. Johnson*, 77 N. W. 293, 74 Minn. 381.

"Mean sun time" is what is called "standard time." The difference between standard time and sun time is exactly the same over each meridian. There is a difference of four minutes for each degree between true sun time, which is obtained by the means of a dial, and standard or mean sun time. *Parker v. State*, 29 S. W. 480, 481, 35 Tex. Cr. R. 12.

MEANDER.

"Meander" as used in a boundary generally relating to a river, means to follow

a winding or flexuous course. Thus, when it is said "thence with the meander of the river," etc., it must mean a meandered line, which is a line which follows the sinuosities of the river, or, in other words, that the river is the boundary of the land claimed between the points indicated. *Turner v. Parker*, 12 Pac. 495, 496, 14 Or. 340.

"Meanders," as used in a conveyance of land, describing it as beginning at a certain point, and then returning to a post standing on the bank of a creek, then proceeding down the same, and along the several meanders thereof, to the place of beginning, is more descriptive of the windings of the stream than of the irregularities or sinuosities of the bank. The word "meander" is derived from a winding river in Asia Minor, known by that name in classic history. In our language, we say that a stream meanders, but we never thus speak of a shore. To speak of a meandering shore would be to use a singularly inapt expression. *Seneca Nation of Indians v. Knight*, 23 N. Y. 498, 500.

MEANDER LINE.

The "meander line" of a water course is the line showing the place of the water course, and its sinuosities, courses, and distances. *Schurmeier v. St. Paul & P. R. Co.*, 10 Minn. 82, 100 (Gil. 59), 88 Am. Dec. 59; *Hendricks v. Feather River Canal Co.*, 71 Pac. 496, 498, 138 Cal. 423.

Meander lines are run in surveying particular portions of public lands bordering on navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows to a demonstration that the water course, and not the meander line as naturally run on the land, is the boundary. *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. (7 Wall.) 272, 286, 19 L. Ed. 74; *Horne v. Smith*, 15 Sup. Ct. 988, 989, 159 U. S. 40, 40 L. Ed. 68; *Jefferies v. East Omaha Land Co.*, 10 Sup. Ct. 518, 523, 134 U. S. 178, 33 L. Ed. 872; *East Omaha Land Co. v. Jeffries* (U. S.) 40 Fed. 386, 388; *Musser v. Hershey*, 42 Iowa, 356, 364; *Kraut v. Crawford*, 18 Iowa, 549, 553, 87 Am. Dec. 414; *Ladd v. Osborne*, 44 N. W. 235, 236, 79 Iowa, 93; *Grant v. Hemphill*, 59 N. W. 263, 265, 92 Iowa, 218; *Schlusser v. Cruickshank*, 65 N. W. 344, 345, 96 Iowa, 414; *James v. Howell*, 41 Ohio St. 696, 707; *Cogswell v. Forrest*, 43 Pac. 1098, 1099, 14 Wash. 1; *Menasha Wooden Ware Co. v. Lawson*, 36 N. W. 412, 416, 70 Wis. 600; *Whitney v. Detroit Lumber Co.*, 47 N. W. 425, 428, 78 Wis. 240; *Olson v. Thorndike*,

79 N. W. 399, 76 Minn. 399; Kirby v. Potter, 72 Pac. 338, 339, 138 Cal. 686.

Meandered lines are lines which course the banks of navigable streams or other navigable waters. The fact that a meandered line was run along the edge of a marsh in surveying fractional sections of public land does not conclusively show that they bordered on a body of water, so as to give the purchaser riparian rights, but the meandered line is only a regular line, beyond which may be forest or prairie, land or water, government or Indian reservation. Niles v. Cedar Point Club, 20 Sup. Ct. 124, 126, 175 U. S. 300, 44 L. Ed. 171.

In surveys of the public lands of the United States, meander lines are generally considered as following the windings of streams, but the question whether they do so or not is a question of fact to be determined by evidence aliunde. Bissell v. Fletcher, 28 N. W. 303, 19 Neb. 725.

Where a meander line, instead of being run along a river, is run along a bayou, some distance from the river, it cannot be said that the meander line of the river has been established, and therefore the land between the bayou meander line and the river does not belong to the abutting owner. Glenn v. Jeffrey, 39 N. W. 160, 161, 75 Iowa, 20.

In an action of ejectment, in which plaintiff, as the owner of a lot, claimed land lying between the meander line of such lot and the stream, an instruction "that a meander line is a line run by the surveyor for the purpose of determining the sinuosity of the stream and the area of the lots, and, where such line in fact meanders the stream under the laws of this state, the boundary of the lots described would be the channel of the stream, and not the meander line as run on the shore. If, however, you find from the evidence in this case that there is a wide and material divergence between the meander line as run by the surveyor and the north bank of the stream as it existed at the time of the survey, then I instruct you, as a matter of law, that the meander line as run by the surveyor upon the ground, and not the stream, should be taken as the southern boundary of the lots described in plaintiff's complaint"—was held to be correct. Barnhart v. Ehrhart, 54 Pac. 195, 197, 33 Or. 274.

A meander line which is run for the purpose of ascertaining the quantity of land in the tract is not a boundary, and was held not to limit the ownership of lands bordering upon a river, but that such ownership extended to the thread of the stream. Illinois & M. Canal v. Haven, 10 Ill. (5 Gilman) 548, 558.

The meander line run by the United States surveyors along a stream is not the boundary of the lands, but is run merely to

determine the quantity of lands contained in the lots, and the purchasers of the lots take to the center of the stream, and not merely to the meander line. Jones v. Pettibone, 2 Wis. 308, 320.

A landowner whose land bordered on a meandered lake was held to have title to a strip of land projecting into the lake, though it was not included within the meander line. Mitchell v. Smale, 11 Sup. Ct. 819-822, 140 U. S. 406, 35 L. Ed. 442.

One who had acquired by patent from the government land bordered by Fox river conveyed a part thereof described in the deed as follows: "Thence due south parallel with the west line of Division street to Fox river; thence northwesterly and along the meander line of said river." Held, that the words "meander line" should be construed to mean the winding line along the shore, where the land and water meet at ordinary high-water mark, and not the meander line indicated by the government survey. The words "meander line," standing by themselves, are ambiguous, and might mean either, but, construed in connection with the context, should be given the above construction. The words "to Fox river" furnish the same controlling call, and can mean nothing less than the water's edge or high-water mark of the stream, and the grantor must be presumed to have intended to convey according to his own boundary line on that side. Wright v. Day, 33 Wis. 260, 262.

MEANS.

See "Available Means"; "By Means of"; "External, Violent, or Accidental Means"; "Legal Means"; "Necessary Means"; "Sufficient Means."

All means, see "All."

Other means, see "Other."

To take proper means, see "Proper Means."

Agency, cause, or measure.

"Means," as used in a life policy insuring against death by violent and accidental means, denotes that which produces a result, and is synonymous with "cause." Tucker v. Mutual Ben. Life Ins. Co., 4 N. Y. Supp. 505, 506, 50 Hun, 50.

"Means," as used in Rev. St. 1881, § 1746, providing that, in an indictment or information for murder in the second degree or for manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death was caused, etc., signifies that through or by the help of which the end is attained. That intermediate agency or measure, such as what the gun was loaded with, whether with leaden ball or iron slugs, etc., or that the revolver was loaded with cartridges or something else; what particu-

lar kind of a gun, revolver, or knife was used; or how long, how deep, how wide the wound was, or other description thereof, need not be stated in the indictment. *Littell v. State*, 33 N. E. 417, 418, 133 Ind. 577.

"Means calculated to inflict great bodily injury," as used in Pen. Code, § 498, subd. 9, providing that an assault shall become aggravated when committed with premeditated design, and by the use of means calculated to inflict great bodily injury, does not necessarily refer to the use of any weapon or instrument; but a man's fist may, under certain circumstances, be means calculated to inflict great bodily injury. *Keley v. State*, 12 Tex. App. 245.

In instructing as to 12 Stat. 738, making it criminal for any owner, consignee, or agent of any goods, wares, or merchandise to knowingly make or attempt to make an entry thereof by means of any false invoice or false certificates, etc., the court says that it would, perhaps, be straining the statute to say that any false practice with reference to the goods themselves would be a means of making the entry. He does not make his entry by means of that false practice or disguise, but he does make his entry by means of any false document he may use, or any false oath he may take, if such doctrine or oath be requisite or necessary as a means and condition precedent to the goods being admitted to entry. *United States v. Cargo of Sugar (U. S.)* 25 Fed. Cas. 288, 289.

After quoting with approval the statement in *O'Reilly v. Morse*, 58 U. S. (15 How.) 62, 119, 14 L. Ed. 601, that "whoever discovers that a certain useful result will be produced in any art by the use of certain means is entitled to a patent for it, provided he specifies the means," the court said: "But everything turns on the force and meaning of the word 'means.' It is very certain that the means need not be a machine, or an apparatus. It may, as the court says, be a process. A machine is a thing. A process is an act, or a mode of acting. The one is visible to the eye, an object of perpetual observation. The other is a conception of the mind, seen only by its effects when being executed or performed. Either may be the means of producing a useful result." *Tilghman v. Proctor*, 102 U. S. 707, 728, 26 L. Ed. 279 (quoted in *Boyd Power Brake Co. v. Westinghouse*, 18 Sup. Ct. 707, 727, 170 U. S. 537, 42 L. Ed. 1136).

Gen. St. c. 71, § 25, making any one by whose means a person not having a settlement in the commonwealth is brought within it liable for such person's support if he becomes a pauper, means "by whose instigation," and is meant only to impose the penalty on the corporation or party who had some agency in inducing the poor person to come in the state, and does not apply to a

common carrier who has brought such person into the commonwealth in the ordinary course of business, and without any reason to suspect that such person would become a pauper. *Inhabitants of Fitchburg v. Cheshire R. Co.*, 110 Mass. 210, 212.

Income, property, or resources.

To speak of a man as a "person of limited means" will be understood to mean a person of little property; the word "means" being synonymous with "property." *Vass v. Southall*, 26 N. C. 301, 303.

In a claim for a lien on a vessel for means furnished, etc., "means" is not equivalent to materials, for without explanation the word "means" is too general—no definite meaning can be attached to it. *Lawson v. Higgins*, 1 Mich. 225, 226.

Code Cr. Proc. § 914, provides that the father, mother, and children of sufficient ability of a poor person unable to maintain himself must maintain him. In an action for wrongful death, where recovery for the loss of services was sought, defendant requested the court to charge that the father has no claim on the earnings of a son beyond the age of 21 years, except in case the father becomes poor and unable to support himself, and the son is shown to have means. Held, that the words "is shown to have means," as used in the request to charge, are synonymous with the words "of sufficient ability," as used in the statute. *Keenan v. Brooklyn City R. Co.*, 40 N. E. 15, 145 N. Y. 348.

Money.

Code 1880, § 1177, providing that a husband shall not rent his wife's plantation, houses, horses, wagons, or other implements, or do business with them, or with any of her means, refers to property of a visible character, the possession of which is indicative of ownership, and does not include money. The words "any of her means" in themselves are broad enough to include money, but the words are so ruled by the context, and by the general purpose and intention of the act, which was to prevent the use of visible property as a means of defrauding creditors, that money could not be regarded as within the view of the statute. *Leinkauf v. Barnes*, 5 South. 402, 404, 66 Miss. 207.

Civ. Code, § 3450, provides that a debtor is insolvent when he is unable to pay his debts from his own means as they become due. The word "means," as defined by Webster, means resources or income; but "resources" does not necessarily mean money in hand, and hence, for a debtor to have means to pay his debts, it is not essential that he should have money in his pocket or in bank, but only that his assets at a given date shall be sufficient and in a condition to be applied to his engagements, or to the pay-

ment of his debts in the usual and ordinary course of business as they become due. He is not without means merely because his assets at a given date may not satisfy all the demands against him, due and to become due. *Sacry v. Lobree*, 23 Pac. 1088, 1090, 84 Cal. 41.

In Laws 1888, c. 583 (Brooklyn City Charter) tit. 18, § 3, providing that no contract shall be binding against the city unless the comptroller shall certify that the means required to make the payment are provided and applicable thereto, "means" does not necessarily mean money on hand, though money in the treasury would be such means, since to speak of a person as a man of means clearly does not signify that he only has money on deposit in bank, and, where bonds can be sold and the money provided thereby, the comptroller should certify that there is means provided and applicable to pay such contract. *People v. Palmer*, 35 N. Y. Supp. 231, 232, 13 Misc. Rep. 727.

Real estate.

In construing a clause of a will in which testatrix directed that "I want the balance of my means to go to the African Kansas Freedmen's Association," the court say that "from the beginning of the second clause of the will, where the testatrix orders a sale of the personal property, down to the end of the provision in question, real estate is not mentioned, and it is apparent from the language used that testatrix had no reference to any property except money or personal property. Had the testatrix, in the first part of the second clause of the will, used language which might include real estate, and then said, 'and I want the balance of my means to go,' etc., there might be some ground for holding that the words 'balance' and 'means' referred to real estate, but such was not the case." *Williams v. Johnson*, 112 Ill. 61, 67, 1 N. E. 274.

MEANS DOCTRINE.

The "means" religious doctrine is a belief and faith that conversions of sinners to Christianity and the salvation of human souls is and may be aided by the use of human means, as contradistinguished from the "anti-means" doctrine, which is a belief and faith in the exact opposite; that is, that such conversions and salvation cannot be brought about or aided by any human means or effort whatever, but that the same must be, and is, wholly and naturally the work of the Lord. *Smith v. Pedigo*, 44 N. E. 363, 370, 145 Ind. 361, 32 L. R. A. 838.

MEANS OF KNOWLEDGE.

The rule that constructive notice of defects in a sidewalk on the part of a municipal corporation exists where the corporation has

had the means of knowledge for a sufficient time to have remedied the defect applies only to visible defects or obstructions, that are open and notorious—so notorious as to be observable by all—and includes cases of neglect to anticipate and prevent defects which might reasonably be expected from long use, etc. *City of Denver v. Dean*, 16 Pac. 30, 32, 10 Colo. 375, 3 Am. St. Rep. 594.

MEANS OF SATISFACTION.

"Means of satisfaction," within the rule that when a creditor has the means of satisfaction in his own hands, and chooses not to retain it, it will constitute a pro tanto discharge of his surety, signifies property or money of the principal debtor in his lawful possession, which he may rightfully retain and appropriate to the satisfaction of his debt without violating any duty or subjecting himself to an action. In other words, there must be a lien in his favor on the property in his hands, conferred either by law or the owner, which is defined to be a right of retainer. *Perrine v. Fireman's Ins. Co.*, 22 Ala. 575, 576; *Knighton v. Curry*, 62 Ala. 404, 408.

MEANS OF SUPPORT.

See "Visible Means of Support."

The phrase "means of support," in its general sense, embraces all those resources from which the necessities and comforts of life are or may be supplied—such as lands, goods, salaries, wages, or other sources of income. In a limited sense, it signifies any resource from which the wants of life may be supplied. *Schneider v. Hosler*, 21 Ohio St. 98, 112; *Medel v. Anthia*, 71 Ill. 241, 246; *McMahon v. Sankey*, 24 N. E. 1027, 1028, 133 Ill. 636.

The term "means of support," as used in the civil damage act, has no legal meaning. Where injury to means of support is the gravamen of the action, the plaintiff must show that his accustomed means of maintenance have been cut off or curtailed, or that he has been reduced to a state of dependence, by being deprived of the support which he had before enjoyed. Plaintiff cannot recover for loss of service or the expenses of his son's illness under the words "means of support," without proof that the services were necessary to his support, or that the charge brought on him by his son's illness diminished his means so as to render them inadequate therefor. Diminution of income or loss of property does not constitute an injury to means of support if the person has adequate means of maintenance from accumulated capital or property, or his remaining income is sufficient for his support. *Volans v. Owen*, 74 N. Y. 526, 530, 30 Am. Rep. 337.

Where there was proof tending to show that plaintiff's husband was frequently drunk with liquor received from defendant, but no proof that he failed to support her, while, on the contrary, some testified that during the time the family were well provided with food and clothing, and lived about as their neighbors did, there was not evidence to justify a finding that she was injured in her means of support by such furnishing of intoxicating liquors. *McCann v. Roach*, 81 Ill. 213, 214.

The term "means of support," within the meaning of the civil damage statute, giving a right of action to a wife for injury to her means of support caused by the sale of intoxicating liquors to her husband, imports the assistance the husband would have furnished the wife and family in the absence of intoxication, without reference to her condition before and after such injury; and therefore it is not erroneous to refuse an instruction that, if plaintiff was in no worse condition after the sale of the liquors than she was before, she has not suffered in her means of support, and cannot recover therefor. *Woolheather v. Risley*, 38 Iowa, 486, 491.

Under Acts 1887, No. 313, § 20, providing that every parent who shall be injured in person or property or means of support by reason of the intoxication of any person shall have a right of action against the person who shall, by furnishing intoxicating liquor, have caused or contributed to such intoxication, it is held that plaintiff was entitled to recover for the death of her adult son, caused by intoxication resulting from liquor furnished to him by defendant, where the son actually contributed to plaintiff's support, though there was no legal obligation on him so to do. *Eddy v. Courtright*, 91 Mich. 264, 269, 51 N. W. 887.

The term "means of support," as used in the civil damage act, includes wages or the proceeds of ordinary labor. *Schneider v. Hosier*, 21 Ohio St. 98, 112 (citing *Duroy v. Blinn*, 11 Ohio St. 331).

A wife's means of support includes what the husband might have earned by his labor and contributed to the support of the family. *Wightman v. Devere*, 33 Wis. 570, 578.

Not limited to necessities.

Within the meaning of the statute giving a remedy to any one who is injured in property or means of support by the sale of intoxicating liquors to another, the family of the inebriate may be injured in their means of support, although not deprived of the bare necessities of life. Whatever lessens or impairs the ability of the husband and father to supply the suitable comforts which might reasonably be expected from one in his occupation, and with his capacity for

earning money, may be regarded as lessening or impairing their means of support. *Herring v. Ervin*, 48 Ill. App. 369, 370.

Damage to the means of support of a wife is a deprivation cutting off or diminishing of the future support below what is reasonable and competent for a person in the plaintiff's station of life, and below what it otherwise would have been. *Mulford v. Clewell*, 21 Ohio St. 191, 197.

In an action for loss of support against liquor sellers, an instruction that the term "means of support" is not confined to the bare necessities of life, but includes all such means of support as would enable the plaintiffs to live in a style and condition, and with a degree of comfort suitable and becoming their station in life, is not erroneous. *Gorey v. Kelly*, 90 N. W. 554, 555, 64 Neb. 605.

MEANTIME.

A deed declaring that the maker held certain lands in trust, and containing a power of sale, and an agreement by the maker to make a conveyance, upon written request, of certain of the lands, when certain mortgage debts were fully paid, and in the meantime he should have full power and authority to sell and convey the premises to purchasers, required the concurrence of two events to terminate the authority to sell: First, the satisfaction of the mortgages on the premises; and, second, the written request of the parties designated to convey the land to them. *Scarlett v. Linckels*, 40 Atl. 590, 597, 56 N. J. Eq. 777.

An order made under Rev. St. § 1524, in bankruptcy proceedings, providing that an injunction shall issue to restrain the debtors in the meantime, and until hearing and decision of the petition, from levying on or making any transfer or disposition of the property of the debtors not exempted by the bankruptcy act, cannot be construed to mean a time later than the time when adjudication of bankruptcy is made on the petition, in case one is made. *In re Irving* (U. S.) 13 Fed. Cas. 108, 109.

MEASURE.

See "Take Measures for."

"Measure," as used in an instruction in relation to the damages recoverable in a certain action, was meant to be understood as referring to "amount." *Atlanta, K. & N. Ry. Co. v. Bryant*, 34 S. E. 350, 110 Ga. 247.

MEAT.

The term "meat" applies not only to the flesh of all animals used for food, but, in

a general sense, to all kinds of provisions; hence an indictment charging the defendant with taking one pound of meat is insufficient, as being too vague and uncertain. *State v. Patrick*, 79 N. C. 635, 656, 28 Am. Rep. 340; *State v. Oakley*, 10 S. W. 17, 51 Ark. 112.

"Meat," as used in an indictment for larceny, charging defendant with stealing 100 pounds of meat, should be construed in its general signification, as including all provisions fit for the sustenance of man, and not to mean only the flesh of animals used for food, and hence the indictment is not defective for insufficiency of description of the property alleged to have been stolen. *State v. Morey*, 2 Wis. 494, 495, 60 Am. Dec. 439.

MEAT HOUSE.

Meat house is a building in which meat is stored and kept, and, by its very definition, is a storehouse, and synonymous with it, and it is included within such term as used in Code 1887, §§ 3705, 3706, forbidding the entering a storehouse with intent to commit larceny. *Benton v. Commonwealth*, 21 S. E. 495, 498, 91 Va. 782.

MEAT MARKET.

"Meat market" is a synonymous term with "butcher shop," and proof in an action for slander that defendant charged plaintiff with stealing from his meat market is not a variance from an allegation that charged the stealing to be from a butcher shop. *Wiest v. Luyendyk*, 41 N. W. 839, 840, 73 Mich. 661.

MEAT STORES.

By a corporate charter the general council of a city was authorized to establish and regulate all mercantile houses and fresh meat stores. A municipal ordinance required all persons keeping meat stores for the sale of fresh meat to pay a license of a certain amount, and provided that such persons should not sell game, fresh vegetables, and other articles of merchandise. Held, that the words "meat stores" should be construed to include all sorts of meats, whether fish, flesh, or fowl, and that the city council had no authority to make the selling of game and fish a separate privilege. *Vosse v. City of Memphis*, 77 Tenn. (9 Lea) 294, 299.

MECHANIC.

See "No Mechanic"; "Practical Mechanic."

As laborer, see "Laborer."

A mechanic is a workman employed in shaping and uniting materials, such as wood,

metal, etc., into some kind of structure, machine, or other object, requiring the use of tools. *Story v. Walker*, 79 Tenn. (11 Lea) 515, 517, 47 Am. Rep. 305; *Merrigan v. English*, 22 Pac. 454, 457, 9 Mont. 113, 5 L. R. A. 837.

The commonly accepted definition of a "mechanic" is any skilled worker with tools; one who has learned a trade. In re Osborn (U. S.) 104 Fed. 780, 781.

A "mechanic" is any skilled worker with tools—a workman who shapes and applies material in the construction of houses. One actually engaged with his own hands in constructive work. *City of New Orleans v. Lagman*, 10 South. 244, 245, 43 La. Ann. 1180.

A "mechanic," within the mechanic's lien law, is a person whose occupation is to construct machines, or goods, wares, instruments, furniture, and the like. *Savannah & O. R. Co. v. Callahan*, 49 Ga. 506, 511.

A mechanic is one skilled in the art of building, and acquainted with the rules and methods observed and pursued by those engaged in constructing, altering, and repairing buildings of all kinds, and possessing skill to follow rules, and to adopt and follow methods, so that one engaged for five years in the study and erection of buildings would be a practical building mechanic. *People v. Board of Aldermen*, 42 N. Y. Supp. 545, 547, 18 Misc. Rep. 533.

A mechanic, within the meaning of the act of 1823 exempting a mechanic's tools of trade from execution, includes all mechanics, whether master workmen or journeymen, who personally work with their own tools and with their own hands. The term is used in counterdistinction to contractors, superintendents, capitalists, or mere owners of machinery. *Parkerson v. Wightman* (S. C.) 4 Strob. 363, 365.

Abstracter of titles.

An abstracter of titles cannot be regarded as a mechanic, so as to exempt his abstract books from execution under a statute exempting the tools of a mechanic. *Tyler v. Coulthard*, 64 N. W. 681, 95 Iowa, 705, 58 Am. St. Rep. 452.

Architect or draftsman.

The term "mechanic," when used in reference to a mechanic's lien, does not include an architect. *Price v. Kirk* (Pa.) 35 Leg. Int. 325.

The term "mechanic or laborer," within the meaning of the statute preferring the claims of mechanics or laborers, does not include a draftsman. *Leinau v. Albright*, 10 Pa. Co. Ct. R. 171, 173.

Wag. St. p. 907, § 1, enacts that every mechanic or other person who shall perform

any labor or furnish any material for any building shall have a lien therefor. Held, that the words "other person" mean other persons ejusdem generis, and hence an architect has no lien for his services in drawing plans and specifications. *Raeder v. Bensberg*, 6 Mo. App. 445, 447.

Baker.

A baker is a mechanic, within the meaning of the term as used in a statute exempting the tools and implements of a mechanic. *In re Osborn* (U. S.) 104 Fed. 780, 781.

Barber.

A barber is a mechanic, so that a chair and mirror, when used by him in his business, are exempt as tools of a mechanic. *Terry v. McDaniel*, 53 S. W. 732, 733, 103 Tenn. 415, 46 L. R. A. 559.

"The labor of a barber is manual. His work is mechanical; hair cutting is as much a mechanical pursuit as wood cutting; and hence a barber is within the meaning of Const. art. 206, exempting from license taxation persons engaged in mechanical pursuits. *State v. Dielenschneider*, 11 South. 823, 44 La. Ann. 1116; *State v. Hirn*, 16 South. 403, 46 La. Ann. 1443.

A "mechanic," within the meaning of the term as used in the exemption law, exempting the tools of a mechanic, includes a barber. "It is argued that no one is a mechanic except a person who works on wood or metal, but it is replied that the barber works upon the head and cheek. So, while there is a distinction between the two, it seems to be a distinction without any material difference. The attention is called to the fact, also, that frequently the impression made on the customer's face is similar to that made by the carpenter with his saw." *Terry v. McDaniel*, 53 S. W. 732, 733, 103 Tenn. 415, 46 L. R. A. 559.

Builder.

A builder is one who builds; one whose occupation it is to build; an architect; a shipwright; a mason, etc.—and is not within the meaning of the word "mechanic," in a statute giving a lien for work and labor. *Savannah & C. R. Co. v. Callahan*, 49 Ga. 506, 511.

Carpenter.

The term "contractor," as well as the term mechanic, in a suit giving liens to mechanics and contractors, applies to a carpenter building a storehouse under a contract with the owner of real estate, and therefore he is entitled to a lien in either capacity. *Thurman v. Pettitt*, 72 Ga. 38, 39.

Carpenters are engaged in mechanical pursuits, within the meaning of Const. art. 206, exempting those engaged in mechanical pursuits from the payment of a license tax,

who, as the house was constructed, continued to use the tools and appliances of carpenters, though others assisted them in such work; they having performed manual labor in building, from the first piece of timber to the last. Having worked at their trade with their own hands, they are engaged in a mechanical pursuit. *City of New Orleans v. Lagman*, 10 South. 244, 245, 43 La. Ann. 1180.

Civil engineer.

The terms "mechanic, artisan, or tradesman" in the statute giving a lien to any mechanic, artisan, or tradesman on any article of value altered or repaired by him, includes a civil engineer; and he is entitled to a lien on field notes, maps, charts, and drawings made by him. *Amazon Irrigating Co. v. Briesen*, 41 Pac. 1116, 1119, 1 Kan. App. 758.

Conductor.

A conductor of a passenger or freight train, who is not employed for the purpose of doing manual labor, but whose duty it is to have general control and superintendence of the train, its running and management, and supervision of the passengers and baggage, is not "a journeyman, mechanic, or a day laborer," within Code, § 3554, exempting from garnishment the wages of a journeyman, mechanic, or day laborer. *Miller v. Dugas*, 77 Ga. 386, 388, 4 Am. St. Rep. 90.

Contractor or master builder.

The term "mechanics and others," in 4 Stat. 659, entitled "An act to secure to mechanics and others payment for labor done and materials furnished in the erection of buildings in the District of Columbia," does not include a master builder, undertaker, or contractor, who undertakes, by contract with the owner, to erect the building, or some part or portion thereof, on certain terms. The persons enumerated in this section are, plainly, those mechanics or tradesmen whose personal labor or property have been incorporated into the building, and not the agents, supervisors, undertakers, or contractors who employed them. *Winder v. Caldwell*, 55 U. S. (14 How.) 434, 444, 14 L. Ed. 487.

The term "mechanic," in Const. art. 206, exempting mechanics from paying a license tax, does not include a mechanic who goes outside his occupation and employs others in a different pursuit, such as brick masons and painters in the erection of a building, but his position is that of a contractor. *City of New Orleans v. Pohlmann*, 12 South. 116, 45 La. Ann. 219. See, also, *Theobalds v. Conner*, 7 South. 689, 690, 42 La. Ann. 787.

Rev. Civ. St. art. 3179a, giving a lien to "mechanics, laborers, and operatives" performing labor or working with tools or teams in the construction of a railroad, does not include one who has undertaken and performed a subcontract for the construction of several miles at a specified sum per mile.

Krakauer v. Locke, 25 S. W. 700, 701, 6 Tex. Civ. App. 446; Parks v. Locke (Tex.) 25 S. W. 702, 703.

Dentist.

"Mechanic," as used in a statute exempting from execution the tools of a mechanic necessary for carrying on his trade, cannot be construed to include a dentist. It is true that the practice of his art requires the use of instruments for manual operation, and that much of it consists in manual operation; but it also involves a knowledge of the physiology of the teeth, which cannot be acquired but by a proper course of study, and this is taught by learned treatises on the subject, and has a distinct, though limited, department of the medical art in institutions established for the purpose. It requires both science and skill, and, if such persons could be included in the denomination of mechanics, because their pursuit required the use of mechanical instruments, and skill in manual operation, the same reason would include general surgeons under the same denomination, because the practice of their profession depends in a great degree on similar instruments and operative skill. Whitcomb v. Reid, 31 Miss. 567, 569, 66 Am. Dec. 579.

Comp. Laws, § 4494, provides that mechanical tools shall be exempt from execution. The court, in deciding that the tools of a dentist were included in the term "mechanical tools," stated that, though a dentist was in one sense a professional man, yet in another sense his calling is mainly mechanical. Maxon v. Perrott, 17 Mich. 332, 337, 97 Am. Dec. 191.

Employé with annual salary.

The words "laborers, workmen, mechanics, and other persons," in Laws 1891, c. 104, § 1, relating to the employment of such persons by public corporations for more than eight hours per day, evidently do not embrace any officer or employé for whom an annual salary has been specifically named and appropriated by the Legislature. State v. Martindale, 27 Pac. 852, 853, 47 Kan. 147 (quoted in Billinsley v. Marshall County Com'rs, 49 Pac. 329, 5 Kan. App. 435).

Farmer.

A farmer is not within Rev. St. c. 134, § 31, subd. 9, exempting the tools and implements or stock in trade of any mechanic, miner, or other person; the statute being construed to apply to mechanics and tradesmen, according to the maxim, "Noscitur a sociis." Bevlitt v. Crandall, 19 Wis. 581, 583.

Furnisher of lumber or machinery.

The term "artisans, builders, and mechanics," in Gould, Dig. c. 112, § 1, giving

a mechanic's lien to all artisans, builders, and mechanics, of every description, who shall perform any work and labor on any building, edifice, or tenement, does not include one furnishing lumber to be used in the construction of a dwelling house. Duncan v. Bateman, 23 Ark. 327, 328, 79 Am. Dec. 109.

"Mechanic or builder," as used in a statute giving a mechanic or builder a lien, does not include one who furnishes timber for the building. Boutner v. Kent, 23 Ark. 389.

The term "mechanics, undertakers, or journeymen," in a statute giving a lien to a mechanic, undertaker, or journeyman who builds or repairs a house, does not include a person who merely furnishes the owner with lumber to be used in such building. Stevens v. Wells, 36 Tenn. (4 Sneed) 387, 389.

One who furnishes machinery to be used in a house for manufacturing purposes is not a mechanic, within the mechanic's lien statute. East Tennessee Iron Mfg. Co. v. Bynum, 35 Tenn. (3 Sneed) 268, 269, 65 Am. Dec. 56.

Master mechanic.

Under the act of 1823 exempting from levy and sale a mechanic's tools of his trade, a machinist who constructs engines and machinery is a mechanic. A master machinist is a mechanic, though the tools of his trade were of the value of \$500. Parkerson v. Wightman (S. C.) 4 Strob. 363, 365.

Materialman.

Code, § 1241, which provides that the homestead is subject to execution or forced sale in satisfaction of judgments obtained on debts secured by "mechanics", laborers', and vendors' liens" on the premises, does not include a materialman's lien. Richards v. Shear, 11 Pac. 607, 608, 70 Cal. 187.

Manufacturer.

The term "tradesman or mechanic," in a statute exempting the necessary tools of a tradesman and mechanic, does not include a manufacturer whose business necessarily requires the occupancy of large and extensive buildings, the investment of considerable capital, and the employment of numerous workmen. Richle v. McCauley, 4 Pa. (4 Barr) 471, 472.

Merchant tailor.

The terms "mechanic, miner, or other person," in the statute exempting from execution the necessary tools and implements of any mechanic, miner, or other person, used for the purpose of carrying on his trade, are broad enough to include a merchant tailor who is a practical workman, and who cuts and fits garments for customers, and super

intends their manufacture. In re Jones (U. S.) 13 Fed. Cas. 931.

Miller.

A mechanic is an artisan or artist. The term in ordinary acceptance does not import either a farmer or a manufacturer of flour. Thus a miller who raises grain, and purchases more, and retails the flour at other places than his mill, is not a mechanic, under Act April 22, 1846, § 11, exempting mechanics from a mercantile tax. Berks Co. v. Bertolet, 13 Pa. (1 Harris) 522, 524.

Painter.

The term "mechanic," in the statute exempting the wages of mechanics from execution, includes a house and sign painter. Waite v. Franciolo, 16 S. W. 116, 90 Tenn. 191.

"Mechanics," as used in an insurance policy providing that it shall be void if mechanics be employed in building or repairing the premises, does not include painters, since a mechanic is, in the common acceptance of the term, a workman employed in shaping and uniting materials, such as wood, metals, etc., into any kind of structure, machine, or other object, requiring the use of tools or instruments. Smith v. German Ins. Co., 65 N. W. 236, 239, 107 Mich. 270, 30 L. R. A. 368.

Photographer.

A photographer is not a mechanic, within the meaning of the statute exempting the tools of a mechanic from execution. Story v. Walker, 79 Tenn. (11 Lea) 515, 517, 47 Am. Rep. 305. See, also, City of New Orleans v. Robira, 8 South. 402, 403, 42 La. Ann. 1098, 11 L. R. A. 141.

A photographer, though doing some work of a mechanical character, cannot be regarded as a mechanic. Mullinnix v. State, 60 S. W. 768, 42 Tex. Cr. R. 526.

Plasterer.

A plasterer is held a laborer or mechanic, within a statute providing that a homestead is not exempt from any laborer's or mechanic's lien. Merrigan v. English, 22 Pac. 454, 457, 9 Mont. 113, 5 L. R. A. 837.

A plasterer is engaged in a mechanical pursuit, within the Constitution, exempting such persons from license taxes, even though he employs others of the same class to assist him. City of New Orleans v. Bayley, 35 La. Ann. 545, 546.

Printer.

"Mechanic," as used in Code 1873, § 797, exempting from taxation the tools of any mechanic to the amount of \$300, should be construed to include a printer. Webster defines the word "mechanic" as one who works

with machines or instruments; a person whose occupation is to construct machines, or goods, wares, instruments, furniture, and the like; one skilled in a mechanical occupation or art. Smith v. Osburn, 5 N. W. 681, 682, 53 Iowa, 474.

Sawmill owner.

The owner of a sawmill and manufacturer of lumber was held to be a mechanic, within Const. 1868, excepting mechanic's liens from the homestead exemption act, as he worked with a machine, and shaped materials of wood for building, etc. Gulledege v. Preddy, 32 Ark. 433, 434.

To be a mechanic, it is necessary that the person should be an operative engaged in a business requiring some particular skill in doing the work, by virtue of which the law creates in his favor a lien; and a sawmillman is not a mechanic, so as to give him a mechanic's lien, where the work done was simply sawing timber into lumber, but he was entitled only to the logging lien given by the statute. The sawmillman has a lien by virtue of ownership of his machinery which converts timber into lumber, and not by virtue of any labor he may perform as a mechanic in operating machinery. Evans v. Beddingfield, 32 S. E. 664, 106 Ga. 755.

Superintendent or manager.

A general manager of a shop is not a mechanic or laborer, within the term "mechanics and laborers" in a statute giving mechanics and laborers employed in a shop a lien for their services. Raynes v. Kokomo Ladder & Furniture Co., 54 N. E. 1061, 153 Ind. 315.

A boss or director of an entire department of an extensive factory, who employs and discharges the hands that work under him, but does no manual labor—merely directing the work of the operatives under him—is not a journeyman, mechanic, or day laborer, within a statute exempting the wages of such persons from garnishment. Kyle v. Montgomery, 73 Ga. 337, 343.

The term "mechanics," in a statute providing that all mechanics, laborers, and operators who may have performed labor in the construction or repair of any railroad, locomotive, car, or other equipment, or may have performed labor in the operating of a railroad, or to whom wages may be due or owing, shall hereafter have a lien prior to all others upon such railroad or its equipment for such wages as are unpaid, does not include the foreman or superintendent of laborers of a subcontractor engaged in the construction of appellant's road, who furnishes certain tools and teams to carry on the work of construction, and sometimes uses the tools himself, and at other times directs their use by the laborers. Texas & St. L. R. Co. v.

Allen (Tex.) 1 White & W. Civ. Cas. Ct. App. §§ 568, 569.

MECHANICAL BUSINESS.

The term "mechanical business," as used in Corp. Act April 29, 1874, cl. 18, in reference to mechanical business, refers to the employment of skilled labor in shaping materials into structures or products of utility, and not as incident to one of the arts or professions. The term does not include preparing and mechanically executing designs for decorating and finishing a building, nor dredging, excavating, building, and executing submarine work. In re Mechanical Business Cases, 9 Pa. Co. Ct. R. 1.

The business of erecting buildings is a mechanical business, within a statute authorizing the formation of co-operative associations for trade or carrying on any lawful mechanical, manufacturing, or agricultural business. *Finnegan v. Noerenberg*, 53 N. W. 1150, 1151, 52 Minn. 239, 18 L. R. A. 778, 38 Am. St. Rep. 552.

The mining of iron ore is a "mechanical business," within Const. art. 10, § 3, providing that each stockholder of any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him. A mechanical business, within the meaning of such exception, is one closely allied to or incidental to some kind of manufacturing business. *Cowling v. Zenith Iron Co.*, 65 Minn. 281, 68 N. W. 48, 49, 33 L. R. A. 508, 60 Am. St. Rep. 471.

MECHANICAL ENGINEER.

A mechanical engineer is one possessing a proficiency not possessed by others in the knowledge of designing, contracting, setting up, and operating boilers, engines, pumps, and machinery generally, and hence a mechanical engineer is a proper person to call upon as an expert upon questions of that character. *Craven v. Orleans Levee Dist.*, 26 South. 104, 51 La. Ann. 1267.

MECHANICAL EQUIVALENT

See, also, "Equivalent (In Patent Law)."

A mechanical equivalent, as generally understood, is found where one thing may be adopted, instead of another, by a person skilled in the art, from his knowledge of the art. *Johnson v. Root* (U. S.) 13 Fed. Cas. 823.

A mechanical equivalent, as generally understood, is found where the one may be adopted, instead of the other, by a person skilled in the art, from his knowledge of the art. *Smith v. Marshall* (U. S.) 22 Fed. Cas. 395 (citing Curt. Pat. § 332).

A mechanical equivalent, as generally understood, is found where one may be adopted, instead of the other, by a skilled mechanic accustomed to machinery and with a competent knowledge of mechanical powers. *May v. Johnson County* (U. S.) 16 Fed. Cas. 1218, 1219.

A mechanical equivalent must be adaptable to use as a substitute for something else, and competent to perform the functions of a particular device for which it may be substituted. *Alaska Packers' Ass'n v. Letson* (U. S.) 119 Fed. 599, 611.

"Mechanical equivalents," as understood in connection with infringements of patents, are such devices as were known previously, and which, in the particular combination of devices specified as constituting the patented invention, can be adapted to perform the functions of those specified devices for which they are employed as substitutes without changing the inventor's idea of means; in other words, without introducing an original idea, producing as the result of it an improvement which is itself a patentable invention. *Jensen Can-Filling Mach. Co. v. Norton* (U. S.) 67 Fed. 236, 239, 14 C. C. A. 383.

The term "mechanical equivalent," when applied to the interpretation of a pioneer patent, has a broad and generous significance, while its meaning is very narrow and limited when it conditions the construction of a patent for a slight and almost immaterial improvement. *Adams Electric R. Co. v. Lindell R. Co.* (U. S.) 77 Fed. 432, 440, 23 C. C. A. 223; *Stirratt v. Excelsior Mfg. Co.* (U. S.) 61 Fed. 980, 981, 10 C. C. A. 216; *McCormick v. Talcott*, 61 U. S. (20 How.) 402, 405, 15 L. Ed. 930; *Chicago & N. W. R. Co. v. Sayles*, 97 U. S. 554, 556, 24 L. Ed. 1053; *Brill v. St. Louis Car Co.* (U. S.) 90 Fed. 666, 33 C. C. A. 213. In its application to all that great mass of inventions which falls between the two extremes, its significance is proportioned to the character of the advance or invention under consideration, and is so interpreted by the courts as to protect the inventor against piracy and the public against unauthorized monopoly. *Brammer v. Schroeder* (U. S.) 106 Fed. 918, 920, 46 C. C. A. 41; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* (U. S.) 106 Fed. 602, 710, 45 C. C. A. 544.

The use of a metal strap, composed of two pieces, joined together by bolt and screw, instead of a continuous strap, is not the substitution of a mechanical equivalent, but is merely a change in the form of the strap. *Holmes v. Trunan* (U. S.) 67 Fed. 542, 545, 14 C. C. A. 517.

A machine of old combination, that works well and accomplishes results intended and desired, cannot be substituted as a mechanical equivalent for a patented ma-

chine that will not and cannot be made to work, and is therefore impractical and worthless. The law of patents affords no protection to a patented machine that has been proved by experiment to be useless and valueless. The owner of such a machine cannot sustain a suit for infringement against the person who employs the same old elements and devices so differently combined and arranged as to operate successfully in accomplishing the result intended by the worthless machine. *Carter Mach. Co. v. Hanes* (U. S.) 70 Fed. 859, 866.

MECHANICAL IMPLEMENTS.

In the case of *Robertson v. Oelschlaeger*, 137 U. S. 436, 438, 11 Sup. Ct. 148, 34 L. Ed. 744, it was said that there is undoubtedly a clear distinction between mechanical implements and philosophical instruments or apparatus, and that implements for mechanical or professional use in the arts are such as are more usually employed in the trades and professions for performing the operations incidental thereto, while philosophical apparatus or instruments are such as are more commonly used for the purpose of making observations and discoveries in nature and experiments for developing and exhibiting natural forces and the conditions under which they can be called into activity. In *re Massachusetts General Hospital* (U. S.) 95 Fed. 973, 974.

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Burns' Rev. St. 1894, § 7058, making all debts due any person from "manual or mechanical labor" a preferred claim in all cases against an individual, corporation, etc., where the property thereof passes into the hands of an assignee or receiver, applies only to persons working for wages or salary, and not to contractors. *Anderson Driving Park Ass'n v. Thompson*, 48 N. E. 259, 261, 18 Ind. App. 458.

MECHANICAL MOVEMENT.

A patent for a mechanical movement is "for a mechanism transmitting power or motion from a driving part to a part to be driven." Another definition given was: "A mechanical movement is the combination and arrangement of mechanical parts intended for the translation or transformation of motion. They are mechanisms adapted usually for employment in wholly different classes of machines, which happen to require a similar resultant motion or movement of parts. A claim for a mechanical movement in a patent is unrestricted to its use in any particular kind of machine, although for its proper illustration and explanation it may be shown and described in connection with such machine." *Campbell Printing Press & Mfg.*

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A process of rendering wood fiber paper soft and pliable by moistening it with a thin water solution of gelatine, and then crumpling and pounding it, and finally drying and smoothing it, is not a mere "mechanical process," or aggregation of functions, within the doctrine of *Risdon Iron & Locomotive Works v. Medart*, 15 Sup. Ct. 745, 158 U. S. 68, 39 L. Ed. 899, but is a true process, within *Cochrane v. Deemer*, 94 U. S. 780, 24 L. Ed. 139; *American Fiber Chamolais Co. v. Buckskin Fiber Co.* (U. S.) 72 Fed. 508, 514, 18 C. C. A. 662.

MECHANICAL PURSUIT.

"Mechanical pursuit," as used in Const. art. 206, exempting those engaged in mechanical pursuits from taxation, includes those who work at their trade with their own hands and all skilled workmen performing manual labor. *City of New Orleans v. Lagman*, 10 South. 244, 245, 43 La. Ann. 1180; *Theobalds v. Conner*, 7 South. 689, 690, 42 La. Ann. 787; *City of New Orleans v. Bayley*, 35 La. Ann. 545.

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"Mechanical pursuit," as used in the Constitution, exempting from a license tax those who are engaged in a mechanical pursuit, does not include photography; the term "mechanical" being employed to indicate that the business, calling, or occupation in view must be one which cannot be utilized unless resort is had to the use of some machinery or instrument of force or appliance of power in aid to manual work in some physical undertaking in which the intervention or interaction of a superior mind is not required. In other words, the expression means that the occupation must be one by which the object realized is not dependent for its condition on the exertion of a controlling intellect, but rather on the adaptation of some helping mechanism or use of some auxiliary tool or instrument. *City of New Orleans v. Robira*, 8 South. 402, 403, 42 La. Ann. 1098, 11 L. R. A. 141. See, also, *Mullinnix v. State*, 60 S. W. 768, 42 Tex. Cr. R. 526.

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The distinction between "mechanical skill" and "inventive genius" is well understood. A device for cleaning windows, consisting of a handle or holder, with an elastic rubber strip attached to one edge, with a tubular rubber bearing or support therefor, embodies mechanical skill, and not inventive genius, and is not patentable. It is the case of the new use of an old and well-known article, so adjusted to an ordinary handle or holder as to make it capable of such new use; the adjustment of parts being purely mechanical, and only requiring the exercise of mechanical ingenuity. *Perfection Window Cleaner Co. v. Bosley* (U. S.) 2 Fed. 574, 577.

A roller in a particular combination had been used before without designs on it, and a roller with designs on it had also been used in another combination. Held, that the placing of designs on the roller in the first-named combination should be construed to involve mechanical skill, within the meaning of United States patent laws, as contradistinguished from a patentable invention, and hence not patentable. *Stimpson v. Woodman*, 77 U. S. (10 Wall.) 117, 19 L. Ed. 866.

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MECHANIC'S LIEN.

See, also, "Building Lien."

As an incumbrance, see "Incumbrance (On Title)."

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MECHANIC'S SHOP.

Factory distinguished, see "Factory."

MECH'S.

"Mech's" is an abbreviation of the word "Mechanics" as applied to the name of a bank. *Boyd v. Gilchrist*, 15 Ala. 849, 853.

"Mech's" may mean either "Merchants" or "Mechanics," and is, perhaps, properly speaking, the abbreviation of neither, and what it does mean is a question of fact, on the trial on an indictment for stealing a note payable to the "Mech's Bank." And where a man was indicted for the theft of a note payable to the "Mech's Bank," and it was charged in the indictment that it was payable to the "Merchants' Bank," and he was acquitted, and on a second indictment he was charged with the theft of the note from the "Mech's Bank," which was alleged to mean the "Mechanics' Bank," the former acquittal was no bar. *Hite v. State* (Tenn.) 9 Yerg. 357, 379.

MECHANISM.

"Mechanism" may be defined to be the arrangement and relation of the parts in a machine. *Frederick R. Stearns & Co. v. Russell* (U. S.) 85 Fed. 218, 225, 29 C. C. A. 121.

MEDALS.

According to the lexicographers all medals are suitable for use as prizes. The commercial meaning of "medal" is not different from the ordinary meaning. *United States v. McSorley* (U. S.) 65 Fed. 492, 13 C. C. A. 15.

"Medals," as used in a will giving the testator's medals to a certain party, include curious pieces of coin kept with medals, for even medals themselves were once current coin. *Bridgman v. Dove*, 3 Atk. 201, 202.

"Medals of gold, silver, or copper, such as trophies or prizes," as used in Tariff Act Oct. 1, 1890, Free List, does not include medals made of copper, washed with silver, commonly used for distribution as prizes to school children, but which have not been awarded as prizes or trophies. *United States v. McSorley* (U. S.) 65 Fed. 492, 13 C. C. A. 15.

MEDIATE DESCENT.

The terms "mediate descent" and "immediate descent" are susceptible of different interpretations, being used by different judges in different senses. A descent may be said to be mediate or immediate in regard to the mediate or immediate descent of the estate or of the right, or it may be said to be mediate or immediate in regard to the mediateness or immediateness of the pedigree or degree of consanguinity. Thus a

descent from the grandfather, who dies in possession, to the grandchild, the father being then dead, or from the uncle to the nephew, the brother being dead, is an immediate descent, although the one is collateral and the other lineal. On the other hand, with reference to the line of pedigree or consanguinity, a descent is often said to be immediate when the ancestor from whom the party derives his blood is immediate and without intervening link or degree, and mediate when the kindred is derived from him mediately, another ancestor intervening between them. *Levy v. McCartee*, 81 U. S. (6 Pet.) 102, 8 L. Ed. 334.

MEDICAL.

(1) Of, pertaining to, or having to do with the art of healing disease, or the science of medicine; as the medical profession, medical services, a medical dictionary, medical jurisprudence. (2) Containing medicine; used in medicine; medicinal, as the medical properties of a plant. *Webst. Dict.*

MEDICAL ATTENDANCE.

To constitute a medical attendance it is not requisite that a physician should attend the patient at his house. An attendance at his own office is sufficient. *Cushman v. United States Life Ins. Co.*, 70 N. Y. 72, 78.

The words "medical attendance," while often used to denote the rendering of professional medical service, does not necessarily exclude all other meanings. The efforts of the physician, however skillful or assiduous he may be, should usually be supplemented by an attendance which he cannot give. It matters not that the persons who usually give such attendance are usually termed "nurses," for their office is to assist the physician to obtain certain medical results; and hence nursing, washing, and boarding furnished to paupers constitute medical attendance. *Scott v. Winneshiek Co.*, 3 N. W. 626, 52 Iowa, 579.

The term "medical attendance," as used in Pen. Code, § 288, making it a misdemeanor to fail to furnish medical attendance to a minor, means attendance by a physician regularly licensed, under Laws 1880, p. 723, c. 513, and does not include such attendance by a person who, because of his religious belief, neglects to furnish proper medical attendance to a minor, relying on prayer for Divine aid. *People v. Pierson*, 68 N. E. 243, 245, 176 N. Y. 201, 63 L. R. A. 187.

Expenses incurred in nursing and medical attendance include expenditures for medicines used by the physician in giving such medical attendance. *Knapp v. Sioux City & P. Ry. Co.*, 71 Iowa, 41, 42, 32 N. W. 18, 20.

MEDICAL ATTENDANT.

A medical attendant is one to whom the care of a sick person has been intrusted, and would not mean a physician merely making a casual prescription for a friend. *Eddington v. Mutual Life Ins. Co. (N. Y.)* 5 Hun, 1, 6.

MEDICAL COLLEGE.

"Medical college," in Ky. St. § 2613, requiring the State Board of Health to issue a certificate to any reputable physician who has a diploma from a reputable medical college, refers to those schools of learning, teaching medicine in its different branches, at which physicians are educated. At such an institution an essential part of the instruction is in teaching the nature and effects of medicine, how to compound and administer them, and for what maladies they are to be used. In such institutions, also, surgery is an essential part of the instruction. The term does not include a school for teaching osteopathy, which neither teaches therapeutics, materia medica, nor surgery. *Nelson v. State Board of Health*, 57 S. W. 501, 504, 108 Ky. 769, 50 L. R. A. 383.

MEDICAL SOAP.

A medical soap is one used for remedial purposes, and is distinguished from a toilet soap, in that the latter is used as a detergent, for cleansing purposes only. *Park v. United States (U. S.)* 66 Fed. 731.

MEDICAL SERVICES.

The professional services of a medical clairvoyant are "medical services," within a statute providing that no person except a physician or surgeon, etc., shall receive any compensation for medical or surgical services, unless, etc. *Bibber v. Simpson*, 59 Me. 181, 182.

MEDICAL TREATMENT.

Death caused by a party inadvertently taking more opium than he intended of that prescribed to him by his physician to allay nervousness and restlessness is caused by "medical treatment for disease," within the meaning of a policy of insurance providing that the insurance should not extend to any death which may have been caused by any "medical or chemical treatment for disease." *Bayless v. Travelers' Ins. Co. (U. S.)* 2 Fed. Cas. 1077, 1078.

In construing a contract of a physician to furnish medical treatment, the court said: "It appears from the evidence that medical treatment in its enlarged sense includes surgery, and in a restricted sense, as used in medical parlance, may mean a division of the curative art exclusive of surgery." And

the court held that the term in the contract, which was made with the officers of a county, was used in its broadest sense, and included services in surgical cases. *County of Clinton v. Ramsey*, 20 Ill. App. (20 Bradw.) 577, 579.

Where an action involves a contract with a physician for medical treatment, evidence is admissible to show that the term "medical treatment" had an understood meaning, and did not embrace unusual surgical operations. *Bonart v. Lee (Tex.)* 46 S. W. 906.

MEDICINAL PREPARATION.

As intoxicating liquor, see "Intoxicating Liquor."

Antipyrine.

Antipyrine, a patented medicine, ready for administration in the condition as imported, made of the aniline from coal tar, alcohol being chemically used and broken up in the manufacture, is not a "medicinal preparation in the preparation of which alcohol is used." *Schulze-Berge v. United States (U. S.)* 66 Fed. 748, 749.

Chloral hydrate.

Chloral hydrate is dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 67, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1631], as an alcoholic medicinal preparation. *United States v. Schering (U. S.)* 119 Fed. 473.

Elaterium.

Elaterium in cakes, prepared from the juice of the fruit of *echallium elaterium* by evaporation and drying, and containing a medicinal drug known as "elaterine," which, however, is extracted from the cakes before it is used by the physician, is not a "medicinal preparation." *United States v. Merck*, 66 Fed. 251, 252, 13 C. C. A. 432.

Guarana.

Guarana, a medicinal drug, consisting of a dried paste in the form of a roll, and which, before being used as a medicine, must be further prepared, is not a "medicinal preparation," under paragraph 68, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1631]. *Cowl v. United States (U. S.)* 124 Fed. 475.

Hyoscin hydrobromate.

Hyoscin hydrobromate, in the preparation of which alcohol is necessarily used, is dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 74, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1631], as a "medicinal preparation in the preparation of which alcohol is used." *Schering v. United States (U. S.)* 119 Fed. 472.

Lanoline.

Lanoline, a manufactured article made from wool grease by an elaborate process, through which the potash salts contained in the crude wool grease have been entirely removed, the volatile fatty acids partially removed, the removal of the potash salts having destroyed any combination that had existed between them and the fats, the fats having been thereby changed in condition, is a "medicinal proprietary preparation." *Movius v. United States* (U. S.) 66 Fed. 734, 735.

Muriate of cocaine.

Hydrochlorate or muriate of cocaine, which consists of hydrochloric acid in combination with cocaine, which is, chemically speaking, an alkaloid, is a "medicinal preparation." In re *Mallinckrodt Chemical Works* (U. S.) 66 Fed. 746; *Lehn v. United States* (U. S.) 66 Fed. 748.

MEDICINAL PROPRIETARY ARTICLE.

Medicinal plasters, based on well-known medical formulas, without any claim to special merit, except with respect to the care exercised in preparing them, are not "medicinal proprietary articles," within the meaning of War Revenue Act June 13, 1898, c. 448, Schedule B, 30 Stat. 462 [U. S. Comp. St. 1901, p. 2306]. *Johnson & Johnson v. Rutan* (U. S.) 122 Fed. 903.

MEDICINE.

As a science.

See "Practice of Medicine."

In the *Century Dictionary*, "medicine" is described as a "lucrative science" and "a professional science"; and with medicine are included theology and law as sciences, so that surgical instruments are instruments for scientific purposes, within the tariff act. *United States v. Massachusetts General Hospital* (U. S.) 100 Fed. 932, 938, 41 C. C. A. 114.

Medicine, if a science at all, belongs to the class called "inductive sciences." *Huffman v. Click*, 77 N. C. 55, 57.

Same—Christian Science.

Prayer by a Christian Scientist for those suffering by disease, or words of encouragement, or the teaching that disease will disappear and physical perfection be obtained as the result of prayer, does not constitute the practice of medicine. *State v. Mylod*, 40 Atl. 753, 755, 20 R. I. 632, 41 L. R. A. 428.

Same—Dental surgery and pharmacy.

"Medicine," as used in Act Pa. April 10, 1867, § 2, conferring on the officers and professors of the *Medico-Chirurgical College of*

Philadelphia the right to confer degrees in medicine, should be construed to include dental surgery and pharmacy. The word "medicine" should be construed in its common signification, which in the beginning—and yet with most of us—includes all learning having for its object the care of the health and the cure of the ills of the human body. Even within the recollection of some of us, the practicing physician or family doctor kept in his own office his drugs, compounded them himself, and not seldom maintained a dental chair, wherein he seated his patients and dosed or extracted their ailing teeth. He had not only been taught dental surgery and pharmacy, but practiced both under his degree from a college of medicine. In re *Medico-Chirurgical College of Philadelphia*, 42 Atl. 524, 190 Pa. 121.

Same—Osteopathy.

The practice of osteopathy is not the practice of medicine or surgery, as commonly understood, since the osteopath declines to use medicines, drugs, or surgery, and his treatment consists solely in kneading, flexing, and rubbing the body, applying hot and cold baths, and prescribing diet and exercise. *State v. McKnight*, 42 S. E. 580, 581, 131 N. C. 717, 59 L. R. A. 187.

The practice of medicine, within the meaning of the statutes relative thereto, does not include the practice of osteopathy. *Nelson v. State Board of Health*, 22 Ky. Law Rep. 438, 441, 108 Ky. 769, 57 S. W. 501, 50 L. R. A. 383.

The word "medicine" is derived from "medeor," to heal. It is defined by the eminent lexicographer of medical terms, Gould, to be "the science and art of preserving health and preventing and curing disease, the healing art, including also the science of obstetrics." Bigelow, an eminent physician and author of medical works, says "medicine is the art and science of understanding diseases, and curing and relieving them when possible." The *Encyclopædia* says: "medicine, the subject-matter of one of the learned professions, includes, as it now stands, a wide range of scientific knowledge and practical skill. The science of medicine is the theory of diseases and remedies." Such definitions show not only that the word "medicine" is a technical word, denoting a science or art, comprehending not only therapeutics, but the art of understanding the nature of diseases, the causes that produce them, as well as the art of knowing how to prevent them; hygiene, sanitation, and the like. And the practitioners of medicine are not simply those who prescribe drugs or other medicinal substances as remedial agencies, but the term is broad enough to include, and does include, all persons who diagnose disease, and prescribe and apply any therapeutic agent for its use; and thus one practicing

osteopathy, a system of healing by manipulation of limbs and body, practices medicine. *Bragg v. State*, 32 South. 767, 770, 134 Ala. 165, 58 L. R. A. 925.

One practicing osteopathy without a license is within the statute against practicing medicine without a license, and liable to the penalty. *Eastman v. People*, 71 Ill. App. 236, 239.

As a remedial substance.

See "Patent Medicines": "Trade-Mark Medicine."

Proprietary medicine, see "Proprietary."

Medicine, in the proper sense, is a remedial substance. *State v. Mylod*, 40 Atl. 753, 755, 20 R. I. 632, 41 L. R. A. 428.

"Medicine" is defined to be any substance administered in a treatment of diseases, a remedial agent, and does not constitute sustenance, under statutes making it a misdemeanor for any one to deprive of necessary sustenance any child. *Justice v. State*, 42 S. E. 1013, 1014, 116 Ga. 605, 59 L. R. A. 601.

The word "medicine," in a physician's account book, in describing the various items of services, etc. rendered, is sufficiently definite to authorize the admission of the book in evidence to prove the account for medicines. The charge for medicine in a physician's book of original entries is as distinct and certain and definite as the law demands. Usually such medicine is a combination of several drugs in largely varying proportions. To say that such a charge would not be one recognized by the courts as a proper one, unless it stated all the various drugs prescribed, with the different proportions of each drug furnished in the prescription, would be a construction of the law which would be absurd. In *re Stagger's Estate*, 8 Pa. Super. Ct. R. 260, 264.

A statute rendering any negro, etc., guilty of an offense, and subject to a death penalty, for administering any medicine with intent to kill any person, construed not to mean that the article given in order to effect the felonious intent must be given or "administered under pretense that it is a medicine." The manifest intention of the Legislature was to punish any person giving or administering any substance known as "medicine," with intent to kill. *Sarah v. State*, 23 Miss. (6 Cushm.) 267, 276, 61 Am. Dec. 544.

Same—Cigars and tobacco.

Cigars and tobacco are not "medicines," within St. 1887, c. 391, § 2, providing that a shop may be kept open on Sunday for the retail sale of drugs and medicines. Cigars are manufactured articles, familiar to everybody. The materials of which they are com-

posed are carefully prepared and put into form, until they lose their original character as mere materials and become articles of commerce, known by a new name and adapted to a particular use. Cigars sold by a tobacconist in the ordinary way are not drugs or medicines, within the meaning of the statute. Many things, not in themselves medicines, may be put to a medicinal use, and when so used they may become medicines. *Commonwealth v. Marzynski*, 21 N. E. 228, 229, 149 Mass. 68.

Tobacco is not a medicine, within the meaning of a Sunday statute permitting the selling of drugs and medicines on Sunday. *State v. Ohmer*, 34 Mo. App. 115, 125.

Tobacco in its manufactured form, or cigars, cigarettes, smoking tobacco, chewing tobacco, snuff, and the like, is not a drug or medicine, within the meaning of a city ordinance excepting drugs and medicines from its operation. *Penniston v. City of Newnan*, 45 S. E. 65, 66, 117 Ga. 700.

Same—Intoxicating liquors.

Rev. St. c. 28, § 5, authorizes druggists to keep medicines and poisons authorized by the United States Dispensatory and pharmacopœia as of recognized medicinal utility. Intoxicating liquors are within this description, and druggists are authorized to keep them. *Pollard v. Allen*, 52 Atl. 924, 925, 96 Me. 455.

The will of a wholesale and retail druggist, giving and bequeathing his stock of "medicines, drugs, paints, and furniture, belonging to or contained in his store" to certain persons, cannot be construed to include 50 barrels of whisky, which were stored in a distillery bonded warehouse, though whisky may be sold by druggists in comparatively small quantities as medicine, which a great many people so take. *Kloch v. Burger*, 58 Md. 575, 578.

MEDITATE.

"Meditated," as used in a statute making it a capital offense for any free person to aid or assist, or be in any wise concerned with, any slave or slaves in any actual or meditated rebellion or conspiracy against the laws, government, or people of this territory, etc., "must be held to mean something not yet done, something in a state of incubation, yet to discover itself, something brooded over and perhaps talked about; for, if there was an entire silence, it would be difficult to ascertain the feelings of the heart or the operation of the mind. Thus considered, it must be held to limit the substantive, 'rebellion' or 'conspiracy,' in its connection to a scheme in fieri, which by no overt act has seen the light of day." *State v. McDonald* (Ala.) 4 Port. 449, 455.

MEET—MEETING.

See "Annual Meeting"; "Family Meeting"; "General Meeting"; "Monthly Meeting"; "Primary Meeting"; "Regular Meeting"; "Special Meeting"; "Town Meeting"; "Yearly Meeting."

Webster defines the word "meet" as "to come together by mutual approach; to fall in with another; to come face to face." He also defines it as "to come together with hostile purpose; to have an encounter or conflict." *Pitts v. State*, 16 S. W. 189, 190, 29 Tex. App. 374.

Webster defines "meet" to mean "to come upon or against, front to front, as distinguished from contact by following and overtaking," and this is the ordinary and popular meaning of the word; but, as used in a charge on a prosecution for carrying a concealed weapon, that the pistol "must be carried in such an open manner and so fully exposed to view that a person meeting the one with the weapon would ordinarily see and know that he had a pistol about his person," the word "meeting" meant coming in contact, and not necessarily coming toward each other from opposite directions. *Stripling v. State*, 40 S. E. 733, 114 Ga. 538.

Whether there is a meeting within the meaning of Pen. Code, art. 598, subd. 4, providing that it must appear that a killing took place immediately upon the happening of the insulting conduct, or as soon thereafter as the party killing may meet the person killed, after having been informed of certain insults, in order to reduce the killing to manslaughter under the provisions of article 597, subd. 4, is a question for the jury in a case when defendant and deceased are shown to have come within 60 or 70 feet of each other on the sidewalk, and that there was nothing to prevent defendant from attacking deceased. *Pitts v. State*, 16 S. W. 189, 190, 29 Tex. App. 374.

As fit or suitable.

An assignment by an insolvent debtor of his property, with directions to his trustees to take possession of the property and "within convenient time, as to them shall seem meet, to sell the property and apply the proceeds to the payment of debts as directed," is void as to the creditors of the assignor. The word "meet" means "fit" or "suitable." They shall attend to the business then, when it shall suit their convenience. Perhaps it will not suit their convenience in six months or a year, or even a longer time. In other words, they shall attend to it when they please; but creditors are entitled to have the assigned property converted into money and applied to the payment of their debts without any unnecessary delay. *Woodburn v. Mosher* (N. Y.) 9 Barb. 255, 257 (citing *Webst.*).

Bankruptcy act.

Bankr. Act 1867, § 47, gives a fee of one dollar for every application for any meeting in any matter under the act. Held, that the word "meeting," as used in such section and elsewhere in the act, means a meeting of creditors, such as is spoken of in the twelfth, twenty-seventh and twenty-eighth sections. Thus the application by a creditor for an order for the examination of the bankrupt account would be regarded as an application for a meeting of creditors, within the forty-seventh section. In *re MacIntire*, 16 Fed. Cas. 148, 149.

County commissioners.

According to parliamentary law, strictly speaking, an original meeting and an adjourned meeting constitute the same meeting; but it is held that in Gen. St. 1878, c. 13, §§ 49-53, relative to meetings of the board of county commissioners, and providing that when a petition is made for the establishment, change, or vacation of a county road, the county auditor shall lay it before the board at their next session, and after the lapse of 30 days, at the next meeting of the board, they shall proceed to determine the prayer of the petition, the words "session" and "meeting" are not used in any strictly technical sense, but have reference merely to a time when the board is lawfully convened and in session for the transaction of business. *Burkleo v. Washington County*, 38 Minn. 441, 442, 443, 38 N. W. 108.

Road law.

"Meet," as used in Rev. St. c. 51, § 1, providing that, whenever any persons shall meet each other on any road, each shall drive to the right of the middle of the traveled part of such road, construed to mean only persons approaching each other on the same road, and not persons coming together from different directions at the intersection of two roads or streets. *Lovejoy v. Dolan*, 64 Mass. (10 Cush.) 495, 497.

Code, § 1000, providing that "persons meeting each other" on the public highway shall give one-half of the same by turning to the right, "does not mean merely persons passing each other while going in opposite directions, but implies a coming together in such manner that there would be an actual collision, or an apparent danger of one, if they should pursue their course without change of direction. If one person travel along one side of a highway, and another pass along the other, there is no meeting, within the meaning of the statute, and no violence of its provisions; and that would be true, even though each person would be on the left side of the highway." *Riepe v. Elting*, 56 N. W. 285, 287, 89 Iowa, 82, 26 L. R. A. 769, 48 Am. St. Rep. 356.

School district.

The word "meeting" as applied to school district meetings whenever used in the title relating to public instruction, shall mean a school meeting warned as provided by law. *V. S. 1894, 804.*

Voters.

An indictment for illegal voting, alleging that a "meeting" of the qualified voters of the various wards was holden on a certain day for the annual election of municipal officers, and that the defendant, at ward 1, in said city, on the day of the election aforesaid, committed the offense charged, sufficiently alleges that the voters met in their respective wards, and that a meeting was held on that day in each of the wards. As a matter of literal exactness it would have been more correct to have alleged that meetings of the voters of the various wards were held on that day, instead of describing it as a meeting in the singular number. *Commonwealth v. Desmond, 122 Mass. 12, 14.*

MEETING END ON.

Sailing ships are "meeting end on," within the meaning of the rules and regulations for preventing collisions, when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision because of their proximity, and when the vessels advance so near each other that the necessity to prevent such a disaster begins. *The Nichols, 74 U. S. (7 Wall.) 656, 19 L. Ed. 157; The George Law (U. S.) 10 Fed. Cas. 216, 219; The T. V. Arrowsmith, Id.*

Sailing vessels are "meeting nearly end on" where two sailing ships are approaching from nearly opposite directions, or on lines of approach substantially parallel, and so near to each other as to involve risk of collision. *The Nichols, 74 U. S. (7 Wall.) 656, 19 L. Ed. 157; The George Law (U. S.) 10 Fed. Cas. 216, 219; The T. V. Arrowsmith, Id.*

MEETING HEAD ON.

The term "meeting head on, or nearly end on," in an admiralty rule in reference to vessels meeting head on or nearly end on, applies to vessels meeting in a narrow channel, where they must pass on narrow courses, not exceeding a half point apart. *The F. W. Wheeler (U. S.) 78 Fed. 824, 828, 24 C. C. A. 353.*

MEETING HOUSE.

A deed granting land on condition that it be continually used as a site for a "meeting house and church," means a house to meet in for religious worship, but does not require

that it should be constantly used for that purpose. It must, however, be kept for that use, and not put to any other use substantially inconsistent with that. *Howe v. School Dist. No. 3, 43 Vt. 282, 288.*

The terms "church," "meeting house," or "other place of religious worship," within the meaning of a statute exempting such places from taxation, does not include a parsonage belonging to an Episcopal Church, if it is not actually annexed to the church edifice or its curtilage. *Dauphin County Treasurer v. St. Stephens Church (Pa.) 3 Phila. 189, 190.*

A church or meeting house, within the meaning of Act May 14, 1874, which provides that all churches, meeting houses, or other regular places of stated worship, with the grounds thereto annexed necessary for the occupancy of the same, shall be exempt from taxation, is confined to churches which in the language of the law are regular places of stated worship. A mere foundation or partly erected walls might by a forced construction be called an unfinished church or meeting house, but it cannot by any construction be made a regular place of stated worship. *Erie County Com'rs v. Bishop (Pa.) 13 Phila. 509, 510.*

The term "meeting house," in an indictment for card playing at a public place, which is designated as a meeting house, is insufficient, as a meeting house may be a public place at one time and not at another time, and therefore it must be alleged that it was a public place at the time of the card playing. *Bishop v. Commonwealth (Va.) 13 Grat. 785, 787.*

MEETING OF MINDS.

The term "meeting of minds," as used in the rule that there is no valid contract without a meeting of minds, means the expression of readiness to contract by one party and the expression of an acceptance thereof by the other party. The offer or acceptance is frequently raised by implication of law. *Davis v. Town of Seymour, 21 Atl. 1004, 1005, 59 Conn. 531, 13 L. R. A. 210.*

MEETING OF LEGISLATURE.

A "meeting of the Legislature," within *Hutch. Code, p. 985*, which provides that, in the event of death, resignation, or refusal of the superintendent of the penitentiary to act, the vacancy shall be filled by the Governor until the meeting of the Legislature, is any meeting of the Legislature, whether at an adjourned, called, or regular session. *McAffee v. Russell, 29 Miss. 84, 95.*

MEETING WITNESSES FACE TO FACE.

See "Face to Face."

intends their manufacture. In re Jones (U. S.) 13 Fed. Cas. 931.

Miller.

A mechanic is an artisan or artist. The term in ordinary acceptation does not import either a farmer or a manufacturer of flour. Thus a miller who raises grain, and purchases more, and retails the flour at other places than his mill, is not a mechanic, under Act April 22, 1846, § 11, exempting mechanics from a mercantile tax. Berks Co. v. Bertolet, 13 Pa. (1 Harris) 522, 524.

Painter.

The term "mechanic," in the statute exempting the wages of mechanics from execution, includes a house and sign painter. Waite v. Franciola, 16 S. W. 116, 90 Tenn. 191.

"Mechanics," as used in an insurance policy providing that it shall be void if mechanics be employed in building or repairing the premises, does not include painters, since a mechanic is, in the common acceptation of the term, a workman employed in shaping and uniting materials, such as wood, metals, etc., into any kind of structure, machine, or other object, requiring the use of tools or instruments. Smith v. German Ins. Co., 65 N. W. 236, 239, 107 Mich. 270, 30 L. R. A. 368.

Photographer.

A photographer is not a mechanic, within the meaning of the statute exempting the tools of a mechanic from execution. Story v. Walker, 79 Tenn. (11 Lea) 515, 517, 47 Am. Rep. 305. See, also, City of New Orleans v. Robira, 8 South. 402, 403, 42 La. Ann. 1098, 11 L. R. A. 141.

A photographer, though doing some work of a mechanical character, cannot be regarded as a mechanic. Mullinnix v. State, 60 S. W. 768, 42 Tex. Cr. R. 526.

Plasterer.

A plasterer is held a laborer or mechanic, within a statute providing that a homestead is not exempt from any laborer's or mechanic's lien. Merrigan v. English, 22 Pac. 454, 457, 9 Mont. 113, 5 L. R. A. 837.

A plasterer is engaged in a mechanical pursuit, within the Constitution, exempting such persons from license taxes, even though he employs others of the same class to assist him. City of New Orleans v. Bayley, 35 La. Ann. 545, 546.

Printer.

"Mechanic," as used in Code 1873, § 797, exempting from taxation the tools of any mechanic to the amount of \$300, should be construed to include a printer. Webster defines the word "mechanic" as one who works

with machines or instruments; a person whose occupation is to construct machines, or goods, wares, instruments, furniture, and the like; one skilled in a mechanical occupation or art. Smith v. Osburn, 5 N. W. 681, 682, 53 Iowa, 474.

Sawmill owner.

The owner of a sawmill and manufacturer of lumber was held to be a mechanic, within Const. 1868, excepting mechanic's liens from the homestead exemption act, as he worked with a machine, and shaped materials of wood for building, etc. Gullledge v. Preddy, 32 Ark. 433, 434.

To be a mechanic, it is necessary that the person should be an operative engaged in a business requiring some particular skill in doing the work, by virtue of which the law creates in his favor a lien; and a sawmillman is not a mechanic, so as to give him a mechanic's lien, where the work done was simply sawing timber into lumber, but he was entitled only to the logging lien given by the statute. The sawmillman has a lien by virtue of ownership of his machinery which converts timber into lumber, and not by virtue of any labor he may perform as a mechanic in operating machinery. Evans v. Beddingfield, 32 S. E. 664, 106 Ga. 755.

Superintendent or manager.

A general manager of a shop is not a mechanic or laborer, within the term "mechanics and laborers" in a statute giving mechanics and laborers employed in a shop a lien for their services. Raynes v. Kokomo Ladder & Furniture Co., 54 N. E. 1061, 153 Ind. 315.

A boss or director of an entire department of an extensive factory, who employs and discharges the hands that work under him, but does no manual labor—merely directing the work of the operatives under him—is not a journeyman, mechanic, or day laborer, within a statute exempting the wages of such persons from garnishment. Kyle v. Montgomery, 73 Ga. 337, 343.

The term "mechanics," in a statute providing that all mechanics, laborers, and operators who may have performed labor in the construction or repair of any railroad, locomotive, car, or other equipment, or may have performed labor in the operating of a railroad, or to whom wages may be due or owing, shall hereafter have a lien prior to all others upon such railroad or its equipment for such wages as are unpaid, does not include the foreman or superintendent of laborers of a subcontractor engaged in the construction of appellant's road, who furnishes certain tools and teams to carry on the work of construction, and sometimes uses the tools himself, and at other times directs their use by the laborers. Texas & St. L. R. Co. v.

Allen (Tex.) 1 White & W. Civ. Cas. Ct. App. §§ 568, 569.

MECHANICAL BUSINESS.

The term "mechanical business," as used in Corp. Act April 29, 1874, cl. 18, in reference to mechanical business, refers to the employment of skilled labor in shaping materials into structures or products of utility, and not as incident to one of the arts or professions. The term does not include preparing and mechanically executing designs for decorating and finishing a building, nor dredging, excavating, building, and executing submarine work. In re Mechanical Business Cases, 9 Pa. Co. Ct. R. 1.

The business of erecting buildings is a mechanical business, within a statute authorizing the formation of co-operative associations for trade or carrying on any lawful mechanical, manufacturing, or agricultural business. *Finnegan v. Noerenberg*, 53 N. W. 1150, 1151, 52 Minn. 239, 18 L. R. A. 778, 38 Am. St. Rep. 552.

The mining of iron ore is a "mechanical business," within Const. art. 10, § 3, providing that each stockholder of any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him. A mechanical business, within the meaning of such exception, is one closely allied to or incidental to some kind of manufacturing business. *Cowling v. Zenith Iron Co.*, 65 Minn. 281, 68 N. W. 48, 49, 33 L. R. A. 508, 60 Am. St. Rep. 471.

MECHANICAL ENGINEER.

A mechanical engineer is one possessing a proficiency not possessed by others in the knowledge of designing, contracting, setting up, and operating boilers, engines, pumps, and machinery generally, and hence a mechanical engineer is a proper person to call upon as an expert upon questions of that character. *Craven v. Orleans Levee Dist.*, 26 South. 104, 51 La. Ann. 1267.

MECHANICAL EQUIVALENT

See, also, "Equivalent (In Patent Law)."

A mechanical equivalent, as generally understood, is found where one thing may be adopted, instead of another, by a person skilled in the art, from his knowledge of the art. *Johnson v. Root* (U. S.) 13 Fed. Cas. 823.

A mechanical equivalent, as generally understood, is found where the one may be adopted, instead of the other, by a person skilled in the art, from his knowledge of the art. *Smith v. Marshall* (U. S.) 22 Fed. Cas. 595 (citing Curt. Pat. § 332).

A mechanical equivalent, as generally understood, is found where one may be adopted, instead of the other, by a skilled mechanic accustomed to machinery and with a competent knowledge of mechanical powers. *May v. Johnson County* (U. S.) 16 Fed. Cas. 1218, 1219.

A mechanical equivalent must be adaptable to use as a substitute for something else, and competent to perform the functions of a particular device for which it may be substituted. *Alaska Packers' Ass'n v. Letson* (U. S.) 119 Fed. 599, 611.

"Mechanical equivalents," as understood in connection with infringements of patents, are such devices as were known previously, and which, in the particular combination of devices specified as constituting the patented invention, can be adapted to perform the functions of those specified devices for which they are employed as substitutes without changing the inventor's idea of means; in other words, without introducing an original idea, producing as the result of it an improvement which is itself a patentable invention. *Jensen Can-Filling Mach. Co. v. Norton* (U. S.) 67 Fed. 236, 239, 14 C. C. A. 383.

The term "mechanical equivalent," when applied to the interpretation of a pioneer patent, has a broad and generous significance, while its meaning is very narrow and limited when it conditions the construction of a patent for a slight and almost immaterial improvement. *Adams Electric R. Co. v. Lindell R. Co.* (U. S.) 77 Fed. 432, 440, 23 C. C. A. 223; *Stirrat v. Excelsior Mfg. Co.* (U. S.) 61 Fed. 980, 981, 10 C. C. A. 216; *McCormick v. Talcott*, 61 U. S. (20 How.) 402, 405, 15 L. Ed. 930; *Chicago & N. W. R. Co. v. Sayles*, 97 U. S. 554, 556, 24 L. Ed. 1053; *Brill v. St. Louis Car Co.* (U. S.) 90 Fed. 666, 33 C. C. A. 213. In its application to all that great mass of inventions which falls between the two extremes, its significance is proportioned to the character of the advance or invention under consideration, and is so interpreted by the courts as to protect the inventor against piracy and the public against unauthorized monopoly. *Brammer v. Schroeder* (U. S.) 106 Fed. 918, 920, 46 C. C. A. 41; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* (U. S.) 106 Fed. 602, 710, 45 C. C. A. 544.

The use of a metal strap, composed of two pieces, joined together by bolt and screw, instead of a continuous strap, is not the substitution of a mechanical equivalent, but is merely a change in the form of the strap. *Holmes v. Truman* (U. S.) 67 Fed. 542, 545, 14 C. C. A. 517.

A machine of old combination, that works well and accomplishes results intended and desired, cannot be substituted as a mechanical equivalent for a patented ma-

chine that will not and cannot be made to work, and is therefore impractical and worthless. The law of patents affords no protection to a patented machine that has been proved by experiment to be useless and valueless. The owner of such a machine cannot sustain a suit for infringement against the person who employs the same old elements and devices so differently combined and arranged as to operate successfully in accomplishing the result intended by the worthless machine. *Carter Mach. Co. v. Hanes* (U. S.) 70 Fed. 859, 866.

MECHANICAL IMPLEMENTS.

In the case of *Robertson v. Oelschlaeger*, 137 U. S. 436, 438, 11 Sup. Ct. 148, 34 L. Ed. 744, it was said that there is undoubtedly a clear distinction between mechanical implements and philosophical instruments or apparatus, and that implements for mechanical or professional use in the arts are such as are more usually employed in the trades and professions for performing the operations incidental thereto, while philosophical apparatus or instruments are such as are more commonly used for the purpose of making observations and discoveries in nature and experiments for developing and exhibiting natural forces and the conditions under which they can be called into activity. In *re Massachusetts General Hospital* (U. S.) 95 Fed. 973, 974.

MECHANICAL LABOR.

Burns' Rev. St. 1894, § 7058, making all debts due any person from "manual or mechanical labor" a preferred claim in all cases against an individual, corporation, etc., where the property thereof passes into the hands of an assignee or receiver, applies only to persons working for wages or salary, and not to contractors. *Anderson Driving Park Ass'n v. Thompson*, 48 N. E. 259, 261, 18 Ind. App. 458.

MECHANICAL MOVEMENT.

A patent for a mechanical movement is "for a mechanism transmitting power or motion from a driving part to a part to be driven." Another definition given was: "A mechanical movement is the combination and arrangement of mechanical parts intended for the translation or transformation of motion. They are mechanisms adapted usually for employment in wholly different classes of machines, which happen to require a similar resultant motion or movement of parts. A claim for a mechanical movement in a patent is unrestricted to its use in any particular kind of machine, although for its proper illustration and explanation it may be shown and described in connection with such machine." *Campbell Printing Press & Mfg.*

Co. v. Miehle Printing Press & Mfg. Co. (U. S.) 102 Fed. 159, 168, 42 C. C. A. 235.

MECHANICAL PROCESS.

A process of rendering wood fiber paper soft and pliable by moistening it with a thin water solution of gelatine, and then crumpling and pounding it, and finally drying and smoothing it, is not a mere "mechanical process," or aggregation of functions, within the doctrine of *Risdon Iron & Locomotive Works v. Medart*, 15 Sup. Ct. 745, 158 U. S. 68, 39 L. Ed. 899, but is a true process, within *Cochrane v. Deemer*, 94 U. S. 780, 24 L. Ed. 139; *American Fiber Chamolis Co. v. Buckskin Fiber Co.* (U. S.) 72 Fed. 508, 514, 18 C. C. A. 662.

MECHANICAL PURSUIT.

"Mechanical pursuit," as used in Const. art. 206, exempting those engaged in mechanical pursuits from taxation, includes those who work at their trade with their own hands and all skilled workmen performing manual labor. *City of New Orleans v. Lagman*, 10 South. 244, 245, 43 La. Ann. 1180; *Theobalds v. Conner*, 7 South. 689, 690, 42 La. Ann. 787; *City of New Orleans v. Bayley*, 35 La. Ann. 545.

The term "mechanical pursuit," in Const. art. 206, exempting persons engaged in mechanical pursuits from a license tax, includes a barber, as his occupation is mechanical. *State v. Hirn*, 16 South. 403, 46 La. Ann. 1443.

"Mechanical pursuit," as used in the Constitution, exempting from a license tax those who are engaged in a mechanical pursuit, does not include photography; the term "mechanical" being employed to indicate that the business, calling, or occupation in view must be one which cannot be utilized unless resort is had to the use of some machinery or instrument of force or appliance of power in aid to manual work in some physical undertaking in which the intervention or interaction of a superior mind is not required. In other words, the expression means that the occupation must be one by which the object realized is not dependent for its condition on the exertion of a controlling intellect, but rather on the adaptation of some helping mechanism or use of some auxiliary tool or instrument. *City of New Orleans v. Robira*, 8 South. 402, 403, 42 La. Ann. 1098, 11 L. R. A. 141. See, also, *Mullinnix v. State*, 60 S. W. 768, 42 Tex. Cr. R. 526.

Master builders and contractors, who employ others to do the work which they merely superintend, are not engaged in mechanical pursuits. *Theobalds v. Conner*, 7 South. 689, 690, 42 La. Ann. 787.

MECHANICAL SKILL.

"Mechanical skill" is that which involves only the expression of the ordinary faculties of reasoning upon the material supplied, by a special knowledge and the facility of manipulation which results from its habitual and intelligent practice. *J. J. Warren Co. v. Rosenblatt* (U. S.) 80 Fed. 540, 542, 25 C. C. A. 625 (citing *Hollister v. Benedict & Burnham Mfg. Co.*, 113 U. S. 59, 72, 73, 5 Sup. Ct. 717, 28 L. Ed. 901).

The term "mechanical skill," as used in patents, is not restricted to the skill of any particular mechanic. The line to be marked is that which separates mere constructive ability from inventive capacity; and as the lowest order of invention is something more than mechanical skill, the highest degree of mechanical skill is something less than invention. All mechanics are not equally skillful, and the question is not whether every mechanic would do the work in one and the best way, but whether any mechanic might, without invention, do the work in the particular manner sought to be exclusively appropriated by the patent. *Johnson Co. v. Pennsylvania Steel Co.* (U. S.) 67 Fed. 940, 942.

The distinction between "mechanical skill" and "inventive genius" is well understood. A device for cleaning windows, consisting of a handle or holder, with an elastic rubber strip attached to one edge, with a tubular rubber bearing or support therefor, embodies mechanical skill, and not inventive genius, and is not patentable. It is the case of the new use of an old and well-known article, so adjusted to an ordinary handle or holder as to make it capable of such new use; the adjustment of parts being purely mechanical, and only requiring the exercise of mechanical ingenuity. *Perfection Window Cleaner Co. v. Bosley* (U. S.) 2 Fed. 574, 577.

A roller in a particular combination had been used before without designs on it, and a roller with designs on it had also been used in another combination. Held, that the placing of designs on the roller in the first-named combination should be construed to involve mechanical skill, within the meaning of United States patent laws, as contradistinguished from a patentable invention, and hence not patentable. *Stimpson v. Woodman*, 77 U. S. (10 Wall.) 117, 19 L. Ed. 866.

MECHANICAL TOOLS.

"Mechanical tools," as used in Comp. Laws, § 4494, providing that the property exempted in a certain statute, excepting mechanical tools and implements of husbandry, shall not be exempt from any execution issued on a judgment rendered for the purchase money for the same property, should be construed to include the dental instruments of a dentist. Though a dentist is in one sense a professional man, in another

sense his calling is mainly mechanical, and the tools which he employs are used in mechanical operation. The operations of the dentist are for the most part mechanical, and so far as tools are employed they are purely so. The ordinary meaning of "mechanical tools" will include those of a dentist. *Maxon v. Perrott*, 17 Mich. 332, 337, 97 Am. Dec. 191.

MECHANIC'S LIEN.

See, also, "Building Lien."

As an incumbrance, see "Incumbrance (On Title)."

As written instrument or instrument in writing, see "Written Instrument."

A mechanic's lien does not exist and is not enforceable of common right, but is purely a statutory lien, and can be maintained only on those conditions which the statute imposes. *May, Purington & Bonner Brick Co. v. General Engineering Co.*, 54 N. E. 638, 640, 180 Ill. 535; *Newman v. Brown*, 27 Kan. 117, 121; *Blattner v. Wadleigh*, 48 Kan. 290, 29 Pac. 165, 166; *Martin v. Burns*, 39 Pac. 177, 54 Kan. 641.

A "mechanic's lien" is a creature of and purely dependent upon statute. To its existence it is necessary that there should be a performance and concurrence of all the conditions and acts prescribed by the statute; the statute creating the lien being only for the benefit of persons performing the labor or furnishing the material under a contract made in accordance with the provisions prescribed. It does not protect those who lend money to the owner to pay laborers or material men, or make payment to them on the order of the owner of the building or otherwise. *First Nat. Bank v. Campbell*, 58 S. W. 628, 630, 24 Tex. Civ. App. 160.

A mechanic's lien is a claim only, and its averments and dates establish nothing. It does not operate as *res judicata*. *Safe Deposit & Trust Co. v. Columbia Iron & Steel Co.*, 35 Atl. 229, 230, 176 Pa. 536.

A mechanic's or manufacturer's lien is a simple right of retainer personal to the party in whom it exists, and not assignable or attachable as personal property or as a chose in action of the person entitled to it. *Lovett v. Brown*, 40 N. H. 511.

A mechanic's lien upon real property has been declared to be in the nature of a mortgage of the property, though it is imposed by statute in favor of a whole class of persons. It has also been likened to an attachment and to a *lis pendens*. *Springston v. Wheeler*, 58 S. W. 658, 660, 3 Ind. T. 388 (citing *Jones*, Liens, § 1184).

MECHANIC'S SHOP.

Factory distinguished, see "Factory."

MECH'S.

"Mech's" is an abbreviation of the word "Mechanics" as applied to the name of a bank. *Boyd v. Gilchrist*, 15 Ala. 849, 853.

"Mech's" may mean either "Merchants" or "Mechanics," and is, perhaps, properly speaking, the abbreviation of neither, and what it does mean is a question of fact, on the trial on an indictment for stealing a note payable to the "Mech's Bank." And where a man was indicted for the theft of a note payable to the "Mech's Bank," and it was charged in the indictment that it was payable to the "Merchants' Bank," and he was acquitted, and on a second indictment he was charged with the theft of the note from the "Mech's Bank," which was alleged to mean the "Mechanics' Bank," the former acquittal was no bar. *Hite v. State* (Tenn.) 9 Yerg. 357, 379.

MECHANISM.

"Mechanism" may be defined to be the arrangement and relation of the parts in a machine. *Frederick R. Stearns & Co. v. Russell* (U. S.) 85 Fed. 218, 225, 29 C. C. A. 121.

MEDALS.

According to the lexicographers all medals are suitable for use as prizes. The commercial meaning of "medal" is not different from the ordinary meaning. *United States v. McSorley* (U. S.) 65 Fed. 492, 13 C. C. A. 15.

"Medals," as used in a will giving the testator's medals to a certain party, include curious pieces of coin kept with medals, for even medals themselves were once current coin. *Bridgman v. Dove*, 3 Atk. 201, 202.

"Medals of gold, silver, or copper, such as trophies or prizes," as used in Tariff Act Oct. 1, 1890, Free List, does not include medals made of copper, washed with silver, commonly used for distribution as prizes to school children, but which have not been awarded as prizes or trophies. *United States v. McSorley* (U. S.), 65 Fed. 492, 13 C. C. A. 15.

MEDIATE DESCENT.

The terms "mediate descent" and "immediate descent" are susceptible of different interpretations, being used by different judges in different senses. A descent may be said to be mediate or immediate in regard to the mediate or immediate descent of the estate or of the right, or it may be said to be mediate or immediate in regard to the mediateness or immediateness of the pedigree or degree of consanguinity. Thus a

descent from the grandfather, who dies in possession, to the grandchild, the father being then dead, or from the uncle to the nephew, the brother being dead, is an immediate descent, although the one is collateral and the other lineal. On the other hand, with reference to the line of pedigree or consanguinity, a descent is often said to be immediate when the ancestor from whom the party derives his blood is immediate and without intervening link or degree, and mediate when the kindred is derived from him mediately, another ancestor intervening between them. *Levy v. McCartee*, 31 U. S. (6 Pet.) 102, 8 L. Ed. 334.

MEDICAL.

(1) Of, pertaining to, or having to do with the art of healing disease, or the science of medicine; as the medical profession, medical services, a medical dictionary, medical jurisprudence. (2) Containing medicine; used in medicine; medicinal, as the medical properties of a plant. *Webst. Dict.*

MEDICAL ATTENDANCE.

To constitute a medical attendance it is not requisite that a physician should attend the patient at his house. An attendance at his own office is sufficient. *Cushman v. United States Life Ins. Co.*, 70 N. Y. 72, 78.

The words "medical attendance," while often used to denote the rendering of professional medical service, does not necessarily exclude all other meanings. The efforts of the physician, however skillful or assiduous he may be, should usually be supplemented by an attendance which he cannot give. It matters not that the persons who usually give such attendance are usually termed "nurses," for their office is to assist the physician to obtain certain medical results; and hence nursing, washing, and boarding furnished to paupers constitute medical attendance. *Scott v. Winneshiek Co.*, 3 N. W. 626, 52 Iowa, 579.

The term "medical attendance," as used in Pen. Code, § 288, making it a misdemeanor to fail to furnish medical attendance to a minor, means attendance by a physician regularly licensed, under Laws 1880, p. 723, c. 513, and does not include such attendance by a person who, because of his religious belief, neglects to furnish proper medical attendance to a minor, relying on prayer for Divine aid. *People v. Pierson*, 68 N. E. 243, 245, 176 N. Y. 201, 63 L. R. A. 187.

Expenses incurred in nursing and medical attendance include expenditures for medicines used by the physician in giving such medical attendance. *Knapp v. Sioux City & P. Ry. Co.*, 71 Iowa, 41, 42, 32 N. W. 18, 20.

MEDICAL ATTENDANT.

A medical attendant is one to whom the care of a sick person has been intrusted, and would not mean a physician merely making a casual prescription for a friend. *Eddington v. Mutual Life Ins. Co. (N. Y.)* 5 Hun, 1, 6.

MEDICAL COLLEGE.

"Medical college," in Ky. St. § 2613, requiring the State Board of Health to issue a certificate to any reputable physician who has a diploma from a reputable medical college, refers to those schools of learning, teaching medicine in its different branches, at which physicians are educated. At such an institution an essential part of the instruction is in teaching the nature and effects of medicine, how to compound and administer them, and for what maladies they are to be used. In such institutions, also, surgery is an essential part of the instruction. The term does not include a school for teaching osteopathy, which neither teaches therapeutics, materia medica, nor surgery. *Nelson v. State Board of Health*, 57 S. W. 501, 504, 108 Ky. 769, 50 L. R. A. 383.

MEDICAL SOAP.

A medical soap is one used for remedial purposes, and is distinguished from a toilet soap, in that the latter is used as a detergent, for cleansing purposes only. *Park v. United States (U. S.)* 66 Fed. 781.

MEDICAL SERVICES.

The professional services of a medical clairvoyant are "medical services," within a statute providing that no person except a physician or surgeon, etc., shall receive any compensation for medical or surgical services, unless, etc. *Bibber v. Simpson*, 59 Me. 181, 182.

MEDICAL TREATMENT.

Death caused by a party inadvertently taking more opium than he intended of that prescribed to him by his physician to allay nervousness and restlessness is caused by "medical treatment for disease," within the meaning of a policy of insurance providing that the insurance should not extend to any death which may have been caused by any "medical or chemical treatment for disease." *Bayless v. Travelers' Ins. Co. (U. S.)* 2 Fed. Cas. 1077, 1078.

In construing a contract of a physician to furnish medical treatment, the court said: "It appears from the evidence that medical treatment in its enlarged sense includes surgery, and in a restricted sense, as used in medical parlance, may mean a division of the curative art exclusive of surgery." And

the court held that the term in the contract, which was made with the officers of a county, was used in its broadest sense, and included services in surgical cases. *County of Clinton v. Ramsey*, 20 Ill. App. (20 Bradw.) 577, 579.

Where an action involves a contract with a physician for medical treatment, evidence is admissible to show that the term "medical treatment" had an understood meaning, and did not embrace unusual surgical operations. *Bonart v. Lee (Tex.)* 46 S. W. 906.

MEDICINAL PREPARATION.

As intoxicating liquor, see "Intoxicating Liquor."

Antipyrine.

Antipyrine, a patented medicine, ready for administration in the condition as imported, made of the aniline from coal tar, alcohol being chemically used and broken up in the manufacture, is not a "medicinal preparation in the preparation of which alcohol is used." *Schulze-Berge v. United States (U. S.)* 66 Fed. 748, 749.

Chloral hydrate.

Chloral hydrate is dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 67, 80 Stat. 154 [U. S. Comp. St. 1901, p. 1631], as an alcoholic medicinal preparation. *United States v. Schering (U. S.)* 119 Fed. 473.

Elaterium.

Elaterium in cakes, prepared from the juice of the fruit of *echallium elaterium* by evaporation and drying, and containing a medicinal drug known as "elaterine," which, however, is extracted from the cakes before it is used by the physician, is not a "medicinal preparation." *United States v. Merck*, 66 Fed. 251, 252, 13 C. C. A. 432.

Guarana.

Guarana, a medicinal drug, consisting of a dried paste in the form of a roll, and which, before being used as a medicine, must be further prepared, is not a "medicinal preparation," under paragraph 68, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 80 Stat. 154 [U. S. Comp. St. 1901, p. 1631]. *Cowl v. United States (U. S.)* 124 Fed. 475.

Hyoscin hydrobromate.

Hyoscin hydrobromate, in the preparation of which alcohol is necessarily used, is dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 74, 80 Stat. 155 [U. S. Comp. St. 1901, p. 1631], as a "medicinal preparation in the preparation of which alcohol is used." *Schering v. United States (U. S.)* 119 Fed. 472.

Lanoline.

Lanoline, a manufactured article made from wool grease by an elaborate process, through which the potash salts contained in the crude wool grease have been entirely removed, the volatile fatty acids partially removed, the removal of the potash salts having destroyed any combination that had existed between them and the fats, the fats having been thereby changed in condition, is a "medicinal proprietary preparation." *Movius v. United States* (U. S.) 66 Fed. 734, 735.

Muriate of cocaine.

Hydrochlorate or muriate of cocaine, which consists of hydrochloric acid in combination with cocaine, which is, chemically speaking, an alkaloid, is a "medicinal preparation." In re *Mallinckrodt Chemical Works* (U. S.) 66 Fed. 746; *Lehn v. United States* (U. S.) 66 Fed. 748.

MEDICINAL PROPRIETARY ARTICLE.

Medicinal plasters, based on well-known medical formulas, without any claim to special merit, except with respect to the care exercised in preparing them, are not "medicinal proprietary articles," within the meaning of War Revenue Act June 13, 1898, c. 448, Schedule B, 30 Stat. 462 [U. S. Comp. St. 1901, p. 2306]. *Johnson & Johnson v. Rutan* (U. S.) 122 Fed. 993.

MEDICINE.

As a science.

See "Practice of Medicine."

In the *Century Dictionary*, "medicine" is described as a "lucrative science" and "a professional science"; and with medicine are included theology and law as sciences, so that surgical instruments are instruments for scientific purposes, within the tariff act. *United States v. Massachusetts General Hospital* (U. S.) 100 Fed. 932, 938, 41 C. C. A. 114.

Medicine, if a science at all, belongs to the class called "inductive sciences." *Huffman v. Click*, 77 N. C. 55, 57.

Same—Christian Science.

Prayer by a Christian Scientist for those suffering by disease, or words of encouragement, or the teaching that disease will disappear and physical perfection be obtained as the result of prayer, does not constitute the practice of medicine. *State v. Mylod*, 40 Atl. 753, 755, 20 R. I. 632, 41 L. R. A. 428.

Same—Dental surgery and pharmacy.

"Medicine," as used in Act Pa. April 10, 1867, § 2, conferring on the officers and professors of the *Medico-Chirurgical College of*

Philadelphia the right to confer degrees in medicine, should be construed to include dental surgery and pharmacy. The word "medicine" should be construed in its common signification, which in the beginning—and yet with most of us—includes all learning having for its object the care of the health and the cure of the ills of the human body. Even within the recollection of some of us, the practicing physician or family doctor kept in his own office his drugs, compounded them himself, and not seldom maintained a dental chair, wherein he seated his patients and dosed or extracted their ailing teeth. He had not only been taught dental surgery and pharmacy, but practiced both under his degree from a college of medicine. In re *Medico-Chirurgical College of Philadelphia*, 42 Atl. 524, 190 Pa. 121.

Same—Osteopathy.

The practice of osteopathy is not the practice of medicine or surgery, as commonly understood, since the osteopath declines to use medicines, drugs, or surgery, and his treatment consists solely in kneading, flexing, and rubbing the body, applying hot and cold baths, and prescribing diet and exercise. *State v. McKnight*, 42 S. E. 580, 581, 131 N. C. 717, 59 L. R. A. 187.

The practice of medicine, within the meaning of the statutes relative thereto, does not include the practice of osteopathy. *Nelson v. State Board of Health*, 22 Ky. Law Rep. 438, 441, 108 Ky. 769, 57 S. W. 501, 50 L. R. A. 383.

The word "medicine" is derived from "medeor," to heal. It is defined by the eminent lexicographer of medical terms, Gould, to be "the science and art of preserving health and preventing and curing disease, the healing art, including also the science of obstetrics." Bigelow, an eminent physician and author of medical works, says "medicine is the art and science of understanding diseases, and curing and relieving them when possible." The *Encyclopædia* says: "medicine, the subject-matter of one of the learned professions, includes, as it now stands, a wide range of scientific knowledge and practical skill. The science of medicine is the theory of diseases and remedies." Such definitions show not only that the word "medicine" is a technical word, denoting a science or art, comprehending not only therapeutics, but the art of understanding the nature of diseases, the causes that produce them, as well as the art of knowing how to prevent them; hygiene, sanitation, and the like. And the practitioners of medicine are not simply those who prescribe drugs or other medicinal substances as remedial agencies, but the term is broad enough to include, and does include, all persons who diagnose disease, and prescribe and apply any therapeutic agent for its use; and thus one practicing

osteopathy, a system of healing by manipulation of limbs and body, practices medicine. *Bragg v. State*, 32 South. 767, 770, 134 Ala. 165, 58 L. R. A. 925.

One practicing osteopathy without a license is within the statute against practicing medicine without a license, and liable to the penalty. *Eastman v. People*, 71 Ill. App. 236, 239.

As a remedial substance.

See "Patent Medicines": "Trade-Mark Medicine."

Proprietary medicine, see "Proprietary."

Medicine, in the proper sense, is a remedial substance. *State v. Mylod*, 40 Atl. 753, 755, 20 R. I. 632, 41 L. R. A. 428.

"Medicine" is defined to be any substance administered in a treatment of diseases, a remedial agent, and does not constitute sustenance, under statutes making it a misdemeanor for any one to deprive of necessary sustenance any child. *Justice v. State*, 42 S. E. 1013, 1014, 116 Ga. 605, 59 L. R. A. 601.

The word "medicine," in a physician's account book, in describing the various items of services, etc. rendered, is sufficiently definite to authorize the admission of the book in evidence to prove the account for medicines. The charge for medicine in a physician's book of original entries is as distinct and certain and definite as the law demands. Usually such medicine is a combination of several drugs in largely varying proportions. To say that such a charge would not be one recognized by the courts as a proper one, unless it stated all the various drugs prescribed, with the different proportions of each drug furnished in the prescription, would be a construction of the law which would be absurd. In *re Stagger's Estate*, 8 Pa. Super. Ct. R. 260, 264.

A statute rendering any negro, etc., guilty of an offense, and subject to a death penalty, for administering any medicine with intent to kill any person, construed not to mean that the article given in order to effect the felonious intent must be given or "administered under pretense that it is a medicine." The manifest intention of the Legislature was to punish any person giving or administering any substance known as "medicine," with intent to kill. *Sarah v. State*, 28 Miss. (6 Cushm.) 267, 276, 61 Am. Dec. 544.

Same—Cigars and tobacco.

Cigars and tobacco are not "medicines," within St. 1887, c. 391, § 2, providing that a shop may be kept open on Sunday for the retail sale of drugs and medicines. Cigars are manufactured articles, familiar to everybody. The materials of which they are com-

posed are carefully prepared and put into form, until they lose their original character as mere materials and become articles of commerce, known by a new name and adapted to a particular use. Cigars sold by a tobacconist in the ordinary way are not drugs or medicines, within the meaning of the statute. Many things, not in themselves medicines, may be put to a medicinal use, and when so used they may become medicines. *Commonwealth v. Marzynski*, 21 N. E. 228, 229, 149 Mass. 68.

Tobacco is not a medicine, within the meaning of a Sunday statute permitting the selling of drugs and medicines on Sunday. *State v. Ohmer*, 34 Mo. App. 115, 125.

Tobacco in its manufactured form, or cigars, cigarettes, smoking tobacco, chewing tobacco, snuff, and the like, is not a drug or medicine, within the meaning of a city ordinance excepting drugs and medicines from its operation. *Penniston v. City of Newnan*, 45 S. E. 65, 66, 117 Ga. 700.

Same—Intoxicating liquors.

Rev. St. c. 28, § 5, authorizes druggists to keep medicines and poisons authorized by the United States Dispensatory and pharmacopœia as of recognized medicinal utility. Intoxicating liquors are within this description, and druggists are authorized to keep them. *Pollard v. Allen*, 52 Atl. 924, 925, 96 Me. 455.

The will of a wholesale and retail druggist, giving and bequeathing his stock of "medicines, drugs, paints, and furniture, belonging to or contained in his store" to certain persons, cannot be construed to include 50 barrels of whisky, which were stored in a distillery bonded warehouse, though whisky may be sold by druggists in comparatively small quantities as medicine, which a great many people so take. *Kloch v. Burger*, 58 Md. 575, 578.

MEDITATE.

"Meditated," as used in a statute making it a capital offense for any free person to aid or assist, or be in any wise concerned with, any slave or slaves in any actual or meditated rebellion or conspiracy against the laws, government, or people of this territory, etc., "must be held to mean something not yet done, something in a state of incubation, yet to discover itself, something brooded over and perhaps talked about; for, if there was an entire silence, it would be difficult to ascertain the feelings of the heart or the operation of the mind. Thus considered, it must be held to limit the substantive, 'rebellion' or 'conspiracy,' in its connection to a scheme in fieri, which by no overt act has seen the light of day." *State v. McDonald* (Ala.) 4 Port. 449, 455.

MEET—MEETING.

See "Annual Meeting"; "Family Meeting"; "General Meeting"; "Monthly Meeting"; "Primary Meeting"; "Regular Meeting"; "Special Meeting"; "Town Meeting"; "Yearly Meeting."

Webster defines the word "meet" as "to come together by mutual approach; to fall in with another; to come face to face." He also defines it as "to come together with hostile purpose; to have an encounter or conflict." *Pitts v. State*, 16 S. W. 189, 190, 29 Tex. App. 374.

Webster defines "meet" to mean "to come upon or against, front to front, as distinguished from contact by following and overtaking," and this is the ordinary and popular meaning of the word; but, as used in a charge on a prosecution for carrying a concealed weapon, that the pistol "must be carried in such an open manner and so fully exposed to view that a person meeting the one with the weapon would ordinarily see and know that he had a pistol about his person," the word "meeting" meant coming in contact, and not necessarily coming toward each other from opposite directions. *Stripling v. State*, 40 S. E. 733, 114 Ga. 538.

Whether there is a meeting within the meaning of Pen. Code, art. 598, subd. 4, providing that it must appear that a killing took place immediately upon the happening of the insulting conduct, or as soon thereafter as the party killing may meet the person killed, after having been informed of certain insults, in order to reduce the killing to manslaughter under the provisions of article 597, subd. 4, is a question for the jury in a case when defendant and deceased are shown to have come within 60 or 70 feet of each other on the sidewalk, and that there was nothing to prevent defendant from attacking deceased. *Pitts v. State*, 16 S. W. 189, 190, 29 Tex. App. 374.

As fit or suitable.

An assignment by an insolvent debtor of his property, with directions to his trustees to take possession of the property and "within convenient time, as to them shall seem meet, to sell the property and apply the proceeds to the payment of debts as directed," is void as to the creditors of the assignor. The word "meet" means "fit" or "suitable." They shall attend to the business then, when it shall suit their convenience. Perhaps it will not suit their convenience in six months or a year, or even a longer time. In other words, they shall attend to it when they please; but creditors are entitled to have the assigned property converted into money and applied to the payment of their debts without any unnecessary delay. *Woodburn v. Mosher* (N. Y.) 9 Barb. 255, 257 (citing Webster.).

Bankruptcy act.

Bankr. Act 1867, § 47, gives a fee of one dollar for every application for any meeting in any matter under the act. Held, that the word "meeting," as used in such section and elsewhere in the act, means a meeting of creditors, such as is spoken of in the twelfth, twenty-seventh and twenty-eighth sections. Thus the application by a creditor for an order for the examination of the bankrupt account would be regarded as an application for a meeting of creditors, within the forty-seventh section. In *re MacIntire*, 16 Fed. Cas. 148, 149.

County commissioners.

According to parliamentary law, strictly speaking, an original meeting and an adjourned meeting constitute the same meeting; but it is held that in Gen. St. 1878, c. 13, §§ 49-53, relative to meetings of the board of county commissioners, and providing that when a petition is made for the establishment, change, or vacation of a county road, the county auditor shall lay it before the board at their next session, and after the lapse of 30 days, at the next meeting of the board, they shall proceed to determine the prayer of the petition, the words "session" and "meeting" are not used in any strictly technical sense, but have reference merely to a time when the board is lawfully convened and in session for the transaction of business. *Burkleo v. Washington County*, 38 Minn. 441, 442, 443, 38 N. W. 108.

Road law.

"Meet," as used in Rev. St. c. 51, § 1, providing that, whenever any persons shall meet each other on any road, each shall drive to the right of the middle of the traveled part of such road, construed to mean only persons approaching each other on the same road, and not persons coming together from different directions at the intersection of two roads or streets. *Lovejoy v. Dolan*, 64 Mass. (10 Cush.) 495, 497.

Code, § 1000, providing that "persons meeting each other" on the public highway shall give one-half of the same by turning to the right, "does not mean merely persons passing each other while going in opposite directions, but implies a coming together in such manner that there would be an actual collision, or an apparent danger of one, if they should pursue their course without change of direction. If one person travel along one side of a highway, and another pass along the other, there is no meeting, within the meaning of the statute, and no violence of its provisions; and that would be true, even though each person would be on the left side of the highway." *Riepe v. Elting*, 56 N. W. 285, 287, 89 Iowa, 82, 26 L. R. A. 769, 48 Am. St. Rep. 356.

School district.

The word "meeting" as applied to school district meetings whenever used in the title relating to public instruction, shall mean a school meeting warned as provided by law. V. S. 1894, 804.

Voters.

An indictment for illegal voting, alleging that a "meeting" of the qualified voters of the various wards was holden on a certain day for the annual election of municipal officers, and that the defendant, at ward 1, in said city, on the day of the election aforesaid, committed the offense charged, sufficiently alleges that the voters met in their respective wards, and that a meeting was held on that day in each of the wards. As a matter of literal exactness it would have been more correct to have alleged that meetings of the voters of the various wards were held on that day, instead of describing it as a meeting in the singular number. *Commonwealth v. Desmond*, 122 Mass. 12, 14.

MEETING END ON.

Sailing ships are "meeting end on," within the meaning of the rules and regulations for preventing collisions, when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision because of their proximity, and when the vessels advance so near each other that the necessity to prevent such a disaster begins. *The Nichols*, 74 U. S. (7 Wall.) 656, 19 L. Ed. 157; *The George Law* (U. S.) 10 Fed. Cas. 216, 219; *The T. V. Arrowsmith*, Id.

Sailing vessels are "meeting nearly end on" where two sailing ships are approaching from nearly opposite directions, or on lines of approach substantially parallel, and so near to each other as to involve risk of collision. *The Nichols*, 74 U. S. (7 Wall.) 656, 19 L. Ed. 157; *The George Law* (U. S.) 10 Fed. Cas. 216, 219; *The T. V. Arrowsmith*, Id.

MEETING HEAD ON.

The term "meeting head on, or nearly end on," in an admiralty rule in reference to vessels meeting head on or nearly end on, applies to vessels meeting in a narrow channel, where they must pass on narrow courses, not exceeding a half point apart. *The F. W. Wheeler* (U. S.) 78 Fed. 824, 828, 24 C. C. A. 353.

MEETING HOUSE.

A deed granting land on condition that it be continually used as a site for a "meeting house and church," means a house to meet in for religious worship, but does not require

that it should be constantly used for that purpose. It must, however, be kept for that use, and not put to any other use substantially inconsistent with that. *Howe v. School Dist. No. 3*, 43 Vt. 282, 288.

The terms "church," "meeting house," or "other place of religious worship," within the meaning of a statute exempting such places from taxation, does not include a parsonage belonging to an Episcopal Church, if it is not actually annexed to the church edifice or its curtilage. *Dauphin County Treasurer v. St. Stephens Church (Pa.)* 3 Phila. 189, 190.

A church or meeting house, within the meaning of Act May 14, 1874, which provides that all churches, meeting houses, or other regular places of stated worship, with the grounds thereto annexed necessary for the occupancy of the same, shall be exempt from taxation, is confined to churches which in the language of the law are regular places of stated worship. A mere foundation or partly erected walls might by a forced construction be called an unfinished church or meeting house, but it cannot by any construction be made a regular place of stated worship. *Erie County Com'rs v. Bishop (Pa.)* 13 Phila. 509, 510.

The term "meeting house," in an indictment for card playing at a public place, which is designated as a meeting house, is insufficient, as a meeting house may be a public place at one time and not at another time, and therefore it must be alleged that it was a public place at the time of the card playing. *Bishop v. Commonwealth (Va.)* 13 Grat. 785, 787.

MEETING OF MINDS.

The term "meeting of minds," as used in the rule that there is no valid contract without a meeting of minds, means the expression of readiness to contract by one party and the expression of an acceptance thereof by the other party. The offer or acceptance is frequently raised by implication of law. *Davis v. Town of Seymour*, 21 Atl. 1004, 1005, 59 Conn. 531, 13 L. R. A. 210.

MEETING OF LEGISLATURE.

A "meeting of the Legislature," within *Hutch. Code*, p. 985, which provides that, in the event of death, resignation, or refusal of the superintendent of the penitentiary to act, the vacancy shall be filled by the Governor until the meeting of the Legislature, is any meeting of the Legislature, whether at an adjourned, called, or regular session. *McAffee v. Russell*, 29 Miss. 84, 95.

MEETING WITNESSES FACE TO FACE.

See "Face to Face."

MELANCHOLIA.

Melancholia is a form of insanity, the characteristics of which are extreme mental depression, associated with delusions and hallucinations. In melancholia the eyes are just the opposite of staring. The melancholic is rarely willing to look you in the face, but turns away, avoids his fellows, and is exclusive. The person so affected would not, as a rule, be apt to seek every opportunity to tell his troubles to others. *People v. Krist*, 60 N. E. 1057, 1060, 168 N. Y. 19.

Melancholia is a disease of the mind and of the affections, which sometimes operates upon the power of the will. Its victim may be entirely sound of mind in all other respects, and yet, with the knowledge of right and wrong which attends such soundness, may be unable to control his will, or resist the prompting of his disease to do what in one having full possession of that faculty would not only be a wrongful, but an atrociously wicked, act. *State v. Reidell* (Del.) 14 Atl. 551, 552.

Melancholia consists in unfounded and morbid fancies of the sufferer regarding his means of subsistence or his position in life, or in distorted conceptions of his relations to society or his family, or his rights or duties, or of dangers threatening his person, property, or reputation. When the melancholia hallucination has fully taken possession of the mind, it becomes the sole object of attention, without the power of varying the impression or directing the thoughts to any acts or considerations calculated to remove or palliate it. *Connecticut Mut. Life Ins. Co. v. Groom*, 86 Pa. 92, 27 Am. Rep. 689.

MELIORATIONS.

Mellorations are valuable and lasting improvements, made on land by one lawfully in the occupation thereof at his expense, and which he is allowed to set off against the legal claim of the proprietor for profits which have accrued to the occupant during his possession. *Green v. Biddle*, 21 U. S. (8 Wheat.) 84, 5 L. Ed. 547.

MEM.

"Mem." is per se an intelligible abbreviation for "member." *Jaqua v. Witham & A. Co.*, 106 Ind. 545, 547, 548, 7 N. E. 314.

MEMBER.

See "Church Member"; "Contributing Member."

Of body.

The ear is a member of the body, within the meaning of the statute providing that

if any person cut off or disable any limb or member of another he shall be guilty of mayhem. *Godfrey v. People* (N. Y.) 5 Hun, 369.

A tooth is a "member of the body," within Pen. Code, art. 507, making the crime of maiming to include the act of depriving any person of any member of his body. *High v. State*, 10 S. W. 238, 241, 28 Tex. App. 545, 8 Am. St. Rep. 488.

Of city council.

The word "member," in *Laws 1898, c. 182, § 12*, providing that each member of the common council of the city should be entitled to vote as to the designation of official newspapers, was construed to refer to the aldermen, and not to also include the mayor, who by section 14 was only expressly authorized to vote in case of a tie vote. If the Legislature had intended to give the mayor a right to vote on this question, it would have included in it the provision conferring a power to vote in the case of a tie. *People v. Bresler*, 75 N. Y. Supp. 209, 210, 70 App. Div. 294.

"Members of the branch," as used in a rule of a city council providing that every ordinance, before being put on its passage, should have two readings on two separate days, unless two-thirds of the members of the branch should by vote otherwise direct, means that number of the body which makes a lawful body or quorum, which is a majority in the absence of a statute prescribing a different number. "Members of the branch" does not mean all the members. *Zeller v. Central Ry. Co.*, 35 Atl. 932, 934, 84 Md. 304, 34 L. R. A. 469.

Of congress.

"Member of Congress" is a phrase synonymous with "Representative in Congress." *Butler v. Hopper* (U. S.) 4 Fed. Cas. 904, 905.

Of corporation.

"Members," as used in *Rev. St. c. 38, § 16*, providing that all the members of every manufacturing company will be liable in certain cases for the debts of the company, embraces all persons who are members at the time when the liability is to be enforced. The term "members" must be held to include all the actual stockholders. *Curtis v. Harlow*, 53 Mass. (12 Metc.) 3, 6.

"Member or shareholder," as used in speaking of the members or shareholders of a company or corporation, means a person who has agreed to become a member and with respect to whom all conditions precedent to the acquisition of the rights of a member have been duly observed. A person may sometimes be held to be a member or shareholder of a corporation when he hold himself out as such by taking dividends, etc. *Burges v. Seligman*, 2 Sup. Ct. 10, 18, 107 U. S. 20, 27 L. Ed. 359.

"Members," as used in Act 1853, § 107, providing that a life insurance company may sue or be sued by any of its members or stockholders, etc., is synonymous with "stockholders." *People v. Security Life Ins. & Annuity Co.*, 78 N. Y. 114, 123, 34 Am. Rep. 522.

If a corporation has no capital stock, the corporators and their successors are called "members." Civ. Code Idaho 1901, § 2096; Rev. St. Okl. 1903, § 951; Rev. Codes N. D. 1899, § 2871.

Of family or household.

"Servants, lodgers, and boarders are members of the family, as well as all others who are subject to the authority of its head." *Blachley v. Laba*, 18 N. W. 658, 659, 63 Iowa, 22, 50 Am. Rep. 724.

"Members of the household or family," within the meaning of Rev. Code, § 2376, which makes the separate estate of the wife liable for necessities furnished for the household or family, would not include children of the husband by a former marriage, although they were residing in the family. *May v. Smith*, 48 Ala. 483, 489.

Of firm.

"Members" as used in an agreement of release of the members of a firm from liability on a claim, should be construed to include a dormant partner, though the creditor is unaware of his existence. *Harbeck v. Pupin*, 39 N. E. 722, 145 N. Y. 70.

Of Legislature.

The phrase "members of the Legislature," as used in Const. art. 1, § 1, providing that the officers of the executive department "shall be chosen by the electors of the state at the time and place of voting for the members of the Legislature," includes both branches of the Legislature. *State v. Robinson*, 1 Kan. 17, 30.

Of mutual insurance company.

The term "member," as used in Rev. St. 1881, § 3753, providing that the funds of every mutual fire insurance company shall be appropriated, first to pay the expenses of the company, and then to pay the damages which any member may be entitled to recover on his policy, is synonymous with policy holder. *Clark v. Manufacturers' Mut. Fire Ins. Co.*, 180 Ind. 332, 336, 30 N. E. 212, 213.

"Member," as used in the charter of a mutual insurance company, providing that, whenever the corporation should make any insurance on any property, the member so insured should pay the required premium in cash or give his note or bond, well secured, for the amount of the insurance money, and providing, further, that the directors might at any time, when the necessities of the com-

pany require it, collect such further sums as might be necessary by making assessments on such notes, giving 30 days' notice by mail to each member, is synonymous with "stockholder." *Carlton v. Southern Mut. Ins. Co.*, 72 Ga. 371, 396.

Of political convention.

A person, considered in relation to any aggregate of individuals to which he belongs, particularly one who has united with, or has been formally chosen as a corporate part of, the association or public body of any kind, is a member thereof; so that a delegate to a political convention is a member thereof, even before such convention is organized, within the meaning of Pen. Code, § 57, making it a crime for any person to give or offer to any officer or member of any legislative or political convention, etc. *People v. Hurley*, 58 Pac. 814, 815, 126 Cal. 351.

Of religious society.

"Members," as used in an act of the Legislature providing for the incorporation of trustees of religious societies, who shall be chosen by the members of the society or congregation, means persons entitled to act and vote in the affairs of the congregation. There is another and popular signification of the term, sometimes attached to it in the form of government and in the proceedings of the church judicatories, but which is more extensive than the purview of the statute. Thus the wife of a member, an infant of tender years who has been baptized, a communicant who from straightened circumstances or other satisfactory reason makes no pecuniary contribution to congregational expenses—all these are nevertheless called, and in many respects rightly, members of the congregation, or, perhaps more accurately speaking, members of the church. In the statute it is used in the former or strict, and not in the latter or popular, sense. *State v. Crowell*, 9 N. J. Law (4 Halst.) 390, 411.

MEMBERS ELECTED.

The Constitution requires each branch of the Legislature to keep a journal, and provides that on the passage of every bill a vote shall be taken of ayes and nays, and be entered on the journal, and no bill shall be passed by either branch without an affirmative vote "by a majority of the members elected" thereto. Held, that it was not clear beyond a reasonable doubt, that the words "members elected," as so used, can only refer to persons elected at the last preceding election, although they may have ceased to be members at the time the vote was taken on the passage of the bill; and hence a construction, in order to sustain the validity of the statute, will be indulged in that the term "members elected" refers to those who were members at the time the vote was tak-

en. *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640.

MEMBERSHIP.

See "Certificate of Membership."

A membership in any body implies, not only the enjoyment of its privileges, but subjection to the rules governing it. *Field v. Drew Theological Seminary* (U. S.) 41 Fed. 871, 375.

MEMORANDUM.

Other memoranda, see "Other."

A memorandum is defined to be a note to help the memory. *Barber v. Bennett*, 4 Atl. 231, 236, 58 Vt. 476, 56 Am. Rep. 565; *Hay v. Peterson*, 45 Pac. 1073, 1080, 6 Wyo. 419, 34 L. R. A. 581; *Seymour v. Cowing* (N. Y.) 4 Abb. Dec. 200, 205, *40 N. Y. (1 Keyes) 532, 536.

"A memorandum is a note to help the memory; a memorial; a record. The object of a memorandum is as frequently to help the memory of another person as that of the writer." *Bissell v. Beckwith*, 32 Conn. 509, 517.

A memorandum is a brief note in writing of some transaction, or an outline of some intended instrument; an instrument drawn up in brief and compendious form. *Joost v. Sullivan*, 43 Pac. 896, 899, 111 Cal. 289 (citing *Webst.*).

A single letter or initial on the wrapper of a newspaper is not a writing or memorandum, within act of 1825 forbidding a writing or memorandum from being written on a newspaper or other printed paper, pamphlet, or magazine transmitted by mail. *Teal v. Felton*, 53 U. S. (12 How.) 284, 291, 13 L. Ed. 990.

Statute of frauds.

A writing cannot be a memorandum of an agreement, unless it contains the whole agreement; that is to say, the parties, the consideration, and the subject-matter, as well as the promise. *Wright v. Weeks*, 25 N. Y. 153, 161.

A "memorandum in writing," within the statute of frauds, however untechnical, must contain the essentials of the contract, or it ceases to be a memorandum of those parts of the agreement which, above all others, the statute must have intended the parties should reduce to writing. It may be in the form of mere entries in a book, naming the seller, purchaser, article, and price. It may be a letter containing the terms of a contract and disclosing the names of the parties. Indeed, it may be with a lead pencil in a mere minute book, if only so explicit as to render

intelligible the extent and the makers of the contract. It is the substance, and not the form, of the instrument which becomes material, and if it can furnish to the jury the essential facts detailed in the declaration the spirit of the statute justifies its admission. *Sherburne v. Shaw*, 1 N. H. 157, 159, 8 Am. Dec. 47.

The term "note or memorandum" does not necessarily require that the written evidence of the purchase should be created at the time of making the contract, but a written admission of a previous verbal contract will satisfy the statute. Neither is it essential that all the written evidence necessary to constitute a sufficient note or memorandum of the bargain should be comprised in a single paper or document. Distinct writings and of different dates, if signed by the parties to be charged and properly conducing to prove the contract, are competent evidence. *Ide v. Stanton*, 15 Vt. 685, 690, 40 Am. Dec. 698.

A "note or memorandum in writing" is a note or memorandum which adequately expresses the intent and obligation of the parties. It may consist of one or many pieces of paper, providing the several pieces are so connected physically or by internal reference that there can be no uncertainty as to their meaning and effect when taken together; but this connection cannot be shown by extrinsic evidence. If there is an agreement on one paper, something additional on another, and a signature on another, it does not constitute a sufficient note or memorandum, unless these several parts require by their own statement the union of the others. It does not include any separate papers, the relation of which to each other must be shown by parol testimony. *Mayer v. Adrian*, 77 N. C. 83, 88.

The word "memorandum," in *Hill's Ann. Laws Or. § 785*, requiring that, in case of an agreement for the sale of real property or any interest therein, there shall be some note or memorandum thereof in writing, expressing the consideration and subscribed by the party to be charged, and no evidence will be received of such agreement, other than the writing or secondary evidence of its contents, is understood to mean a note or minute, informally made, of the agreement, expressing briefly the essential terms, and was never intended to stand as and for the agreement itself. The necessary elements are that it must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties. Accordingly it must show who are the contracting parties, identify the subject-matter involved, express the consideration, be signed by the party to be charged, and disclose the terms and conditions of the agreement. A memorandum of an

agreement for the sale of land as follows: "Price, \$6,000. C. pays note for \$200. Deed to be special warranty, and C. pays for cablegrams. Money to be paid on or before 40 days. Possession when money paid and deed given to W. Farm 297 acres, more or less as shown by deed. Abstract furnished"—is insufficient, for indefiniteness. *Catterlin v. Bush*, 65 Pac. 1064, 1065, 39 Or. 496.

An undelivered deed, which does not recite the terms of the contract of sale, and which is in no way connected with any written contract signed by the grantor, or by any one under authority from him, is not a sufficient memorandum in writing. *Kopp v. Reiter*, 34 N. E. 942, 943, 146 Ill. 437, 22 L. R. A. 273, 37 Am. St. Rep. 156.

An agreement on the back of a note by a third party, guarantying the payment of the contents of the within note to the payee, the one half within 6 months and the other half within 12 months, is a sufficient memorandum to comply with the statute of frauds. *Neelson v. Sanborne*, 2 N. H. 413, 414, 9 Am. Dec. 108.

A letter from the purchaser to the vendor, alluding to a parol agreement for the sale of goods, and inquiring whether they would be ready at the time agreed upon, but not mentioning the quantity, quality, or price of the goods, or the time of payment, was not a sufficient note or memorandum. *Waterman v. Meigs*, 58 Mass. (4 Cush.) 497, 499.

An order reading: "Send to [a certain person]. Terms, net thirty days; freight allowed"—signed by the traveling agent of a company, and followed by a list of the merchandise desired, with prices and directions for shipping, signed by the purchaser, was not a sufficient note or memorandum within the statute of frauds. *Banks v. Charles P. Harris Mfg. Co.* (U. S.) 20 Fed. 667.

A., a purchaser at an administrator's sale, went with the administrator to a scrivener immediately after the sale, and the administrator executed a deed, and A. signed a note for the purchase money of the land. The deed and note were left with the scrivener until A. procured security on the note in accordance with the terms of the sale. Held, that the deed and note so executed was a sufficient note or memorandum in writing, within the statute of frauds. *Work v. Cowhick*, 81 Ill. 317.

MEMORANDUM ARTICLES.

The term "memorandum articles" is used in the law of marine insurance to designate certain articles which by nature are apt to be deteriorated from other causes than the perils of the sea. The term originated from the fact that in insuring a cargo it became

usual to insert a memorandum freeing the insurer from average, except general, as to such goods. *Wain v. Thompson* (Pa.) 9 Serg. & R. 115, 120, 11 Am. Dec. 675.

MEMORANDUM CHECK.

A "memorandum check" is in the ordinary form of a bank check, with the word "memorandum" written across its face, and is not intended for immediate presentation, but simply as evidence of an indebtedness by the drawer to the holder. A memorandum check is an instrument well known in the commercial world, which, it might be claimed, does not come under the general term of a "check." Mr. Parsons in his work on Notes and Bills says: "It has been said that the word 'memorandum' or 'mem.' written on a check, would not affect the rights of the holder. We think this might have been doubted, because there is a well-known custom in all our commercial cities of drawing and using checks in this form merely as duebills." *United States v. Isham*, 84 U. S. (17 Wall.) 496, 502, 21 L. Ed. 728.

A memorandum check is a check with the word "memorandum" written on its face, which becomes a part of the contract. "The memorandum check is negotiable, and, if presented at the bank when the drawer has funds, may be paid as other checks may be. No term of credit can be imputed, preventing the holder from exacting payment within a reasonable time; and the memorandum operates as a waiver of presentment and notice, the contract being an unconditional engagement to pay the money. It would seem to follow that in other respects the memorandum inures to the benefit of both parties. The party receiving such a check could not, as in the case of a check proper, claim that he had been defrauded if the drawer had no money in the bank to be applied in payment; nor could the drawer claim to be relieved from his obligation by reason of negligence should the bank fail after reasonable time for the presentation of the check had elapsed. These and like consequences result from the waiver of which the memorandum is declarative." In *Story, Prom. Notes*, § 499, it is said that these memorandum checks, as between the parties thereto, seem designed as mere evidence of indebtedness, and are in the nature of the common duebill. "The memorandum check is of modern use, a form of contracting where immediate payment at the bank is not contemplated or a more formal contract not considered necessary." *Turnbull v. Osborne* (N. Y.) 12 Abb. Prac. (N. S.) 200, 202.

A memorandum check is a contract by which the maker engages to pay the bona fide holder absolutely, and not upon a condition to pay if the bank upon which it is drawn should not pay upon presentation at

maturity, and if due notice of the presentation and nonpayment should be given. The word "memorandum," written or printed on the check, describes the nature of the contract with precision. It is an express waiver on the part of the maker of the check of any objection against the claim of a bona fide holder that it had not been presented for payment, or, if it were presented and not paid, that he had no notice of the nonpayment by the bank therein named. *Franklin Bank v. Freeman*, 33 Mass. (16 Pick.) 533, 539.

MEMORIAL

"Memorial" means, in law, a short note, abstract, memorandum, or rough draft of the orders of the court, from which the records thereof may at any time be fully made; and the docket entries may well answer thereto. *State v. Shaw*, 50 Atl. 863, 868, 73 Vt. 149.

MEMORY.

See "Legal Memory"; "Sane Memory"; "Sound Memory and Discretion"; "Sound Mind and Memory"; "Time of Memory."

"Memory," as used in 2 Rev. St. p. 56, permitting every male person of sound mind and memory, and no others, to give, bequeath, etc., is synonymous with the word "mind" as there used. "The words 'mind' and 'memory,' as used in this last statute and as used at common law, are and were convertible terms. The use of the words 'mind' and 'memory' as convertible terms is not so unphilosophical as it might first seem to be, for without memory there could be no mind properly speaking, and without any memory a person would be the mere recipient of a succession of present sensations, like the lowest type of animal life." In *re Forman's Will* (N. Y.) 54 Barb. 274, 286.

MEN.

In an action by a woman against a railroad company for injury claimed to have resulted from the negligence of the defendant, and in which the defendant claimed contributory negligence upon the part of the plaintiff, a criticism of the court's instruction in defining negligence to mean the lack of such care and caution as reasonable and prudent men would exercise under the circumstances, because the court used the word "men," instead of "women," is not well taken, as a jury would have been utterly unfit to try any case if they did not understand that "men" in this instruction was generic, and embraced "women." *Eichorn v. Mis-*

souri, K. & T. Ry. Co., 130 Mo. 575, 589, 32 S. W. 993, 997.

The phrase "men of a county" would in common parlance be understood to mean residents. *Rix v. Johnson*, 5 N. H. 520, 526, 22 Am. Dec. 472.

MEN OF LEGAL ATTAINMENTS.

See "Legal Attainments."

MENACE.

A "menace," as defined by Webster, is the show of an intention to inflict evil. "To menace" is to act in a threatening manner, and any overt act of a threatening character, short of an actual assault, is a "menace." *Cumming v. State*, 27 S. E. 177, 178, 99 Ga. 662.

"Menace," as used in Comp. Laws Dak. §§ 3504, 3505, defining duress of the person, and declaring a threat of such duress to be a "menace," does not include a threat to have the criminal laws of the state executed, which the party under the circumstances had an undoubted right to demand. *Gregor v. Hyde* (U. S.) 62 Fed. 107, 110, 10 C. C. A. 290.

Under a statute defining menace as a threat of duress or of injury to the character, an averment, in an action to set aside a transfer of stock in a bank, that defendant threatened that, if plaintiff did not transfer the stock to defendant, he would inform the bank that plaintiff was not the owner of said stock, was not a menace. *Bancroft v. Bancroft* (Cal.) 40 Pac. 488, 489.

A note payable to one who, for the sole purpose of intimidating the maker, illegally and fraudulently procured a warrant for his arrest on a charge of embezzlement, and which was executed in fear of, and to procure immunity from, arrest and imprisonment, is extorted under a menace, within the meaning of Civ. Code, § 1570, providing that "menace consists of a threat of duress or of a threat of injury to the character or person." Threats of imprisonment upon a charge of embezzlement are in effect necessarily threats of injury to the character. *Morrill v. Nightingale*, 28 Pac. 1068, 1069, 93 Cal. 452, 27 Am. St. Rep. 207.

"Menaces," as used in Pen. Code, § 338, defining the offense of forcible entry as "violently taking possession of lands and tenements with menaces, force, and arms, and without authority of law," are such as are directed against the person of the occupant, and not such as are directed against the premises themselves, if, indeed, it were possible that a house could by menaces be intimidated into a state of submission to an

unlawful entry. *Lewis v. State*, 26 S. E. 496, 498, 99 Ga. 692, 59 Am. St. Rep. 255.

MENIAL SERVANT.

A barkeeper in a tavern is a "menial servant," within a statute giving the wages of menial servants preference as a debt against a decedent's estate. "In short, all the hirelings employed in service in and about the house and household affairs, or whose business it is to assist in the economy of the family—the stable boy, the coachman, and all that class of hirelings—fall within the reason of the law. In legal phrase they are menial servants; and whether in common parlance they are called servants, or whether, as that term seems degrading, courtesy gives them a less offensive appellation, as gardener, housekeeper, nurse, coachman, or barkeeper, they are menial servants—are servants within the meaning of the law." *Bonifacio v. Scott* (Pa.) 3 Serg. & R. 351, 354.

MENSURATION.

The science of mensuration is a branch of pure mathematics with which the court is presumed to be acquainted, and of which it takes judicial notice. *Scanlan v. San Francisco & S. J. V. Ry. Co.* (Cal.) 55 Pac. 694, 695.

MENTAL.

"Mental," as used to describe the condition of a person, should be construed to refer to his senses, perceptions, consciousness, and ideas. *Mutual Life Ins. Co. v. Terry*, 82 U. S. (15 Wall.) 580, 588, 21 L. Ed. 236.

MENTAL AGONY OR ANGUISH.

The term "mental agony," as used in an instruction defining items of damages for personal injuries, includes physical pain and suffering, peril, and fright. *San Antonio & A. P. Ry. Co. v. Corley* (Tex.) 26 S. W. 903, 904.

"Mental anguish," for which recovery may be had in an action for personal injuries, includes not only the mental sensation of pain resulting from the physical injury, but also the purely mental suffering experienced by the injured person in contemplating his crippled condition and brooding over his future prospects. *Missouri, K. & T. Ry. Co. of Texas v. Miller*, 61 S. W. 978, 979, 25 Tex. Civ. App. 460.

"The mental distress and anxiety which may be proven in actions for personal injuries is confined to such as is connected with the bodily injury, and is fairly and reasonably the plain consequences of such injury. The mental anguish, like physical

pain, to be taken into consideration in such cases, is confined to such as is endured by the plaintiff in consequence of a personal injury to himself." *Keyes v. Minneapolis & St. L. Ry. Co.*, 30 N. W. 888, 889, 36 Minn. 290.

MENTAL CAPACITY.

"Mental capacity to contract" means that one has the ability to understand the nature and effect of the act in which he is engaged and the business he is transacting. One may be old, enfeebled by disease, and irrational on some topics; but, in the absence of fraud and imposition, he may still execute a valid deed or other disposition of his property. But if the mind be so clouded or perverted by age, disease, or affliction that he cannot comprehend the business in which he is engaging, the writing is not his deed. *Eaton v. Eaton*, 37 N. J. Law (8 Vroom) 108, 113, 18 Am. Rep. 716.

The test of "mental incapacity," sufficient to set aside a deed, in the absence of fraud, is, did the person whose act is brought in judgment possess sufficient ability at the time he did the act to understand in a reasonable manner the nature and effect of his act? If he did, the act is valid. He may have been old, or enfeebled by disease, or irrational upon some subjects; yet, if he had sufficient ability to comprehend in a reasonable manner what he is doing, his act will bind him. *Davren v. White*, 7 Atl. 682, 683, 42 N. J. Eq. (15 Stew.) 569.

Extreme weakness of intellect, even when not amounting to insanity in the person executing a deed, may be sufficient ground for setting it aside, when made upon a nominal or grossly inadequate consideration; but when the testimony shows that the grantor was sober and capable, and well knew what he was doing when he executed the deed, the facts can furnish no reason for setting aside the deed thus executed on the ground of mental incapacity. *Conley v. Nailor*, 6 Sup. Ct. 1001, 1005, 118 U. S. 127, 30 L. Ed. 112.

MENTAL CONDITION.

When we speak of the mental condition of a person, we refer to his senses, his perceptions, his consciousness, his ideas. If his mental condition is perfect, his will, his memory, his understanding, are perfect, and connected with a healthy bodily organization. If these do not concur, his mental condition is diseased or defective. *Mutual Life Ins. Co. v. Terry*, 82 U. S. (15 Wall.) 580, 588, 21 L. Ed. 236.

MENTAL DEFECT.

"Mental defect," as applied to the qualifications of a juror, must be understood to

embrace either such gross ignorance or imbecility as practically disqualifies any person from performing his duties as a juror; and if his mind is so weak that he cannot be made to understand the obligation of an oath, or religious scruples, his mental defect is sufficient to disqualify him. *Caldwell v. State*, 41 Tex. 86, 94.

MENTAL DERANGEMENT.

Ray, Med. Jur. §§ 63, 121, 122, arranges the diseases included in the general term "mental derangement" in two divisions, founded on very different conditions of the brain; the first being a want of its ordinary development, and the second a lesion of its structure subsequent to its development. In the former division he places idiocy and imbecility, as differing only in degree. *Francke v. His Wife*, 29 La. Ann. 302, 304.

MENTAL DISTRESS AND INJURY.

As personal injury, see "Personal Injury."

MENTALLY INCOMPETENT.

In an action to recover land for fraud in procuring the conveyance, it was alleged that the plaintiff was mentally weak and incompetent, while the finding in support thereof was that she was weak-minded and far below the average in intellect. It was held that the words "mentally incompetent" have no fixed, definite meaning. They do not necessarily mean that the person to whom they are applied is an idiot or non compos mentis. They merely indicate a relative, and not an absolute, lack of mental activity, and that therefore the findings and allegations were practically equivalent in meaning. *Hayes v. Candee*, 52 Atl. 826, 827, 75 Conn. 131.

The phrase "mentally incompetent," as used in the title on Guardianship, shall be construed to mean any person who, though not insane, is by reason of old age, disease, weakness of mind, or from any other cause, unable unassisted to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons. Rev. St. Utah 1898, § 4001; Code Civ. Proc. Cal. 1903, § 1767.

MENTALLY UNSOUND.

A man may be "mentally unsound," in a medical point of view, from certain conditions which exist, which would not in a legal sense relieve him from responsibility. He may be subject to mania, and medically of unsound mind; yet, if the peculiar phase

of mania has no influence upon the act brought in question, such act is not in law invalidated. He may be an imbecile, and medically of unsound mind; but, if he has sufficient mind to reasonably understand the act which is brought in question, he is legally competent. *Kern v. Kern*, 28 Atl. 837, 841, 51 N. J. Eq. (6 Dick.) 574.

"Mental unsoundness which will avoid a contract" is an inability to know what the act is to which the contract relates, or intelligently to do such act; and, as applied to a marriage, if the incapacity of the husband was such at the time of the ceremony that he was incapable of understanding the nature of the contract itself, he could not dispose of his person or property by the matrimonial contract, any more than by any other contract. Mere imbecility or weakness of mind, caused by disease, would not, when unaccompanied by circumstances showing that it had been taken advantage of, be sufficient ground for avoiding such contract. If the power of his mind had been so affected by disease, or the decay of his faculties, as to render him incapable of knowing the effect of the act he was about to perform, and of intelligently consenting to the ceremony, there was an incapacity on his part to contract. On the other hand, if his understanding was weak, still, if his capacity remained at the time to see things in their true relations and to form correct conclusions, the contract of marriage will be valid, in the absence of fraud or imposition. *Baughman v. Baughman*, 4 Pac. 1003, 1007, 32 Kan. 538.

MENTION.

A will, after bequeathing certain property, providing that all other property not hereinbefore "made mention of" shall be given to a daughter, will not be held to mean "disposed of as remainders after life estates," but will be limited to such property as was not actually spoken of in the will. *Toerge v. Toerge*, 41 N. Y. Supp. 244, 247, 9 App. Div. 194.

"Mentioned," as used in Battle's Revisal, c. 32, § 98, embracing the buildings therein specified by name, and in addition the houses or building mentioned in section 28 of the chapter, should be construed in the sense of "referred to" or "noticed." *State v. Bryan*, 89 N. C. 531, 533.

Code, § 3567, provides that any transfer, sale, or assignment made after the filing of an attachment bill in chancery, or after the suing out of an attachment at law of property mentioned in the bill or attachment, shall be void. Held, that it was possible that those who framed the bill used the word "mentioned" with purpose to indicate

a moderate degree of particularity of description, and hence the Code only gives a lien on property mentioned in the bill or writ. *Lacy v. Moore*, 46 Tenn. (8 Cold.) 348, 353.

MERCANTILE.

"Mercantile" is defined by Webster as "pertaining to merchants or the business of merchants." In *re San Gabriel Sanatorium Co.* (U. S.) 95 Fed. 271, 273.

The word "mercantile," in its ordinary acceptation, pertains to the business of merchants, and has to do with trade or the buying and selling of commodities. In *re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co.* (U. S.) 96 Fed. 756, 757.

The words "mercantile pursuits" may have a little broader signification than "trading." "Mercantile" is defined by the *Century Dictionary* as "having to do with trade or commerce; of or pertaining to merchants or the traffic carried on by merchants; trading; commercial." It signifies for the most part the same thing as the word "trading," and by "mercantile pursuits" is meant the buying and selling of goods or merchandise, or dealing in the purchase and sale of commodities, and that, too, not occasionally or incidentally, but habitually as a business. In *re Pacific Coast Warehouse Co.* (U. S.) 123 Fed. 749, 750 (citing *In re New York & W. Water Co.* [U. S.] 98 Fed. 711); In *re Surety Guarantee & Trust Co.* (U. S.) 121 Fed. 73, 75, 56 C. C. A. 654.

"Mercantile business," as used in Act 1855, providing that no corporation shall engage in "mercantile business," means the buying and selling of articles of merchandise as an employment, and implies operations conducted with a view of realizing profits which come from skillful purchase, barter, speculation, and sale. *Graham v. Hendricks*, 22 La. Ann. 523, 524.

A company which made a contract which would entitle the holder to buy a diamond for \$100, to be paid for in installments of \$1.25 each, and which stipulated that after payment of the installments the buyer shall have the option either to take the diamond or receive \$120 in cash, and which company never purchased any diamonds, nor owned any, cannot be said to be engaged in mercantile pursuits. In *re Tontine Surety Co.* (U. S.) 116 Fed. 401, 402.

The term "mercantile establishments," as used in all laws relative to employment of labor, shall mean any premises used for the purpose of trade, in the purchase or sale of any goods or merchandise, and any premises used for the purpose of a restaurant, or for publicly providing and serving meals. *Rev. Laws Mass. 1902, p. 916, c. 106, § 8.*

Barber shop.

"Mercantile purposes," within the meaning of a lease of a building to be used for mercantile purposes and a dwelling, cannot be construed to include a barber shop. *Cleve v. Mazzoni* (Ky.) 45 S. W. 88, 89.

Production and transportation of gas.

A mercantile partnership is one which habitually buys and sells, or which buys for the purpose of afterwards selling; and a business which consists in the production and transportation of natural gas issuing from the wells owned by the partnership is not a mercantile partnership, where the firm does not purchase and sell natural gas issuing from wells belonging to other people. *Commonwealth v. Natural Gas Co.* (Pa.) 2 Lanc. Law Rev. 41, 42.

Insurance.

An incorporated mutual fire insurance company, organized under Act Mo. March 21, 1895, is not engaged principally in a "mercantile" pursuit, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], so as to be subject to a petition in involuntary bankruptcy. In *re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co.* (U. S.) 96 Fed. 756, 757.

Mining.

A mining corporation is not a corporation engaged in "mercantile pursuits," within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], providing that a petition in involuntary bankruptcy may be maintained against corporations engaged principally in manufacturing, trading, or mercantile pursuits. In *re Elk Park Min. & Mill Co.* (U. S.) 101 Fed. 422, 423; In *re Rollins Gold & Silver Min. Co.* (U. S.) 102 Fed. 982, 983.

Public warehouse.

A corporation conducting a public warehouse, in which it receives and stores grain and other merchandise for hire, issuing receipts therefor, is not engaged in "trading" or "mercantile pursuits," and is not subject to be adjudged an involuntary bankrupt. In *re Pacific Coast Warehouse Co.* (U. S.) 123 Fed. 749, 750.

Restaurant and saloon.

A corporation engaged in running a saloon and restaurant is not a "mercantile or trading corporation," within Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], describing corporations which may be adjudged involuntary bankrupts. In *re Chesapeake Oyster & Fish Co.* (U. S.) 112 Fed. 960, 961.

A fire insurance policy, permitting the building to be used for any "mercantile

purpose," cannot be construed to include a restaurant, which is not a mercantile purpose. Webster says the word "mercantile" means appertaining to merchants, or the business of merchants, having to do with freight, or the buying and selling of commodities commercial. The business of keeping a restaurant is in no sense commerce. If a restaurant be a mercantile establishment, the term is equally applicable to taverns, boarding houses, and the like, which cannot be admitted. *Garretson v. Merchants' & Bankers' Ins. Co.*, 60 N. W. 540, 541, 92 Iowa, 293.

The use of a building as a restaurant is a violation of a clause in a policy providing that it was to be used for "any mercantile purpose." *Garretson v. Merchants' & Bankers' Ins. Co.*, 60 N. W. 540, 541, 92 Iowa, 293.

Sanitarium.

A corporation which owns and maintains a private hospital for consumptives, conducting its business for profit, furnishing to its patients the usual accommodations of a hotel, and treating their diseases chiefly by the inhalation of an antiseptic vapor chemically prepared on the premises, is a corporation engaged principally in trading or mercantile pursuits, and may be adjudged bankrupt on involuntary proceedings against it. *In re San Gabriel Sanatorium Co. (U. S.)* 95 Fed. 271, 273.

Water company.

Though a water company is authorized by its charter to buy, sell, use, and deal in water, yet, if its business is actually confined to supplying water for domestic purposes and to municipal fire departments, it cannot be said to be "engaged principally in trading and mercantile pursuits" within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]. *In re New York & W. Water Co. (U. S.)* 98 Fed. 711, 713; *Commonwealth v. Natural Gas Co. (Pa.)* 32 Pittsb. Leg. J. (O. S.) 309, 310 (citing *Norris v. Commonwealth*, 27 Pa. [3 Casey] 494).

MERCANTILE AGENCY.

See, also, "Commercial Agency"; "Special Mercantile Agency."

A mercantile agency is an establishment which makes a business of collecting information relating to the credit, character, responsibility, and reputation of merchants, for the purpose of furnishing the information to subscribers; for example, *R. G. Dun & Co.*, the *Bradstreet Company*, etc. *City of Brookfield v. Kitchen*, 63 S. W. 825, 826, 163 Mo. 546 (citing *State v. Hoffman*, 50 Mo. App. 585, and authorities there cited).

MERCANTILE AGENT.

Act Gen. Assem. March 16, 1893 (Sess. Acts 1893, pp. 89, 90), authorizes cities of the third class to collect license tax on peddlers, drummers, and mercantile agents. It was held that as the term "mercantile agents" could not refer to a mercantile agency, inasmuch as no establishment of that kind existed in any third-class city of the state, and as it apparently meant something different from either "peddler" or "drummer," a person whose business consisted in going from house to house with samples soliciting orders for future delivery, which were sent to his business house in another city and there filled, was a mercantile agent; his business as thus conducted being differentiated from that of a peddler, in that he makes no sales or delivery of goods carried with him for that purpose, and from that of a drummer, in that he takes orders, not from retail merchants, but from private parties. *City of Brookfield v. Kitchen*, 63 S. W. 825, 826, 163 Mo. 546.

MERCANTILE CHARACTER.

The term "mercantile character," when used in reference to a business firm, means "the generally received opinion in the community respecting the solvency of the firm, the probity and punctuality with which it performed its obligation, and the efficiency with which its affairs are managed." *Donnell v. Jones*, 13 Ala. 490, 513, 48 Am. Dec. 59 (cited in *Seattle Crockery Co. v. Haley*, 33 Pac. 650, 653, 6 Wash. 302, 36 Am. St. Rep. 156).

MERCANTILE LAW.

See "Commercial Law"; "Law Merchant."

MERCHANDISE.

See "General Merchandise"; "Lawful Merchandise."

Goods, wares, and merchandise, see "Goods."

"Merchandise" is defined by Webster to be "the objects of commerce; whatever is usually bought and sold in trade, or market, or by merchants; wares; goods; commodities." *Hein v. O'Connor (Tex.)* 15 S. W. 414; *Kent v. Liverpool & L. Ins. Co.*, 26 Ind. 294, 295, 89 Am. Dec. 463; *Commonwealth v. Keller*, 9 Pa. Ct. R. 253, 255.

"Merchandise" is a term including all those things which merchants sell, either at wholesale or retail, as dry goods, hardware, groceries, drugs, etc. *In re San Gabriel Sanatorium Co. (U. S.)* 95 Fed. 271, 273 (citing *Bouv. Law Dict.*); *Pearce v. City Council of Augusta*, 37 Ga. 597, 599; *Kent v. Liver-*

pool & L. Ins. Co., 26 Ind. 294, 297, 89 Am. Dec. 463.

The word "merchandise" is defined in Phillip's New World of Words, which is the earliest work in which the meaning of words in ordinary and popular use was given, "as commodities or goods to trade with"; and this exact definition is given in the succeeding dictionaries of Kersey, Martin, and Bailey. It is said in Glossographia Anglicana Nova, that the word came into use as a term to designate the goods and wares exposed to sale in fairs and markets, which is affirmed also by Cowell. *Passaic Mfg. Co. v. Hoffman* (N. Y.) 3 Daly, 495, 512.

"Merchandise," as used in Civ. Code, § 1768, providing that one who sells merchandise not in existence, warrants it to be sound and merchantable at the place of production contemplated by the parties, "covers all kinds of personal property which is bought and sold in the market." *Blackwood v. Cutting Packing Co.* 18 Pac. 248, 249, 76 Cal. 212, 9 Am. St. Rep. 189.

The term "merchandise," as used in the act relating to licenses of transient merchants, etc., shall be construed to mean any personal property. *Horner's Rev. St. Ind.* 1901, § 5273.

The denomination of "merchandise" subject to the payment of duties is to be understood in a commercial sense, although it may not be scientifically correct. All laws regulating the payment of duties are for practical application confined to commercial operations, and are to be understood in a commercial sense; and it is presumed that Congress so used and intended that to be understood. *United States v. 112 Casks of Sugar*, 33 U. S. (8 Pet.) 277, 279, 8 L. Ed. 944 (citing *Elliott v. Swartwout*, 35 U. S. [10 Pet.] 137, 9 L. Ed. 373; *Curtis v. Martin*, 44 U. S. [3 How.] 106, 11 L. Ed. 516; *Maillard v. Lawrence*, 57 U. S. [16 How.] 251, 14 L. Ed. 925).

The word "merchandise," as used in the title relating to collection of duties upon imports, may include goods, wares, and chattels of every description capable of being imported. *U. S. Comp. St.* 1901, p. 1861.

Chattel imported.

The word "merchandise" imports that the things which it is used to describe are chattels. *Pickett v. State*, 60 Ala. 77, 78.

Limited to subjects of sale.

The word "merchandise" is usually, if not universally, limited to things which are ordinarily bought and sold; the subjects of commerce and traffic. The fact that a thing is sometimes bought and sold does not prove that it is merchandise; that term being limited to things which are the subjects of sale

and commerce. *Van Patten v. Leonard*, 8 N. W. 334, 336, 55 Iowa, 520.

The term "merchandise," in an open fire policy on merchandise kept in a certain building, does not include articles kept wholly or partially for use in and about the building, but only articles kept for sale. *Burgess v. New England Mut. Marine Ins. Co.*, 92 Mass. (10 Allen) 221.

The term "merchandise," in a policy of insurance against fire, may be used to describe property intended for use, and not for sale. *Hartwell v. California Ins. Co.*, 24 Atl. 954, 84 Me. 524.

The term "merchandise" means any article which is the object of commerce, or which may be bought or sold in trade, and in the tariff act, providing for forfeiture of merchandise imported contrary to law, is not limited to such as is sent or received for sale, but includes mailable matter not so intended. *Von Cotzhausen v. Nazro* (U. S.) 15 Fed. 891, 899.

Bonds.

"Merchandise," as used in *Burns' Rev. St. Ind.* 1894, § 4583 (*Horner's Rev. St.* 1897, § 3502), authorizing the formation of corporations for the purpose of buying and selling merchandise and conducting mercantile operations, means ordinarily things that have an intrinsic value in bulk, weight, or measure, and which are bought and sold, and hence does not include bonds, and does not authorize the creation of a corporation for the purpose of buying and selling bonds. *Indiana Bond Co. v. Ogle*, 54 N. E. 407, 408, 22 Ind. App. 593, 72 Am. St. Rep. 326.

Carriages, wagons, etc.

The term "merchandise" embraces within its ordinary meaning carriages, wagons, and other vehicles, and where a person had complied with the terms of a city ordinance imposing a tax on "merchandise, meaning dealers in varied stock of goods," he is entitled to sell carriages, wagons, and other vehicles without paying an additional tax. *Wynne v. City of Eastman*, 31 S. E. 737, 738, 105 Ga. 614.

The term "merchandise," within the meaning of a marine policy on merchandise, was construed to include a curricule. *Duplanty v. Commercial Ins. Co.* (N. Y.) *Anth.* N. P. 114.

Cattle and sheep.

"Merchandise" conveys the idea of personality used by merchants in the course of trade, and horses, cattle, and sheep are not usually included, though, of course, they may be. *Jewell v. Board of Trustees of Sumner Tp.*, 84 N. W. 973, 975, 113 Iowa, 47.

China, hardware, and glassware.

"Merchandise such as is usually kept in a country store," as used in a fire policy insuring merchandise such as is usually kept in a country store, is sufficient to include hardware, china, and glassware, if such goods are usually kept in such a store. *Pittsburg Ins. Co. v. Frazee*, 107 Pa. 521, 528.

Cement.

Cement, which is taken from the earth, manufactured, and then becomes an article of merchandise, should be regarded as an article of produce, so as to be within the regulation and enforcement of contracts relating to it entered into between members of a produce exchange. *Haebler v. New York Produce Exchange*, 44 N. E. 87, 90, 149 N. Y. 414.

Compass of vessel.

"Merchandise," as used in Rev. St. § 2873 [U. S. Comp. St. 1901, p. 1910], imposing a punishment upon the master of a vessel for being concerned in landing any "merchandise" without a certain permit, does not include the compass of a steamship; such article being part of its apparel and tackle. *United States v. Fry* (U. S.) 48 Fed. 713.

Drugs.

The term "merchandise" has a very extended meaning, covering all articles of commerce, including medicines; but a license as a retail merchant will not carry the right to sell drugs, where a special license is required of such persons. *State v. Holmes*, 28 La. Ann. 765, 767, 26 Am. Rep. 110.

Farm products.

"Merchandise," as used in Act April 17, 1848, § 1, forbidding the sale of goods, wares, and merchandise by any person as a hawker or peddler, was not intended to include farm products in the hands of farmers, nor is the transportation of such products to a market for sale, or to regular customers who are supplied by the grower. *Commonwealth v. Gardner*, 19 Atl. 550, 551, 183 Pa. 284, 7 L. R. A. 668, 19 Am. St. Rep. 645.

Horse or stallion.

"Merchandise" conveys the idea of personality used by merchants in the course of trade, and horses are not usually included, though, of course, they may be. *Jewell v. Board of Trustees of Sumner Tp.*, 84 N. W. 973, 975, 113 Iowa, 47.

Horses are "merchandise," within the meaning of Pen. Code, § 125, providing a penalty for embezzlement of the proceeds of the sale of merchandise by consignees and factors. *Commonwealth v. Keller*, 9 Pa. Co. Ct. R. 253, 255.

"Merchandise," as used in St. 1821, § 1, providing that every person coming into the United States from an adjacent foreign territory shall deliver at the office of the collector of customs a manifest of the merchandise, should be construed to include a horse brought in for the purpose of sale, or of being kept in the United States either for use or sale, but not one brought in as a mere instrument of convenience, in the prosecution of a temporary journey on business or a visit. Horses may not be usually included in the term "merchandise," but, being objects of trade and commerce, they may be called merchandise, within the meaning and intention of the act, whenever they are imported or brought into the country as such. *United States v. One Sorrel Horse*, 22 Vt. 655, 656, 27 Fed. Cas. 315.

"Merchandise," as used in Rev. St. § 4282 [U. S. Comp. St. 1901, p. 2943], which makes a shipowner liable for loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in, or put on board certain vessels, by reason or means of any fire, etc., is used in its mercantile sense, and might include horses and trucks, when shipped or put aboard a vessel as merchandise, but does not include such horses or trucks when they are driven aboard in charge of their drivers, who are passengers, and remain in their charge on the trip. *The Garden City* (U. S.) 28 Fed. 768, 770.

Within the meaning of Civ. Code, § 2430, providing that a partner as such has no authority "to dispose of the whole of the partnership property at once, unless it consists entirely of merchandise," a partner in the ownership of a stock ranch has no authority to sell all the partnership property, including a stallion kept solely for breeding purposes. Such a stallion was not merchandise. *Myers v. Moulton*, 12 Pac. 505, 507, 71 Cal. 498.

Linen.

The linen of a farmer, which he sells, is not merchandise. *Dyott v. Letcher*, 29 Ky. (6 J. J. Marsh.) 541, 543.

Lumber, logs, and posts.

"Merchants' goods, wares, and commodities," as used in a statute providing for the taxation of merchants' goods, wares, and commodities kept for sale in the place where located, will be construed to include lumber kept for sale in a lumber yard. *Mitchell v. Town of Plover*, 11 N. W. 27, 28, 53 Wis. 548; *Washburn v. City of Oshkosh*, 19 N. W. 384, 60 Wis. 453.

"Merchants' goods, wares, and commodities," as used in Rev. St. § 1041, as amended by Laws Wis. 1882, § 258, requiring merchants' goods, wares, and commodities to be

taxed in the county where kept for sale, includes ties, poles, and posts which are kept for sale. *Torrey v. Shawano County*, 48 N. W. 246, 247, 79 Wis. 152.

"Merchants' goods, wares, and commodities," as used in Sanb. & B. Ann. St. § 1040, providing that merchants' goods, wares, and commodities shall be assessed for taxation in the district where located, includes pine logs kept for sale. *Town of Eagle River v. Brown*, 55 N. W. 163, 164, 85 Wis. 76.

Meat.

"Merchandise," as used in Act March 7, 1846 (P. L. 78), authorizing the councils of the city of Pittsburg to levy and assess an annual tax on goods, wares, and merchandise, and on all articles of trade and commerce sold in the said city, including sales at auction or otherwise, should be construed to include butchers' meat sold by one who slaughters his own cattle and sells the fresh meat derived therefrom at a stall in the market in the city, for the use of which stall he pays an annual rental to the city. *City of Pittsburg v. Kalchthaler*, 7 Atl. 921, 922, 114 Pa. 547.

Money.

A clause in the charter of a railroad company, requiring them to transport merchandise and property, is held not to oblige them to become common carriers of money. In this connection the court observes that "property" is a word of very enlarged meaning, comprehending ordinarily everything which is valuable, and is subject to disposition and protection under the law; but in the case under consideration it was clear, from the fact that at the time the charter was granted it was not incumbent as a general thing on common carriers of merchandise and property to transport money, that it was not the intention of the Legislature to include coin under the head of merchandise and property. *Kuter v. Michigan Cent. R. Co.* (U. S.) 14 Fed. Cas. 884, 885.

Notes, policies of insurance, etc.

"Merchandise," as used in a charter incorporating a steamboat company for the transportation of "merchandise," does not apply to mere evidences of value, such as notes, bills, checks, policies of insurance, and bills of lading, but only to articles having an intrinsic value in bulk, weight, or measure, and which are bought and sold. *Indiana Bond Co. v. Ogle*, 54 N. E. 407, 408, 22 Ind. App. 593, 72 Am. St. Rep. 326 (citing *Citizens' Bank v. Nantucket Steamboat Co.* [U. S.] 5 Fed. Cas. 719).

Slaves.

"Merchandise" is a comprehensive term, and may include every article of traffic,

whether foreign or domestic, which is properly embraced in a commercial regulation; but, if slaves are considered in some states as merchandise, we cannot divest them of the leading and controlling quality of persons by which they are designated in the Constitution. The character of property is given them by the local law. This law is respected, and all rights under it are apprehended by the federal authorities; but the Constitution acts upon slaves as persons, and not as property. *Groves v. Slaughter*, 40 U. S. (15 Pet.) 449, 506, 507, 10 L. Ed. 800.

Scale, cornsheller, etc.

The term "merchandise," in a policy of insurance against loss on merchandise, does not include a platform scale bedded in the floor of a warehouse in which the insured merchandise is situated, nor a cornsheller, nor a bean scale, which have been dispensed with in the business but have not been offered for sale. *Kent v. Liverpool & L'Ina Co.*, 26 Ind. 294, 297, 89 Am. Dec. 463.

Stocks.

"The word 'merchandise' includes in general objects of traffic and commerce, and is broad enough to include stocks or shares in incorporated companies." *Tisdale v. Harris*, 37 Mass. (20 Pick.) 9, 13.

Wearing apparel.

The word "merchandise" conveys to the ordinary mind the idea of personal property used by merchants in the course of trade, and is usually, if not universally, applied to property which has not yet reached the hands of the consumer, and does not include wearing apparel or other personal effects. *The Marine City* (U. S.) 6 Fed. 413, 415.

MERCHANDISE BROKER.

Merchandise brokers are those who buy and sell goods, and negotiate between the buyer and seller, but without having the custody of the property. *Ayres v. Thomas*, 47 Pac. 1013, 116 Cal. 140; *City of Little Rock v. Barton*, 33 Ark. 430, 444.

A merchandise, produce, or grain broker is defined, in an ordinance of the city of Chicago requiring such brokers to be licensed, as one who, for commission or other compensation, is engaged in selling or negotiating the sale of goods, wares, merchandise, produce, or grain belonging to others. *O'Neill v. Sinclair*, 39 N. E. 124, 125, 153 Ill. 525.

MERCHANDISE NOT IN EXISTENCE.

"Merchandise not in existence," within the meaning of Civ. Code, § 1868, providing that one who agrees to sell merchandise not in existence thereby warrants that it shall be sound and merchantable at the place of

production contemplated by the parties, and as nearly so at the place of delivery as can be secured by reasonable care, includes future crops of fruit. *Blackwood v. Cutting Packing Co.*, 18 Pac. 248, 250, 76 Cal. 212, 9 Am. St. Rep. 199.

MERCHANT.

See "Commission Merchant"; "Forwarding Merchants"; "Grain Merchant"; "Itinerant Merchant"; "Sample Merchant"; "Statute Merchant"; "Transient Merchant"; "Traveling Merchant"; "Unsettled Merchant."

Chinese merchant as laborer, see "Chinese Laborer."

"Merchant" is defined by Webster to be "one who carries on trade or who traffics; who buys goods to sell again; any one who is engaged in the purchase and sale of goods; a trafficker; a trader." *Hein v. O'Connor (Tex.)* 15 S. W. 414. "Webster defines the word 'merchant' as a person who buys goods to sell again, or any one who has engaged in the purchase and sale of goods." *Torrey v. Shawano Co.*, 48 N. W. 246, 79 Wis. 152. Webster defines a "merchant" as "one who is engaged in the purchase and sale of goods; a trafficker; a trader." *Crater v. Deemer*, 4 Pa. Co. Ct. R. 375, 378.

A merchant is a dealer in goods, wares, and merchandise, who has the same on hand for sale and present delivery. *White v. Commonwealth*, 78 Va. 484, 485.

The term "merchant" embraces all who buy and sell any species of movable goods for gain or profit. *Rosenbaum v. City of Newbern*, 24 S. E. 1, 2, 118 N. C. 83, 32 L. R. A. 123.

In the statute fixing an occupation tax upon merchants, etc., the term "merchant" is defined as "any person or firm engaged in buying and selling goods, wares, and merchandise of any kind whatever." *Galveston County v. Gorham*, 49 Tex. 279, 285.

A merchant is one who traffics in, or who buys and sells, goods and commodities. He would be a merchant if his business consisted in buying without selling, and he might be a merchant by simply selling. In re *Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co.* (U. S.) 96 Fed. 756, 757. "All persons who keep for sale and sell any kind of chattel property at a fixed place are merchants." *Washburn v. City of Oshkosh*, 19 N. W. 364, 60 Wis. 453.

The term "merchant" has been defined to be strictly a buyer, but, by extension, one who buys to sell, or buys and sells; one who deals in the purchase of goods; a dealer in merchandise; a trader. *Kinney*, Law Dict.

& *Glos.* 459. One who buys to sell again, and who does both, not occasionally, but habitually, as a business; one who buys and sells an article. *Anderson*, Law Dict. One who is engaged in the business of buying commercial commodities, and selling them again, for the sake of profit. *Cent. Dict.* 3713. The term in the *Kansas City* charter, authorizing the common council to license merchants, etc., means dealers in every kind of commercial commodities, including produce. *Kansas City v. Lorber*, 64 Mo. App. 604, 608.

A merchant is one who buys and trades in anything, and, as merchandise includes all goods and wares exposed to sale in fairs or markets, so the word "merchant" formerly extended to all sorts of traders, buyers, and sellers. But every one who buys and sells is not at this day under the denomination of a merchant. Only those who traffic in the way of commerce, by importation or exportation, or carry on business by way of exemption, vendition, barter, permutation, or exchange, and who make it their living to buy and sell by a continued assiduity or frequent negotiation in the mystery of merchandising, are esteemed merchants. *State v. Smith*, 24 Tenn. (5 Humph.) 394, 395.

The term "merchant," as used in an act for the exclusion of Chinese, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant. *U. S. Comp. St.* 1901, p. 1323; *United States v. Wong Ah Gah* (U. S.) 94 Fed. 831, 832; *United States v. Loo Way* (U. S.) 68 Fed. 475.

The word "merchant" or "merchants," where used in the article relating to cities of the second class, shall be held to mean and include every person or copartnership of persons who shall deal in the selling of goods, wares, and merchandise, including clocks, at any store, stand, or place occupied for that purpose in such city. *Rev. St. Mo.* 1899, § 5647.

Every person, corporation, or copartnership of persons who shall deal in the selling of goods, wares, and merchandise, including clocks, at any store, stand, or place occupied for that purpose, is declared to be a merchant. *Rev. St. Mo.* 1899, § 8540.

The term "merchant," as used in the chapter relating to merchants' licenses, shall be construed to include all merchants, commission merchants, grocers, manufacturers, and dealers in drugs and medicines, except physicians, for medicines used in their prac-

tion, whether trading as wholesale or retail dealers. Rev. St. Mo. 1899, § 8565.

Any person owning or having in his possession or under his control, within the state, with authority to sell the same, any personal property purchased with a view to its being sold at a profit, or which has been consigned to him from any place out of the state to be sold within the same, shall be held to be a merchant, for the purposes of the revenue act. Ann. St. Ind. T. 1899, § 4941.

"Merchant," as used in the act relating to taxation, includes whoever owns or has in his possession, or subject to his control, any goods, merchandise, grain, or produce of any kind, or other personal property, within this state, with authority to sell the same, which has been purchased either in or out of the state, with a view of being sold at an advanced price or profit, or which has been consigned to him out of this state for the purpose of being sold at any place within this state. Rev. Codes N. D. 1899, § 1196.

As used in the chapter relating to the listing of personal property for taxation, the term "merchant" includes every person who shall own or have in his possession or subject to his control any personal property within this state, with authority to sell the same, which shall have been purchased either in or out of this state with a view to being sold at an advanced price or profit, which shall have been consigned to him from any place out of this state for the purpose of being sold at any place within this state. But no person who is engaged in the business of selling on commission, and who does not retain control of such property longer than 48 hours, shall be held to be a merchant. Bates' Ann. St. Ohio 1904, § 2740.

Any person, firm, or corporation owning or having in his possession or under his control within the state, with authority to sell the same, any personal property purchased with a view of its being sold, or which has been consigned to him from any place out of the state to be sold within the same, or to be delivered or shipped by him within or without the state, shall be held to be a merchant, for the purpose of the title relating to the revenue. Code Iowa 1897, § 1318.

Apothecary.

Apothecaries are not merchants, within Rev. St. c. 87, § 4, prohibiting merchants from selling spirituous liquors without a license. Anderson v. Commonwealth, 72 Ky. (9 Bush) 569, 571.

Builder.

Bankr. Act 1867 (14 Stat. 517) authorizes involuntary bankruptcy proceedings against a merchant or tradesman. Held, that the term "merchant or tradesman" included a

stair builder who bought lumber, nails, and other materials, and, by the labor of workmen employed by him, wrought the materials into stairs for persons who gave him orders to build the stairs, and paid him a gross sum therefor, though he kept no books of account, except a memorandum book of his men's time. In re Garrison (U. S.) 10 Fed. Cas. 49.

Butcher or wholesale meat dealer.

A butcher is a merchant, within a statute providing that actions on mutual and current accounts concerning the trade of merchandise between merchant and merchant, where factors are agents, shall be brought within four years, etc. Hein v. O'Conner (Tex.) 15 S. W. 414.

The term "merchant" is sufficiently broad to include one engaged in the business of selling fresh meats at wholesale from cars standing on the track of a railway. City of St. Joseph v. Dye, 72 Mo. App. 214, 216.

Carriage maker.

"Merchants," as used in the act authorizing proceedings in bankruptcy against a merchant means a person who is engaged in a business requiring the purchase of articles to be sold again, either in the same or in an improved state. Thus a carriage maker carrying on an extensive business in the manufacture and sale of carriages might be held a merchant, the carriages being considered as merchandise, but the term would not include a person who sells merely the product of his own labor; he being only a seller, and his business requiring no purchases, and on that account he having no occasion for credit. Wakeman v. Hoyt (U. S.) 28 Fed. Cas. 1350, 1351.

Commercial partnership engaged in banking.

"Merchants," as used in Civ. Code, § 2248, providing that the books of merchants cannot be given in evidence in their favor, includes a private unincorporated commercial partnership conducting a banking business. Brown v. Pike, 34 La. Ann. 576, 578.

Commercial traveler.

The term "merchant" does not apply to a drummer or commercial traveler who simply exhibits samples of goods kept for sale by his principal, and takes orders from purchasers for such goods, which are afterwards to be delivered by the principal to the purchasers, and payment made by the latter to the principal on such delivery; and therefore a statute requiring a merchant to take out a license does not apply to such person. Neither will a single sale and delivery of goods by such agent out of the samples exhibited, or out of any other lot of goods, con

stitute him a merchant. *City of Kansas v. Collins*, 8 Pac. 865, 868, 34 Kan. 434.

Distiller.

A distiller, whose business consists in purchasing and selling grain, and converting the same into alcohol, and the sale of alcohol, and also the purchase of domestic animals, and of the sale of them for their flesh after they are fatted, is within the statute authorizing proceedings in involuntary bankruptcy against all persons being merchants, etc. *Ex parte Eccles* (U. S.) 8 Fed. Cas. 365.

Elevator company.

Under a statute providing that "the personal property pertaining to the business of a merchant shall be listed in the town or district where his business is carried on," grain purchased by a company owning a line of elevators in different towns, and doing business in Minneapolis, where the wheat was shipped and sold, could not be taxed for such wheat at the points where the wheat was purchased. A merchant is defined as one who is engaged in the purchase and sale of goods. The business of merchandising includes both buying and selling, and a merchant may buy his goods in one place, and sell them in another; and, under such statute, where the goods are kept for sale by the merchant is the place where they should be listed and assessed. *Minneapolis & N. Elevator Co. v. Board of Com'rs of Clay County*, 63 N. W. 101-102, 60 Minn. 522.

Ex-merchant.

The term "merchants," in a statute authorizing proceedings in involuntary bankruptcy against merchants, may be construed to include a person who has quit the mercantile business a short time before the proceedings are commenced. *Baldwin v. Rosseau* (U. S.) 2 Fed. Cas. 527, 528.

Farmer.

A merchant is one who deals in things in a commercial way, and carries on business by way of vendition, barter, or exchange, and whose usual avocation is buying and selling; and partners in farming and raising stock, though they carry their products to market, are not merchants. *Lansdale v. Brashear*, 19 Ky. (3 T. B. Mon.) 330, 335.

"The term 'merchants' includes those only who traffic, in the way of commerce, by importation or exportation, who carry on business by way of emption, vendition, barter, permutation, or exchange, and who make it their living to buy and sell by a continued vivacity or frequent negotiations in the mystery of merchandise, and does not include a farmer who sells what he makes." *Dyott v. Letcher*, 29 Ky. (6 J. J. Marsh.) 541, 543.

A merchant is defined to be, in one sense, a trader, by Webster, and by Burrill

and Bouvier in their Law Dictionaries, and a person who is engaged in farming and stock raising is not a merchant. *In re Ragsdale* (U. S.) 20 Fed. Cas. 175.

Feeder of stock for market.

A merchant is one whose business is to buy and sell merchandise; one who buys to sell again, and who does both, not occasionally or incidentally, but habitually and as a business. Not every one who buys and sells is a merchant; but, generally speaking, only those who traffic in the way of commerce, or carry on business by way of emption, vendition, barter, permutation, or exchange, and who, to make their living, buy and sell by a continued assiduity or frequent negotiation in the mystery of merchandise, are esteemed merchants. Citing *Lansdale v. Brashear*, 19 Ky. (3 T. B. Mon.) 330; *State v. Smith*, 24 Tenn. (5 Humph.) 394; *Norris v. Commonwealth*, 27 Pa. (3 Casey) 494. So that a person who buys sheep for the purpose of feeding and fattening them for the market, and selling them when so fattened, is not a merchant. *Jewell v. Board of Trustees*, 84 N. W. 973, 974, 113 Iowa, 47.

Foreign corporation.

A foreign corporation, having an agent in the state, to whom it shipped goods, to be kept in stock, and used to fill contracts of sale made by the corporation salesman, or contracts made by intending purchasers depositing specifications of goods desired with the agent, who had no authority to fix prices, was a merchant, within the act providing that merchants shall pay an ad valorem tax upon the capital invested in their business equal to that levied on taxable property; the term "merchant" including all persons, copartnerships, or corporations engaged in dealing in any kind of goods, whether kept on hand for sale or purchase, and delivered for profit, as ordered. *American Steel & Wire Co. v. Speed*, 75 S. W. 1037, 1040, 110 Tenn. 524.

Furniture dealer.

Where a bankrupt for a year before filing his petition was engaged in the business of buying and selling furniture on his own account, having a shop where his goods were displayed and sold, he was a "merchant or tradesman," under Bankr. Act 1867, § 29, requiring a merchant or tradesman to keep proper books of account, in order to be entitled to a discharge in bankruptcy. *In re Newman* (U. S.) 18 Fed. Cas. 96, 97.

Grocer.

"A merchant is one who traffics, by way of buying and selling or bartering goods or any merchandise (5 Com. Dig. 68), and would include a person who keeps and

sells groceries." *Cole v. Commonwealth*, 38 Ky. (8 Dana) 31, 32.

Hay and straw dealer.

A teamster who to a very considerable extent buys and sells hay and straw for the bona fide purpose of keeping his teams from standing idle is not a "merchant or tradesman," within the provisions of the bankrupt law requiring merchants or tradesmen to keep books of account. *In re Kimball* (U. S.) 7 Fed. 461, 462.

Hotel keepers.

"Merchant," as used in Act 1862, extending to two years the limitation to actions on merchants' accounts, includes the keeper of a hotel, who in the same house buys and retails liquors, tobacco, and other articles as an unrestricted business. *Campbell v. Finck*, 63 Ky. (2 Duv.) 107.

Huckster.

A merchant is one whose business it is to buy and sell merchandise, and applies to all persons who habitually trade in merchandise, and one who sold common produce on the market square of the city from his wagon was not a merchant, and was not required to obtain a merchant's license for the conduct of such business. *Brown v. Commonwealth*, 36 S. E. 485, 486, 98 Va. 366.

Ice dealer.

A merchant is one who traffics or carries on trade, and an ice dealer is a merchant within the meaning of that word as used in a city charter providing for the licensing of persons carrying on the occupation of merchant. *Kansas City v. Vindquest*, 36 Mo. App. 584, 588.

Livery stable keeper.

A merchant is one whose business it is to buy and sell merchandise. *Bouv. Law Dict.* The word includes a hotel keeper. *Campbell v. Finck*, 63 Ky. (2 Duv.) 107. In the case of *In re Odell*, 18 Fed. Cas. 574, it was held that one who keeps a livery or board horses belonging to other persons is a merchant. *In re San Gabriel Sanitorium Co.* (U. S.) 95 Fed. 271, 273.

Rev. St. U. S. § 5110, subd. 7, provides that no discharge shall be granted to a bankrupt, if, "being a merchant or tradesman, he has not kept proper books of account." Held, that the term "merchant or tradesman," as so used, included a livery stable keeper, though he only purchased horses for use in his business, and sold them again when disabled and unfit for use, and who boarded the horses of other parties, and fed them with hay, etc., which he had purchased. *In re Odell*, 18 Fed. Cas. 574.

Bankr. Act 1841 (5 Stat. 440), authorized involuntary bankrupt proceedings to be instituted against persons being merchants, or using the trade of merchandise, or retailers of merchandise. Held that, in order to constitute a person a merchant, it was necessary that he should be a trader, and, in order to constitute a person a trader, it was necessary that he should be engaged in selling as well as buying, and that the fact that a livery stable keeper made an occasional sale of horses and carriages that had become unfit for use did not render him a trader, within the ordinary meaning of such term, such sales being necessarily incidental to his main business of letting for hire, and did not constitute the trade of merchandise. *Hall v. Cooley* (U. S.) 11 Fed. Cas. 217, 218.

Lumber dealer.

A merchant is one who traffics or carries on trade, one who buys goods to sell again—one who is engaged in the purchase and sale of goods—and includes lumber dealers. *Campbell v. City of Anthony*, 20 Pac. 492, 493, 40 Kan. 652.

"Merchants," within Rev. St. 1878, § 1040, requiring merchants' goods, wares, and commodities, etc., kept for sale, to be assessed in the district where located, are "all persons who keep for sale and sell any kind of chattel property at a fixed price." "Men who keep lumber yards for the purpose of buying or selling lumber at retail or wholesale are merchants, within the meaning of the statute, as well as a man who buys and sells dry goods, groceries, or hardware." *Mitchell v. Town of Plover*, 11 N. W. 27, 28, 53 Wis. 548.

Manufacturer.

One who manufactures and supplies goods to the previous orders of his customers alone, although he keeps on hand, but not for sale, the materials from which the manufactured articles are produced, is not a merchant, within the meaning of the statute requiring merchants to take out a license. *State v. Richeson*, 45 Mo. 575.

Under a charter of *Kansas City* (article 5, § 78), the word "merchant," when used in the charter, means and includes every person or copartnership of persons who shall deal in the selling of goods, wares, and merchandise at any store or place occupied for that purpose in the city; and Rev. St. 1899, § 8540, defines a merchant as every person, corporation, or copartnership who shall deal in the selling of goods, wares, and merchandise at any store, stand, or place occupied for that purpose. These definitions are somewhat different from that of the common law. In *State v. West*, 34 Mo. 424, it was held that, to be a merchant in the sense of the law, the dealer must have on

hand goods ready for sale and present delivery, and must also actually deal in the selling of the same. A manufacturer may or may not be a merchant, within the meaning of the charter. If he keeps at a store in stock articles manufactured by him for sale, he is a merchant. If he only manufactures upon order, he is not a merchant. *Kansas City v. Ferd. Helm Brewing Co.*, 73 S. W. 302, 98 Mo. App. 590.

Member of a firm.

Hartley's Dig. art. 2377, providing that actions on an open account, to recover for the value of goods furnished, must be brought within two years, except such accounts as concern the trade of merchants between "merchant and merchant," cannot be construed to include an account or any balance due one partner by the other, who were merchants, for the account is not one between merchant and merchant, within the meaning of the statute. Angell on Limitations says that accounts between one partner and another for a settlement of partnership accounts do not concern the trade of merchandise between merchant and merchant, and are not embraced by the exception in the statute. *Leavitt v. Gooch*, 12 Tex. 95, 96.

"Merchant," as used in Act Cong. Nov. 3, 1893, c. 14, § 2, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], relating to the entrance into the United States of Chinamen formerly engaged as merchants therein, does not include a Chinaman whose business was conducted under a firm name of which his own name was no part, though it is shown that he was a partner, and that Chinese merchants do not in general conduct business in individual partnership names. In *re Quan Gin* (U. S.) 61 Fed. 395, 397.

A Chinaman is not a merchant unless his interest is real, and appears in the business and partnership articles in his own name. It is not necessary that his name appear in the firm designation. *Lee Kan v. United States* (U. S.) 62 Fed. 914, 915, 10 C. C. A. 669.

A Chinaman serving a term of imprisonment at hard labor is not a merchant, though prior to his imprisonment he owned an interest in the name of another in a mercantile firm, and retained it during his imprisonment. *United States v. Wong Ah Hung* (U. S.) 62 Fed. 1005, 1006.

In proceedings under Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], for the deportation of a Chinese person, it was admitted that on August 1, 1893, he was a merchant, as defined by the statute. On that day the store he and his partner occupied was destroyed by fire, and in the following November he left for China; returning to California in May, 1895. The

evidence showed that, before leaving, the firm had rebuilt and restocked the store, and that, on returning, defendant resumed his connection with the business, which the partner testified had always been retained. Held sufficient evidence to show that defendant had not lost the character of merchant, although there was no direct testimony that his name appeared in partnership articles or partnership accounts; nor was his status affected by the fact that he also conducted a gardening enterprise with Chinese labor, his own work being supervisory only. *Wong Fong v. United States* (U. S.) 77 Fed. 168, 169, 23 C. C. A. 110 (reversing *United States v. Wong Hong*, 71 Fed. 283).

A Chinaman who is a member of a firm of Chinese merchants engaged in buying and selling merchandise at a fixed place of business, and who is sent out by such firm as an employé to take charge of another mercantile establishment, in which said firm owns a one-half interest, is a merchant, and not a laborer, within the meaning of Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], and is not liable to deportation while thus employed. In *re Chu Foy* (U. S.) 81 Fed. 826, 828.

Evidence that a Chinese person since he came to the United States has been assisting in the business of a mercantile company, keeping the books and selling goods, and that he has an interest in the stock of goods of such company, is insufficient to establish his status as a merchant; it not being shown that his name appears in the partnership articles, or that he is in fact a partner. *United States v. Pin Kwan* (U. S.) 100 Fed. 609, 610, 40 C. C. A. 618.

A Chinaman came to the United States for the first time in June, 1897. From that time until his arrest, on September 9, 1897, under the statute relative to Chinese emigration, he worked in a laundry in Missouri. He testified that he had an interest of \$1,000 in the Chinese grocery business conducted under the name of One Lung, 43 Mott street, New York City. Held, that this did not constitute him a merchant, under Act Cong. Nov. 3, 1893, c. 4, § 2, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], but that he was a laborer. *United States v. Yong Yew* (U. S.) 83 Fed. 832, 837.

Where a Chinese is shown to have been a member of a firm of merchants in this country for seven years, with \$1,000 invested as his share of the capital, the fact that he has lately visited China, and returned from there—nothing being shown as to his manner of re-entry—does not warrant his arrest and deportation. *United States v. Wong Lung* (U. S.) 103 Fed. 794.

A person cannot be a "merchant," within the meaning of the Chinese exclusion acts, by being a member of a firm, unless he has

a fixed, substantial interest in the firm, which is indicated either by his own name appearing in the partnership firm name, or by some other evidence of the interest such as is ordinarily found among partners doing business in this country. And when a person claims to be a merchant, he must show a fixed place of business, and such frequent sales of merchandise as entitle him to be a merchant, within the ordinary meaning of the term. *United States v. Lung Hong* (U. S.) 105 Fed. 188, 189.

Merchant tailor.

A merchant includes all sorts of traders as well and as properly as merchant adventurers. A merchant tailor is a common term. *Mayor and Commonalty of London v. Wilks*, 2 Salk. 445 (citing *Hamond v. Jethro*, 2 Brownl. & G. 97, 99).

"Merchant," as used in Acts 1859, p. 53, requiring a merchant to take out a license for the privilege of conducting his business, etc., does not include a tailor who keeps cloths, etc., which he makes up into clothing only for the personal use of his customers. To be a merchant, in the sense of the law, the dealer must have on hand goods, wares, and merchandise ready for sale and present delivery, and must also actually deal in the selling of the same. *State v. West*, 34 Mo. 424, 428.

The term "merchant" includes persons who keep or handle a stock of goods which they have purchased outside of the state, and made up into clothing and sold upon orders of their customers, as used in Code, § 682, providing that no merchant shall commence business in the state without obtaining a license from the clerk of the county in which he intends to do business. *Murray v. State*, 79 Tenn. (11 Lea) 218, 219.

A Chinese person who during half his time is engaged in cutting and sewing garments for sale by a firm of which he is a member is not a merchant, within the meaning of Act Cong. Nov. 3, 1893, c. 14, § 2, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], known as the "McCreary Act," requiring a Chinese merchant to establish his status in a certain way. *Lai Moy v. United States* (U. S.) 66 Fed. 955, 956, 14 C. C. A. 283.

Oil painting dealer.

One engaged in the purchase and sale of oil paintings for a profit is not a "merchant," within the meaning of the bankrupt act, which makes the failure of a merchant to keep books of account grounds for refusing a discharge. *In re Chapman* (U. S.) 5 Fed. Cas. 470.

Pork packer.

A pork packer who purchased hogs and cut them up, and cured hams, some of

which he habitually sold at his place of business in St. Louis, and others he shipped to other markets for sale, was a "merchant," within the statute requiring merchants to pay a license, and defining a merchant to be a person who deals in the selling of goods, wares, and merchandise at any store, stand, or place occupied for that purpose. *State v. Whittaker*, 33 Mo. 457, 459.

Produce dealer.

The term "produce dealer" applies to a person engaged in the business of buying and selling fruit, butter, eggs, poultry, and produce. Such a dealer is a merchant, within the meaning of Kansas City charter, authorizing the council to license merchants, etc. *Kansas City v. Lorber*, 64 Mo. App. 604, 608.

Saloon keeper.

The words "merchants or tradesmen," within Rev. St. § 5110, subd. 7, requiring merchants or tradesmen to keep proper books of account as a condition to a discharge in bankruptcy, includes a person whose only regular business is keeping a saloon, and selling there, for cash and on credit, at retail, liquors and cigars. *In re Sherwood* (U. S.) 21 Fed. Cas. 1285.

"Merchant," as used in the statutes which permit merchants to sell spirits in quantities not less than a quart, means "one who is really engaged in the business of a merchant. If an individual, merely for the purpose of selling liquor, should have on hand a few goods for sale as a cover for his real object, and was not actually and in good faith engaged in merchandising, he could not bring himself within this proviso in the statute." *Commonwealth v. McGeorge*, 48 Ky. (9 B. Mon.) 3, 4.

Speculator in stocks.

A man who speculates in stocks, buying and selling them through brokers—he keeping no office, and not acting as a commission broker for others in buying and selling stocks—is not a "merchant or tradesman," within the meaning of Bankr. Act 1867, 14 Stat. 517, relating to the keeping of books of account by a merchant or tradesman, although, according to the lexicographers, he who is engaged in the business of buying and selling for gain may be called a merchant and also a tradesman, for no one would ever think of speaking of a person carrying on such a business as a merchant or tradesman. *In re Marston* (U. S.) 16 Fed. Cas. 857.

The words "merchant or tradesman" involve the idea of a dealing with merchandise in some form or other. In their ordinary and natural signification, they do not include one who makes profits by buying and

selling shares and speculation, whether for himself or for others. Such a person would not, in ordinary parlance, be said to be engaged in trade. In re Woodward (U. S.) 30 Fed. Cas. 542, 543.

A merchant or tradesman, as the term is used in Bankr. Act 1867 (14 Stat. 517), does not include a speculator in stocks. In re Woodward (U. S.) 30 Fed. Cas. 542, 543.

"Merchant," as used in the national bankrupt act, providing that a merchant or trader who has not kept proper books of account shall not be entitled to a discharge, does not include an insolvent debtor, who during a period of about a year bought and sold mining stocks from time to time, amounting in all to about \$3,500, where such transactions were casual, and outside and independent of his established business. Ex parte Conant, 77 Me. 275, 277, 52 Am. Rep. 759.

Steamboat manager.

"Merchant," as used in Bankr. Act, § 5110, cl. 7, providing that no bankrupt, being a merchant or tradesman, shall be discharged from his debts, who has not kept proper books of account, cannot be construed to include a person superintending the running of a steamer, and who, as treasurer of the corporation owning her, received and disbursed the moneys earned by the steamer. In re Merritt (U. S.) 7 Fed. 853, 854.

Stockbroker.

A stock and gold broker, who is not a member of the stock exchange, who takes orders for the purchase and sale of stocks and gold, but conducts the business exclusively through the agency of other brokers, who are members of the exchange, and divides the commission with them, is not a merchant or tradesman, within the meaning of the bankrupt act, and as such, disentitled to a discharge for failure to keep books of account. In re Moss (U. S.) 17 Fed. Cas. 901.

Theatrical manager or society.

"Merchant," as used in Rev. St. § 5110, relating to the keeping of proper books of account by a merchant or tradesman who becomes bankrupt, cannot be construed to include a theatrical manager, who had no other business, who bought costumes, machinery, etc., for use in his business, and also on a few occasions had sold some such property. In re Duff (U. S.) 4 Fed. 519, 521.

A merchant is one who either sells, or buys and sells. The term does not include a theatrical society which merely gives performances of one kind or another, to which the public are attracted by the skill of the performers, so that such a society cannot be adjudged an involuntary bankrupt, under

Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]. The skill of such performers is not sold. It is merely exhibited for hire. The fact that the society must buy scenery and stage appliances and furniture, which it may afterwards sell again, is of no importance. In re Oriental Society (U. S.) 104 Fed. 975.

Tradesman.

"Merchant," as used in Rev. St. § 5110, providing that a merchant or tradesman shall not be discharged in bankruptcy, who has not kept books of account, contrasts with "tradesman," which means substantially the same as "shopkeeper," as the greater with the less, and not vice versa. In re Cote (U. S.) 6 Fed. Cas. 614, 615.

MERCHANT APPRAISER.

As a clerk, see "Clerk."

A merchant appraiser is an expert selected, as an emergency arises, on the request of an importer of goods for reappraisal, to reappraise goods imported, about which there is a dispute between the revenue department of the government and the importer as to the amount of tariff taxes that should be assessed thereon. His appointment is not one specified under the civil service law, nor is he to be appointed on a competitive examination, but he is an executive agent, as an expert assistant to aid in ascertaining the exact value of the goods selected in the particular case. *Auffmordt v. Hedden*, 30 Fed. 360, 362 (affirmed 11 Sup. Ct. 103, 107, 137 U. S. 310, 34 L. Ed. 674).

A merchant appraiser is a person appointed by a customs collector to be associated with one of the general appraisers for the purpose of instituting a re-examination of merchandise imported. He occupies the position of a quasi judicial officer and has been aptly described as a legislative referee. He is presumed to be, and in fact is, the special representative of the importer, and quite naturally is somewhat biased against the government, and will not be permitted to testify to his own neglect of duty in the appraisal. *Oelberman v. Merritt* (U. S.) 19 Fed. 408, 409.

MERCHANT SEAMEN.

"Merchant seamen are seamen in private vessels, as distinguished from seamen in the navy or public vessels." *United States v. Sullivan* (U. S.) 43 Fed. 602, 604.

The term "merchant seamen" includes seamen or mariners on boats or vessels employed in navigable fresh waters within the admiralty jurisdiction of the United States, and therefore are entitled to all the rights and subject to all duties as such, as much

as seamen on the ocean. *The Ben Flint* (U. S.) 3 Fed. Cas. 183, 184.

MERCHANTABLE.

See "Good and Merchantable Cattle."

"Merchantable," as used in mercantile contracts, denotes the salableness of the goods, and signifies ordinary quality or medium quality of goodness, salability, etc. *Pacific Coast Elevator Co. v. Bravinder*, 44 Pac. 544, 546, 14 Wash. 315; *Riggs v. Armstrong*, 23 W. Va. 760, 773.

Crop of tobacco.

Where the article bargained for and to be furnished in the future was a merchantable crop of tobacco, it was held that it was the sale of a particular thing by its proper description, to wit, merchantable, and that the descriptive words for defining the thing agreed to be sold were of the substance of the contract, and not a warranty, as collateral to the main object of it. *Reed v. Randall*, 29 N. Y. 358, 361, 86 Am. Dec. 305.

Glass.

The meaning of the term "merchantable glass," in a contract for the purchase of such glass, is to be determined by evidence of the meaning of the term in the trade, and cannot be defined by the court in the absence of evidence of such meaning. *King v. Nelson*, 36 Iowa, 509, 512.

Hay.

Where a contract was to deliver a million pounds of good, merchantable prairie hay, the controlling word in such description was the word "merchantable"; and this word, as so used, was not used with reference to any particular location or market, but only as descriptive of the quality of the hay required by the contract, and, as so used, meant, generally, vendible in market, and merchantable hay is so vendible because of its fitness to serve its proper purpose, and, as applied to forage or hay, means generally edible. *Wood v. United States* (U. S.) 11 Ct. Cl. 680, 685.

R. agreed to pay for a quantity of hay, provided that L. should pronounce it merchantable, but, if he should pronounce it an inferior lot, the agreement was to be void. Held, that the word "merchantable" meant sound and undamaged, and that where a part of the hay was damaged the whole quantity could not be said to be merchantable, within the meaning of the agreement. *Crane v. Roberts*, 5 Me. (5 Greenl.) 419, 420.

Ice.

The term "merchantable," as used in a contract for the sale of merchantable ice,

meant such ice as could be sold in the market at the usual and ordinary price then prevailing for it. *Walton v. Black* (Del.) 5 Houst. 149, 150, 151.

A contract for the sale of merchantable ice means that the ice, as a lot, should be of merchantable quality, fit for the ordinary uses to which ice is put, and such as would fairly pass in market, not only at the place where sold, but everywhere, and does not require that all—that is, every part—of the ice should be of merchantable quality. *Cullen v. Bimm*, 37 Ohio St. 236, 239.

Logs.

In construing the term "merchantable," as used in a contract to deliver good, sound, and merchantable logs, the court observes that a log might be good, sound, and merchantable for many purposes, and yet not fit for being manufactured into lumber, and the same log might, owing to differences in the usages of the business in two different localities, be deemed a merchantable log in one, and not in the other. Merchantable logs, then, in reference to the business of manufacturing lumber in any particular locality, are such logs as are ordinarily used for that purpose in that particular place, and, if the usage of the business in that locality requires the logs ordinarily used to be good and sound, then the word "merchantable" would include the particular meaning of each, and render their employment of no utility in any such contract. *Tenny v. Mulvaney*, 9 Or. 405, 411.

Oil barrel staves.

A trust deed of merchantable oil barrel staves is to be construed as meaning both first and second class oil barrel staves. Staves of the first and second class "are merchantable and sold in the markets, and a barrel from the one class sells for the same price as a barrel from the other. The first class has a fixed quotation price in the market, while those of the second class are sold at a less price, and according to quality, and have no fixed market price." And such deed does not cover culls. *Riggs v. Armstrong*, 23 W. Va. 760, 772. •

Ore.

A lease of land for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable iron ore which is or which hereafter may be found on any or under said land, and at a specified annual rent, presupposes the existence of ore; and if, after reasonable efforts on the part of the lessee, no ore is found, the lease fails, and no rent can be collected. *Gribben v. Atkinson*, 31 N. W. 570, 571, 64 Mich. 651; *Blake v. Lobb's Estate*, 68 N. W. 427, 110 Mich. 608.

Peaches.

The word "merchantable," in a contract, means generally vendible in market (2 Bouv. Law Dict. 400); and, when unqualified in any way, such is its general meaning. It would be difficult, if not impossible, to give an inflexible definition of the word "merchantable." Much in each case would depend on whether the article to be dealt in is susceptible to a fixed and uniform standard, or is of a variable nature, and is also dependent upon the conditions and circumstances surrounding each case. Where a contract was for the sale of peaches which were to be merchantable, and delivered in usual-sized baskets in merchantable order, the term "merchantable" is to be construed in reference to those peaches and others in that neighborhood, and for that season. *Darby v. Hall* (Del.) 50 Atl. 64, 3 Pennewill, 25.

Wood.

In an action to recover for breach of a contract to deliver good, merchantable wood, the court instructed the jury that "the term 'good, merchantable wood' only means that the whole lot of wood, taken together, should be such as is generally sold in the market, and not that every stick should be of the best quality." This instruction was held to express the fair, legal import of the agreement. *Blake v. Hedges*, 14 Ind. 566, 568.

MERCHANTABLE ORDER.

"Merchantable order," as used in a contract requiring the defendant to deliver corn in merchantable order, means goods of good, merchantable quality. The term "order" means proper state, and includes the intrinsic or organic condition of the thing itself, as well as its extrinsic or accidental relations to other things. To say that a person is in order is equivalent to saying that he is in a sound and healthy condition, and so to say of articles bought and sold in market that they are in good order or "merchantable order" is to affirm that they are in all respects articles of that character and quality. *Hamilton v. Ganyard* (N. Y.) 84 Barb. 204, 206.

"Merchantable order," as used in a contract for the sale of wine to be delivered in merchantable order, means that at the time of delivery the goods were salable and fit for market. *Gentili v. Starace*, 14 N. Y. Supp. 764, 59 N. Y. Super. Ct. 449.

MERCHANTABLE QUALITY.

The sale of wheat of merchantable quality was not an express warranty. That the subject of a sale is to be merchantable is understood of every such contract, and when the party comes to deliver an inferior, un-

merchantable commodity, which lies open to inspection, the vendee must assert his right to refuse acceptance. *Sprague v. Blake* (N. Y.) 20 Wend. 61, 64.

"Merchantable quality," as used in an instruction that, where the purchaser had no sufficient and reasonable opportunity to inspect the goods before or at the time of the sale, there would be an implied warranty on the part of the seller that they were of fairly merchantable quality, means ordinary quality; marketable quality; bringing the average price, at least, of medium quality or goodness; good merchandise of stable quality; free from any remarkable defect. *Warner v. Arctic Ice Co.*, 74 Me. 475, 476.

MERCHANTS' ACCOUNTS.

By St. 21 Jac. 1, c. 16, it was enacted "that all actions of accounts or upon the case other than such actions as concern the trade of merchandise between merchant and merchant and their factors or servants," should be commenced within six years. With the omission of the word "accounts," the exception in the New Hampshire statute was in terms like that of James. That the exception in the statute, says Parker, J., "was considered in the earlier cases to be confined to merchants, and to transactions concerning the trade of merchandise between them, is very evident. *Webber v. Tivill*, 2 Saund. 127, note 6; *Sturt v. Mellish*, 2 Atk. 612.

* * * It is difficult to discover upon what principle the earlier cases were ever departed from, or how this exception relative to merchants' accounts can be made to apply indiscriminately to all mutual accounts. The exception is very specific in its terms—"other than such as concern the trade of merchandise between merchant and merchant, their factors and servants." How can this language, with any regard to its obvious meaning, be construed to mean all actions upon accounts, or all cases where there are mutual accounts, with items within six years? No greater violence to language can be imagined. It is making the terms 'trade of merchandise,' 'merchant,' 'factors and servants,' mean absolutely nothing, or, what is worse, making all these terms mean 'mutual accounts.'" *Blair v. Drew*, 6 N. H. 235, 237.

The statute of limitations excepting from its operation other than such "accounts" as concern the trade of merchandise between merchant and merchant, their factors or servants, applies only to open accounts, as distinguished from stated accounts. Stated accounts are those which have been examined by the parties, and where a balance due from one to the other has been ascertained and agreed upon as correct. Hence merchants' accounts, where one or both of the parties have died, or deal-

ings between them have ceased for more than six years, are within the exception. *McLellan v. Crofton*, 6 Me. (6 Greenl.) 307, 337.

In order to bring an account within the exception of the statute of limitations excluding accounts concerning the trade of merchandise between merchants, the parties must both be merchants at the time the cause of action accrued, and the account must be unsettled and mutual, consisting of debts and credits, and to have originated for articles of merchandise. *Fox v. Fisk*, 7 Miss. (6 How.) 328, 347.

The exception in the statute of limitations in the District of Columbia in favor of merchants' accounts extends to all accounts current which concern the trade of merchandise, and applies to actions of assumpsit as well as to actions of account. *Mandeville v. Wilson*, 9 U. S. (5 Cranch) 15, 18, 3 L. Ed. 23.

The term "merchant's account," in an exemption from the statute of limitations, applies only to a proper action of account, or perhaps also an action on the case for not accounting, and does not apply to an action of indebitatus assumpsit for the several items of which the account is composed, or for the general balance. *Inglis v. Haigh*, 8 Mees. & W. 769, 777.

A demand of an attorney for professional services is not a merchant's account. *Mattern v. McDivitt*, 6 Atl. 83, 84, 113 Pa. 402.

A contract for the joint purchase of goods, whereby one of the purchasers took the whole goods, and agreed to account to the other for his share of them, or of the net proceeds, and to charge no commission in case of sale, is not a merchant's account. *Murray v. Coster* (N. Y.) 20 Johns. 576, 582, 11 Am. Dec. 333.

MERCHANTS' GOODS, WARES, AND COMMODITIES.

See "Merchandise."

MERE.

On a prosecution for murder, the court, in charging that the jury might find defendant guilty of assault and battery, used the word "mere" before "assault and battery." It was held not an expression of opinion, as "mere" was used in the sense of "only." *Marshall v. State*, 74 Ga. 26, 32.

MERE GLIMMERING OF REASON.

The expression "mere glimmering of reason" can be best defined by an illustration. Wills may be made by infants of the age of

14. This is the morning dawn of reason, or the break of day of the mind. It continues to unfold until it culminates in the meridian blaze of noon, when no suspicion is entertained of the competency and freedom to act of the testator, and then begins to go down until its disk disappears beneath the horizon. Still there is a mellow glow of twilight, by which the testator is enabled to comprehend the contents of his will, the nature of his estate, the situation of his family connections, his own situation, and the circumstances which surround him. This and like objects, although seen by the testator as through a glass dimly, by reason of the infirmity of age or other causes, are still contemplated not by the flashy, fitful, and evanescent glare of the aurora borealis, but the steady, though subdued, lights and illumination of the glorious king of day, although disrobed of his gorgeous and dazzling beams. *Terry v. Buffington*, 11 Ga. 337, 345, 56 Am. Dec. 423.

MERE LICENSE.

By a "mere license" is meant the tacit permission or privilege which a person has of entering upon the premises of another, but without any invitation, express or implied. *Klugherz v. Chicago, M. & St. P. Ry. Co.*, 95 N. W. 586, 90 Minn. 17.

MERE POSSIBILITY.

The common law declares all contingent estates, when the person to take is not ascertained, to be a mere possibility, not coupled with an interest, and to be neither devisable, descendible, alienable by voluntary conveyance, nor subject to execution. Such a naked possibility is, in law, neither an estate, property, right, nor claim. One having such a possibility may in the future have a right or claim, but cannot be correctly said to have any existing right or claim. This was held in *Jackson v. Waldron* (N. Y.) 13 Wend. 178, 221, 222, prior to the statute of New York making all contingent estates descendible and devisable, where Senator Tracy, in the opinion which prevailed, said: "A mere naked possibility is, in law, no interest, and there was nothing which would pass by his release. 'Ex nihilo nihil fit.' A mere possibility is not a right in being, but an abstraction too remote and uncertain for any form of conveyance to reach." *Godwin v. Banks*, 40 Atl. 268, 273, 87 Md. 425.

MERELY.

The word "merely," as used in an instruction to the effect that, if the jury believed that the injuries sustained by plaintiff were merely the result of accident, then their verdict should be for defendant, implied that there must not have been any negligence or

carelessness on the part of the plaintiff contributing to the injury. *Henry v. Grand Ave. R. Co.*, 113 Mo. 525, 537, 21 S. W. 214.

"Merely," as used in an instruction that an object within a highway is not necessarily in the way merely because it exposes a traveler's horse to become frightened at the sight of it, does not relate to the degree of the tendency of the object to produce fright, as though the court had told the jury that an object was not necessarily a deficiency in the road because it was barely possible that the horse might be frightened; but the word was used to distinguish between liability to frighten and other modes of causing injury. *Foshay v. Town of Glen Haven*, 25 Wis. 288, 291, 3 Am. Rep. 73.

MERGER.

Confusion synonymous, see "Confusion."

Corporations.

A merger of corporations consists in the uniting of two or more corporations by the transfer of property of all to one of them, which continues in existence; the others being swallowed up or merged therein. In regard to the survivorship of one of the constituent corporations, it differs from a consolidation, wherein all the consolidating companies surrender their separate existence and become parts of a new corporation. *Adams v. Yazoo & M. V. R. Co.*, 24 South. 200, 203, 77 Miss. 194, 60 L. R. A. 33.

A merger, rightly understood, is not the equivalent of consolidation at all, but exists only where one of the constituent companies remains in being, absorbing or merging in itself all the other constituent companies. *Vicksburg & Y. C. Tel. Co. v. Citizens' Tel. Co.*, 30 South. 725, 728, 79 Miss. 341, 89 Am. St. Rep. 656.

Estates.

A merger, at law, is defined to be where a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate. The less estate is immediately annihilated, or, in the law phrase, is said to be merged—that is, sunk or drowned—in the greater. Thus, if there be a tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance. The rule in equity is the same as at law, with this modification: that at law it is invariable and inflexible; in equity it is controlled by the expressed or implied intention of the party in whom the interest or estates unite. *James v. Morey* (N. Y.) 2 Cow. 246, 300, 14 Am. Dec. 475; *Clift v. White* (N. Y.) 15 Barb. 70, 75; *Clift v. White*, 12 N. Y. (2 Kern.) 519, 527; *Asche v. Asche*, 21 N. E. 70, 71, 113 N. Y. 232 (cited in

Strever v. Earl, 15 N. Y. Supp. 350, 353, 60 Hun, 528; *Hayden v. Brock*, 57 S. W. 721, 723, 157 Mo. 88; *Bassett v. O'Brien*, 51 S. W. 107, 108, 149 Mo. 381 (quoting and approving 1 Jones, Mortg. [4th Ed.] § 848); *Strong v. Garrett*, 57 N. W. 715, 716, 90 Iowa, 100; *Watson v. Dundee Mortg. & Trust Co.*, 8 Pac. 548, 552, 12 Or. 474; *Johnson v. Hines*, 61 Md. 122, 135 (quoting Prest. Est. 7); *Wehrhane v. Safe Deposit & Trust Co.*, 42 Atl. 930, 931, 89 Md. 179; *Frick Coke Co. v. Laughead*, 52 Atl. 172, 174, 203 Pa. 168; *Shelton v. Hadlock*, 25 Atl. 483, 484, 62 Conn. 143 (citing Bl. Comm.); *Garland v. Pamplin* (Va.) 32 Grat. 805, 815.

"Merger," at law, follows upon a union of a greater and a lesser estate in the same owner, but does not so follow in equity. *Henry & Coatsworth Co. v. Bond*, 37 Neb. 207, 55 N. W. 643, 647.

It is only in those cases where it is perfectly indifferent to the party in whom the interests had united whether the charge or term should or should not subsist that in equity the term is merged. But if the owner has an interest in keeping them distinct, or there is an intervening right, there will be no merger. Where the fee is acquired by a mortgagee, merger will not take place where it is to his interest that it should not do so, and such merger would work flagrant injustice. *Watson v. Dundee Mortg. & Trust Inv. Co.*, 8 Pac. 548, 552, 12 Or. 474.

The true idea of merger consists in a thorough coalescence and indissoluble union of the merging estates; each still retaining its rights and advantages, or perhaps, more properly speaking, each imparting to the whole its peculiar attributes. That unity of ownership of two estates in the same land which occasions merger does not of necessity destroy either of such estates. Its effect often is to blend or combine them together. Therefore the payment of a debt secured by a mortgage by the purchaser of the equity of redemption, not being the mortgagor, does not necessarily merge the estates created by the mortgage, but it becomes a question of intention, and such estate will be considered as destroyed or kept alive as will best subserve the justice of the case. *Duncan v. Smith*, 31 N. J. Law (2 Vroom) 325, 327. See, also, *Burhans v. Vanness*, 10 N. J. Law (5 Halst.) 102, 106.

In order to produce a merger, there must be two distinct estates meeting in the same person. *Clift v. White*, 12 N. Y. (2 Kern.) 519, 527.

Where land is purchased and the vendee enters into possession, but the purchase price is not paid until after his death, when it is paid out of the personal property of his estate, the interest of his heirs in such property, before payment, cannot be said to be

merged in the legal title which the administrator acquired by such payment. *H. C. Frick Co. v. Laughead*, 52 Atl. 172, 174, 203 Pa. 168.

An intervening incumbrance or equity of any kind is generally sufficient to prevent a merger of the equity of redemption, provided the incumbrance be not one which the owner has assumed to pay, or one against which he can be estopped from defending, whether such an incumbrance be an attachment a levy of execution, another mortgage, or any other lien or equity. *Hayden v. Lauffenburger*, 57 S. W. 721, 723, 157 Mo. 88 (quoting 1 Jones, Mortg. [4th Ed.] § 848).

A decree of foreclosure of a mortgage merges the mortgage as a cause of action, but not the special lien of the mortgage. *Evansville Gaslight Co. v. State*, 73 Ind. 219, 38 Am. Rep. 129. A general rule is that foreclosure and sale of mortgaged premises invests the purchaser with the fee simple, and the mortgage becomes extinct. The title passes when the deed is made. The judgment of foreclosure, with or without a sale, except a sale consummated by a deed, does not discharge the lien. *Alden v. White* (Ind.) 66 N. E. 509, 511.

Same—Surrender distinguished.

The doctrine of merger applies as well where the remainder interest comes into the possession of the life tenant, as when the life estate comes into the ownership and possession of the remainderman. In either event, the two estates become merged in one. A distinction is pointed out between "surrender", and "merger," and it is said that "merger" is a wider term than "surrender," in that it takes place when the two estates are united, either in the hands of the remainderman or reversioner, or in the hands of the tenant of the particular estates, without regard to the method in which the two estates were united, while "surrender" is confined to the relinquishment by the tenant of the particular estate to him in reversion or remainder. *Harrison v. Johnston*, 70 S. W. 414, 417, 109 Tenn. 245 (citing *Fisher v. Edington*, 80 Tenn. [12 Lea] 189).

Judgments.

A judgment of a lower court is not merged in the judgment of a court of appeals affirming the judgment of the lower court, since both judgments are of equal dignity, and no merger can take place unless one of the rights be inferior to the other. *Planters' Bank v. Calvit*, 11 Miss. (3 Smedes & M.) 143, 194, 41 Am. Dec. 616.

MERINO YARN.

Merino yarn is yarn which is made by carding together wool and cotton, and spin-

ning. By this process an article of commerce distinct from either wool or cotton is produced, which is known as "merino," and goods made of such yarn are known as "merino goods." Articles made of such goods come within Tariff Act (22 Stat. § 2504) Schedule M, relating to clothing other than wool, etc. *Greenleaf v. Worthington* (U. S.) 26 Fed. 303.

MERIT.

"Merit," as used in reference to merit as a qualification for office, is not necessarily synonymous with "fitness," since a person, by reason of his faithful service in the army, and his good citizenship since his discharge therefrom, can very properly be said to merit any appointment in the civil service for which he is fitted. If he were blind or deaf or dumb he would, in a certain sense, be unfit for the position which he seeks. *People v. Knauber*, 60 N. Y. Supp. 298, 300, 43 App. Div. 342; *Id.*, 57 N. Y. Supp. 782, 783, 27 Misc. Rep. 253.

MERITORIOUS DEFENSE.

Under a ruling that a substantial meritorious defense against a claimant under a purchase at tax sale cannot be denied or cut off by the Legislature, the words "meritorious defense" mean any act or omission of the revenue officers in violation of law, and prejudicial to the former owner's rights or interests, as well as those jurisdictional and fundamental defects which affect the power to levy the tax or to sell for the nonpayment. *Cooper v. Freeman Lumber Co.*, 61 Ark. 304, 31 S. W. 981.

MERITS.

See "Affidavit of Merits"; "Pleading to the Merits."

"Merits" is defined as a matter of substance, as distinguished from matter of form. *Rahn v. Gunnison*, 12 Wis. 528, 529; *Clawson v. Hutchinson*, 14 S. C. 517, 521.

The word "merits" should be understood as meaning the strict legal rights of the parties, as contradistinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court. *St. Johns v. West* (N. Y.) 4 How. Prac. 329, 331; *Megrath v. Van Wyck*, 5 N. Y. Super. Ct. (3 Sandf.) 750, 751; *Tracey v. New York Steam Faucet Mfg. Co.* (N. Y.) 1 E. D. Smith, 349, 357; *Cruger v. Douglass* (N. Y.) 8 Barb. 81, 84; *Hirschbach v. Ketchum*, 80 N. Y. Supp. 143, 145, 79 App. Div. 561 (citing *Tallman v. Hinman* [N. Y.] 10 How. Prac. 89, 90); *Chouteau v. Parker*, 2 Minn. 118, 121 (Gil. 95); *Plano Mfg. Co. v. Kaufert*,

89 N. W. 1124, 1125, 86 Minn. 13; *Holmes v. Campbell*, 13 Minn. 66, 68 (Gil. 58, 64).

Where the word "merit" is used in speaking of the determination of a prosecution on the merits, it implies a consideration of substance, not of form; of legal rights, not of mere defects of procedure, or the technicalities thereof. *People v. Lyman*, 65 N. Y. Supp. 1062, 1065, 53 App. Div. 470.

The term "merits," as used by the profession when applied to actions, usually denotes the subject or grounds of an action as stated in the complaint, or the grounds of the defense as stated in the answer; and a trial of the merits of an action generally means the elicitation of evidence in support of the averments of fact set out in the pleadings. But the courts, in construing statutes governing appeals from interlocutory orders have frequently enlarged this meaning, and have held that the phrase "Involves the merits" must be so interpreted as to embrace orders which pass upon the substantial legal rights of the suitor, whether such rights do or do not relate directly to the cause of action or subject-matter in controversy. *Bolton v. Donavan*, 84 N. W. 357, 358, 9 N. D. 575.

As a technical legal term, "merits" has been defined as matter of substance, in law, as distinguished from matters of form, and as the real or substantial grounds of action or defense, in contradistinction to some technical or collateral matter raised in the course of the suit. The judgment is upon the merits when it amounts to a declaration of the law as to the respective rights and duties of the parties, based on the ultimate facts or state of facts disclosed by the pleadings, and evidence upon which the right of recovery depends, irrespective of formal, technical, or dilatory objections or contentions. *Ordway v. Boston & M. R. R.*, 45 Atl. 243, 244, 69 N. H. 429.

The term "merits" is not very clearly defined. It certainly embraces more than questions of law and fact constituting a cause of action or defense. As it regards the principles of construction, the necessary means of attaining an end stand upon the same ground or privilege as the end itself. If, then, a party is entitled to an appeal as a means of securing a proper judgment, he is presumably entitled to such appeal in order to secure that without which the judgment could not be rightfully had. The word "merits" naturally bears the sense of including all that the party may claim of right in reference to his case. *Blakely v. Frazier*, 11 S. C. 122, 134; *Bolin v. Southern R. Co.*, 43 S. E. 665, 668, 65 S. C. 222.

By a "decree upon the merits" is not meant 'on the merits,' in the moral sense of those words. It is sufficient that the status of the suit was such that the parties might have had their suit disposed of on its merits

if they had presented all their evidence, and the court had properly understood the facts. *Rogers v. Rogers*, 16 S. E. 633, 638, 37 W. Va. 407.

The merits of an action do not relate to the moral and abstract rights of the case, without reference to the constitution of judicial tribunals, or their mode of investigating facts, or their well-established rules of practice. Of course, there are many things in the proceedings of courts of justice which are mere matters of form, not in any way affecting any substantial right, nor touching the real merits of the controversy; but we can hardly say that a right secured to a suitor by the Constitution is an immaterial matter, to be regarded, or not, as the courts may think proper. *Oatman v. Bond*, 15 Wis. 20, 26.

Under a Code provision providing that a decree pro confesso shall not be absolute for a certain time, but that within that period the defendant may be admitted to answer the bill upon petition showing merits, it is held that merits need not be facts additional to those disclosed in the original suit, but any issues of law or fact which might arise if the suit were merely begun. *Brown v. Brown*, 6 S. W. 869, 86 Tenn. (2 Pickle) 277.

Dismissal.

Where a petition was dismissed for want of jurisdiction and the absence of proper parties so far as it related to the special relief sought by the suit—vacation and surrender of a patent—and was dismissed generally on the ground that it was defective; uncertain, and insufficient in the statement of the cause of action, it was not a decision on the merits, so as to be a bar to a subsequent suit involving the same subject-matter. *Hughes v. United States*, 71 U. S. (4 Wall.) 232, 237, 18 L. Ed. 303.

A judgment dismissing the complaint is not a "judgment on the merits," where those words do not appear in the judgment, though they do appear in the motion for a judgment, and are recited in the findings. *Whiteside v. Noyac Cottage Ass'n*, 23 N. Y. Supp. 63, 65, 68 Hun, 565.

Involuntary nonsuit.

A judgment upon an involuntary nonsuit, ordered on the ground that the plaintiff's own evidence conclusively showed that he knew of the danger which caused his injury complained of, and that, with such knowledge, he assumed the risk thereof, as a matter of law, is a judgment upon the merits, and a bar to another action between the same parties for the same cause. *Ordway v. Boston & M. R. R.*, 45 Atl. 243, 244, 69 N. H. 429.

Permitting answer after judgment.

An order permitting defendants to answer, made under section 105, c. 66, Gen. St.,

more than one year after the entry of judgment, involves the "merits of the action, or some part thereof," within subdivision 3, § 8, c. 86., Gen. St., by which an appeal is allowed "from an order involving the merits of the action, or some part thereof." *Holmes v. Campbell*, 13 Minn. 66, 68 (Gil. 58, 64).

Refusing application for judgment nunc pro tunc.

An order involving the merits of an action is an order involving matters in controversy in the suit, and hence an appeal will not lie from an order denying an application before judgment for a judgment nunc pro tunc. *Fairchild v. Dean*, 13 Wis. 329, 331.

Refusing to set aside service.

An order denying the motion of the defendant appearing specially for that purpose to set aside the service of the summons upon him is an order involving the merits of the action, within Gen. St. 1904, § 6140, subd. 3, for it determines his positive legal rights, and compels him to take upon himself the burden of defending the action on the merits when the court has no jurisdiction over him. *Plano Mfg. Co. v. Kaufert*, 89 N. W. 1124, 1125, 86 Minn. 13.

Refusing to strike immaterial averments.

An order refusing to strike out immaterial averments in a pleading does not involve the merits of the action, so as to be appealable. *Whitney v. Waterman* (N. Y.) 4 How. Prac. 313, 314. The word "merits," in a statute limiting appeals from orders to those involving the merits of the action, does not include an order refusing to strike out matter in the pleading as irrelevant and redundant. *Bedell v. Stickles* (N. Y.) 4 How. Prac. 432, 434.

Refusing to suspend proceedings.

An order denying a motion for an order that all proceedings in a case for the recovery of possession of land be suspended until the trial of a case to recover the value of the last improvements on the land was an order involving the merits. *Dill v. Moon*, 14 S. C. 338, 339.

Retaxation of costs.

An order for the retaxation of costs is not an order involving the merits of an action. *Ernst v. The Brooklyn*, 24 Wis. 616, 617.

Vacating default judgment.

A final judgment determines the rights of the parties to the action, and any order which vacates or modifies it necessarily affects the legal rights of the party in whose favor it is, and hence involves the merits of the action. An order vacating a judgment

on default, and granting defendant leave to answer, is such an order, and therefore appealable. *People's Ice Co. v. Schlenker*, 52 N. W. 219, 50 Minn. 1.

Vacating final judgment.

Orders vacating or modifying a final judgment are orders involving the merits of the action. *People's Ice Co. v. Schlenker*, 52 N. W. 219, 50 Minn. 1.

MEROLI.

"Meroli" is defined in the dictionary as the essential oil obtained from the flowers of the bitter orange, but there was evidence introduced in a tariff duties case that, within the meaning of the trade, the words "oil meroli" were generally used to designate oil not made from the flowers, but from the leaves, twigs and immature fruit, of orange trees. *Dodge v. Hedden* (U. S.) 42 Fed. 446, 447.

MESH.

"Mesh," as used in St. 1 Eliz. c. 17, § 3, prohibiting fishing except with a net whereof every mesh or mask shall be 2½ inches broad, was used in its ordinary sense, meaning the space from thread to thread. *Thomas v. Evans*, El. Bl. & El. 171, 174.

MESNE.

The word "mesne" signifies merely intervening, intermediate. *Birmingham Dry Goods Co. v. Bledsoe*, 21 South. 403, 113 Ala. 418.

MESNE LORDS.

The term "mesne lord" is used in the English law to designate a lord holding lands immediately under the King, who grants out portions of such lands to inferior persons, and who thus becomes a lord with respect to such inferior persons. They are called "mesne lords" because, while tenants with respect to the King, they were lords in respect to their own tenants. *De Peyster v. Michael*, 6 N. Y. (2 Seld.) 467, 495, 57 Am. Dec. 470.

MESNE PROCESS.

Mesne process, strictly speaking, embraces all writs and orders of the court necessary for the carrying on of the suit after it has been instituted, from and after the summons, which is original process, up to, but not including, those writs which are necessary to secure the benefits of the suit to the successful party, which are final process; but, in the sense in which the phrase mesne process has come to be used, it em-

selling shares and speculation, whether for himself or for others. Such a person would not, in ordinary parlance, be said to be engaged in trade. In re Woodward (U. S.) 30 Fed. Cas. 542, 543.

A merchant or tradesman, as the term is used in Bankr. Act 1867 (14 Stat. 517), does not include a speculator in stocks. In re Woodward (U. S.) 30 Fed. Cas. 542, 543.

"Merchant," as used in the national bankrupt act, providing that a merchant or trader who has not kept proper books of account shall not be entitled to a discharge, does not include an insolvent debtor, who during a period of about a year bought and sold mining stocks from time to time, amounting in all to about \$3,500, where such transactions were casual, and outside and independent of his established business. Ex parte Conant, 77 Me. 275, 277, 52 Am. Rep. 759.

Steamboat manager.

"Merchant," as used in Bankr. Act, § 5110, cl. 7, providing that no bankrupt, being a merchant or tradesman, shall be discharged from his debts, who has not kept proper books of account, cannot be construed to include a person superintending the running of a steamer, and who, as treasurer of the corporation owning her, received and disbursed the moneys earned by the steamer. In re Merritt (U. S.) 7 Fed. 853, 854.

Stockbroker.

A stock and gold broker, who is not a member of the stock exchange, who takes orders for the purchase and sale of stocks and gold, but conducts the business exclusively through the agency of other brokers, who are members of the exchange, and divides the commission with them, is not a merchant or tradesman, within the meaning of the bankrupt act, and as such, disentitled to a discharge for failure to keep books of account. In re Moss (U. S.) 17 Fed. Cas. 901.

Theatrical manager or society.

"Merchant," as used in Rev. St. § 5110, relating to the keeping of proper books of account by a merchant or tradesman who becomes bankrupt, cannot be construed to include a theatrical manager, who had no other business, who bought costumes, machinery, etc., for use in his business, and also on a few occasions had sold some such property. In re Duff (U. S.) 4 Fed. 519, 521.

A merchant is one who either sells, or buys and sells. The term does not include a theatrical society which merely gives performances of one kind or another, to which the public are attracted by the skill of the performers, so that such a society cannot be adjudged an involuntary bankrupt, under

Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 8423]. The skill of such performers is not sold. It is merely exhibited for hire. The fact that the society must buy scenery and stage appliances and furniture, which it may afterwards sell again, is of no importance. In re Oriental Society (U. S.) 104 Fed. 975.

Tradesman.

"Merchant," as used in Rev. St. § 5110, providing that a merchant or tradesman shall not be discharged in bankruptcy, who has not kept books of account, contrasts with "tradesman," which means substantially the same as "shopkeeper," as the greater with the less, and not vice versa. In re Cote (U. S.) 6 Fed. Cas. 614, 615.

MERCHANT APPRAISER.

As a clerk, see "Clerk."

A merchant appraiser is an expert selected, as an emergency arises, on the request of an importer of goods for reappraisal, to reappraise goods imported, about which there is a dispute between the revenue department of the government and the importer as to the amount of tariff taxes that should be assessed thereon. His appointment is not one specified under the civil service law, nor is he to be appointed on a competitive examination, but he is an executive agent, as an expert assistant to aid in ascertaining the exact value of the goods selected in the particular case. *Auffmordt v. Hedden*, 30 Fed. 360, 362 (affirmed 11 Sup. Ct. 103, 107, 137 U. S. 310, 34 L. Ed. 674).

A merchant appraiser is a person appointed by a customs collector to be associated with one of the general appraisers for the purpose of instituting a re-examination of merchandise imported. He occupies the position of a quasi judicial officer and has been aptly described as a legislative referee. He is presumed to be, and in fact is, the special representative of the importer, and quite naturally is somewhat biased against the government, and will not be permitted to testify to his own neglect of duty in the appraisal. *Oelberman v. Merritt* (U. S.) 19 Fed. 408, 409.

MERCHANT SEAMEN.

"Merchant seamen are seamen in private vessels, as distinguished from seamen in the navy or public vessels." *United States v. Sullivan* (U. S.) 43 Fed. 602, 604.

The term "merchant seamen" includes seamen or mariners on boats or vessels employed in navigable fresh waters within the admiralty jurisdiction of the United States, and therefore are entitled to all the rights and subject to all duties as such, as much

as seamen on the ocean. *The Ben Flint* (U. S.) 3 Fed. Cas. 183, 184.

MERCHANTABLE.

See "Good and Merchantable Cattle."

"Merchantable," as used in mercantile contracts, denotes the salableness of the goods, and signifies ordinary quality or medium quality of goodness, salability, etc. *Pacific Coast Elevator Co. v. Bravinder*, 44 Pac. 544, 546, 14 Wash. 315; *Riggs v. Armstrong*, 23 W. Va. 760, 773.

Crop of tobacco.

Where the article bargained for and to be furnished in the future was a merchantable crop of tobacco, it was held that it was the sale of a particular thing by its proper description, to wit, merchantable, and that the descriptive words for defining the thing agreed to be sold were of the substance of the contract, and not a warranty, as collateral to the main object of it. *Reed v. Randall*, 29 N. Y. 358, 361, 86 Am. Dec. 305.

Glass.

The meaning of the term "merchantable glass," in a contract for the purchase of such glass, is to be determined by evidence of the meaning of the term in the trade, and cannot be defined by the court in the absence of evidence of such meaning. *King v. Nelson*, 36 Iowa, 509, 512.

Hay.

Where a contract was to deliver a million pounds of good, merchantable prairie hay, the controlling word in such description was the word "merchantable"; and this word, as so used, was not used with reference to any particular location or market, but only as descriptive of the quality of the hay required by the contract, and, as so used, meant, generally, vendible in market, and merchantable hay is so vendible because of its fitness to serve its proper purpose, and, as applied to forage or hay, means generally edible. *Wood v. United States* (U. S.) 11 Ct. Cl. 680, 685.

R. agreed to pay for a quantity of hay, provided that L. should pronounce it merchantable, but, if he should pronounce it an inferior lot, the agreement was to be void. Held, that the word "merchantable" meant sound and undamaged, and that where a part of the hay was damaged the whole quantity could not be said to be merchantable, within the meaning of the agreement. *Crane v. Roberts*, 5 Me. (5 Greenl.) 419, 420.

Ice.

The term "merchantable," as used in a contract for the sale of merchantable ice,

meant such ice as could be sold in the market at the usual and ordinary price then prevailing for it. *Walton v. Black* (Del.) 5 Houst. 149, 150, 151.

A contract for the sale of merchantable ice means that the ice, as a lot, should be of merchantable quality, fit for the ordinary uses to which ice is put, and such as would fairly pass in market, not only at the place where sold, but everywhere, and does not require that all—that is, every part—of the ice should be of merchantable quality. *Cullen v. Bimm*, 37 Ohio St. 236, 239.

Logs.

In construing the term "merchantable," as used in a contract to deliver good, sound, and merchantable logs, the court observes that a log might be good, sound, and merchantable for many purposes, and yet not fit for being manufactured into lumber, and the same log might, owing to differences in the usages of the business in two different localities, be deemed a merchantable log in one, and not in the other. Merchantable logs, then, in reference to the business of manufacturing lumber in any particular locality, are such logs as are ordinarily used for that purpose in that particular place, and, if the usage of the business in that locality requires the logs ordinarily used to be good and sound, then the word "merchantable" would include the particular meaning of each, and render their employment of no utility in any such contract. *Tenny v. Mulvaney*, 9 Or. 405, 411.

Oil barrel staves.

A trust deed of merchantable oil barrel staves is to be construed as meaning both first and second class oil barrel staves. Staves of the first and second class "are merchantable and sold in the markets, and a barrel from the one class sells for the same price as a barrel from the other. The first class has a fixed quotation price in the market, while those of the second class are sold at a less price, and according to quality, and have no fixed market price." And such deed does not cover culls. *Riggs v. Armstrong*, 23 W. Va. 760, 772. •

Ore.

A lease of land for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable iron ore which is or which hereafter may be found on any or under said land, and at a specified annual rent, presupposes the existence of ore; and if, after reasonable efforts on the part of the lessee, no ore is found, the lease falls, and no rent can be collected. *Gribben v. Atkinson*, 31 N. W. 570, 571, 64 Mich. 651; *Blake v. Lobb's Estate*, 63 N. W. 427, 110 Mich. 608.

Peaches.

The word "merchantable," in a contract, means generally vendible in market (2 Bouv. Law Dict. 400); and, when unqualified in any way, such is its general meaning. It would be difficult, if not impossible, to give an inflexible definition of the word "merchantable." Much in each case would depend on whether the article to be dealt in is susceptible to a fixed and uniform standard, or is of a variable nature, and is also dependent upon the conditions and circumstances surrounding each case. Where a contract was for the sale of peaches which were to be merchantable, and delivered in usual-sized baskets in merchantable order, the term "merchantable" is to be construed in reference to those peaches and others in that neighborhood, and for that season. *Darby v. Hall* (Del.) 50 Atl. 64, 3 Pennewill, 25.

Wood.

In an action to recover for breach of a contract to deliver good, merchantable wood, the court instructed the jury that "the term 'good, merchantable wood' only means that the whole lot of wood, taken together, should be such as is generally sold in the market, and not that every stick should be of the best quality." This instruction was held to express the fair, legal import of the agreement. *Blake v. Hedges*, 14 Ind. 566, 568.

MERCHANTABLE ORDER.

"Merchantable order," as used in a contract requiring the defendant to deliver corn in merchantable order, means goods of good, merchantable quality. The term "order" means proper state, and includes the intrinsic or organic condition of the thing itself, as well as its extrinsic or accidental relations to other things. To say that a person is in order is equivalent to saying that he is in a sound and healthy condition, and so to say of articles bought and sold in market that they are in good order or "merchantable order" is to affirm that they are in all respects articles of that character and quality. *Hamilton v. Ganyard* (N. Y.) 34 Barb. 204, 206.

"Merchantable order," as used in a contract for the sale of wine to be delivered in merchantable order, means that at the time of delivery the goods were salable and fit for market. *Gentilli v. Starace*, 14 N. Y. Supp. 764, 59 N. Y. Super. Ct. 449.

MERCHANTABLE QUALITY.

The sale of wheat of merchantable quality was not an express warranty. That the subject of a sale is to be merchantable is understood of every such contract, and when the party comes to deliver an inferior, un-

merchantable commodity, which lies open to inspection, the vendee must assert his right to refuse acceptance. *Sprague v. Blake* (N. Y.) 20 Wend. 61, 64.

"Merchantable quality," as used in an instruction that, where the purchaser had no sufficient and reasonable opportunity to inspect the goods before or at the time of the sale, there would be an implied warranty on the part of the seller that they were of fairly merchantable quality, means ordinary quality; marketable quality; bringing the average price, at least, of medium quality or goodness; good merchandise of stable quality; free from any remarkable defect. *Warner v. Arctic Ice Co.*, 74 Me. 475, 476.

MERCHANTS' ACCOUNTS.

By St. 21 Jac. 1, c. 16, it was enacted "that all actions of accounts or upon the case other than such actions as concern the trade of merchandise between merchant and merchant and their factors or servants," should be commenced within six years. With the omission of the word "accounts," the exception in the New Hampshire statute was in terms like that of James. That the exception in the statute, says Parker, J., "was considered in the earlier cases to be confined to merchants, and to transactions concerning the trade of merchandise between them, is very evident. *Webber v. Tivill*, 2 Saund. 127, note 6; *Sturt v. Mellish*, 2 Atk. 612. * * * It is difficult to discover upon what principle the earlier cases were ever departed from, or how this exception relative to merchants' accounts can be made to apply indiscriminately to all mutual accounts. The exception is very specific in its terms—other than such as concern the trade of merchandise between merchant and merchant, their factors and servants.' How can this language, with any regard to its obvious meaning, be construed to mean all actions upon accounts, or all cases where there are mutual accounts, with items within six years? No greater violence to language can be imagined. It is making the terms 'trade of merchandise,' 'merchant,' 'factors and servants,' mean absolutely nothing, or, what is worse, making all these terms mean 'mutual accounts.'" *Blair v. Drew*, 6 N. H. 235, 237.

The statute of limitations excepting from its operation other than such "accounts" as concern the trade of merchandise between merchant and merchant, their factors or servants, applies only to open accounts, as distinguished from stated accounts. Stated accounts are those which have been examined by the parties, and where a balance due from one to the other has been ascertained and agreed upon as correct. Hence merchants' accounts, where one or both of the parties have died, or deal-

ings between them have ceased for more than six years, are within the exception. *McLellan v. Crofton*, 6 Me. (6 Greenl.) 307, 337.

In order to bring an account within the exception of the statute of limitations excluding accounts concerning the trade of merchandise between merchants, the parties must both be merchants at the time the cause of action accrued, and the account must be unsettled and mutual, consisting of debts and credits, and to have originated for articles of merchandise. *Fox v. Flak*, 7 Miss. (6 How.) 328, 347.

The exception in the statute of limitations in the District of Columbia in favor of merchants' accounts extends to all accounts current which concern the trade of merchandise, and applies to actions of assumpsit as well as to actions of account. *Mandeville v. Wilson*, 9 U. S. (5 Cranch) 15, 18, 3 L. Ed. 23.

The term "merchant's account," in an exemption from the statute of limitations, applies only to a proper action of account, or perhaps also an action on the case for not accounting, and does not apply to an action of indebitatus assumpsit for the several items of which the account is composed, or for the general balance. *Ingils v. Haigh*, 8 Mees. & W. 769, 777.

A demand of an attorney for professional services is not a merchant's account. *Mattern v. McDivitt*, 6 Atl. 83, 84, 113 Pa. 402.

A contract for the joint purchase of goods, whereby one of the purchasers took the whole goods, and agreed to account to the other for his share of them, or of the net proceeds, and to charge no commission in case of sale, is not a merchant's account. *Murray v. Coster* (N. Y.) 20 Johns. 576, 582, 11 Am. Dec. 333.

MERCHANTS' GOODS, WARES, AND COMMODITIES.

See "Merchandise."

MERE.

On a prosecution for murder, the court, in charging that the jury might find defendant guilty of assault and battery, used the word "mere" before "assault and battery." It was held not an expression of opinion, as "mere" was used in the sense of "only." *Marshall v. State*, 74 Ga. 26, 32.

MERE GLIMMERING OF REASON.

The expression "mere glimmering of reason" can be best defined by an illustration. Wills may be made by infants of the age of

14. This is the morning dawn of reason, or the break of day of the mind. It continues to unfold until it culminates in the meridian blaze of noon, when no suspicion is entertained of the competency and freedom to act of the testator, and then begins to go down until its disk disappears beneath the horizon. Still there is a mellow glow of twilight, by which the testator is enabled to comprehend the contents of his will, the nature of his estate, the situation of his family connections, his own situation, and the circumstances which surround him. This and like objects, although seen by the testator as through a glass dimly, by reason of the infirmity of age or other causes, are still contemplated not by the flashy, fitful, and evanescent glare of the aurora borealis, but the steady, though subdued, lights and illumination of the glorious king of day, although disrobed of his gorgeous and dazzling beams. *Terry v. Buffington*, 11 Ga. 337, 345, 56 Am. Dec. 423.

MERE LICENSE.

By a "mere license" is meant the tacit permission or privilege which a person has of entering upon the premises of another, but without any invitation, express or implied. *Klugherz v. Chicago, M. & St. P. Ry. Co.*, 95 N. W. 586, 90 Minn. 17.

MERE POSSIBILITY.

The common law declares all contingent estates, when the person to take is not ascertained, to be a mere possibility, not coupled with an interest, and to be neither devisable, descendible, alienable by voluntary conveyance, nor subject to execution. Such a naked possibility is, in law, neither an estate, property, right, nor claim. One having such a possibility may in the future have a right or claim, but cannot be correctly said to have any existing right or claim. This was held in *Jackson v. Waldron* (N. Y.) 13 Wend. 178, 221, 222, prior to the statute of New York making all contingent estates descendible and devisable, where Senator Tracy, in the opinion which prevailed, said: "A mere naked possibility is, in law, no interest, and there was nothing which would pass by his release. 'Ex nihilo nihil fit.' A mere possibility is not a right in being, but an abstraction too remote and uncertain for any form of conveyance to reach." *Godwin v. Banks*, 40 Atl. 268, 273, 87 Md. 425.

MERELY.

The word "merely," as used in an instruction to the effect that, if the jury believed that the injuries sustained by plaintiff were merely the result of accident, then their verdict should be for defendant, implied that there must not have been any negligence or

carelessness on the part of the plaintiff contributing to the injury. *Henry v. Grand Ave. R. Co.*, 113 Mo. 525, 537, 21 S. W. 214.

"Merely," as used in an instruction that an object within a highway is not necessarily in the way merely because it exposes a traveler's horse to become frightened at the sight of it, does not relate to the degree of the tendency of the object to produce fright, as though the court had told the jury that an object was not necessarily a deficiency in the road because it was barely possible that the horse might be frightened; but the word was used to distinguish between liability to frighten and other modes of causing injury. *Foshay v. Town of Glen Haven*, 25 Wis. 288, 291, 3 Am. Rep. 73.

MERGER.

Confusion synonymous; see "Confusion."

Corporations.

A merger of corporations consists in the uniting of two or more corporations by the transfer of property of all to one of them, which continues in existence; the others being swallowed up or merged therein. In regard to the survivorship of one of the constituent corporations, it differs from a consolidation, wherein all the consolidating companies surrender their separate existence and become parts of a new corporation. *Adams v. Yazoo & M. V. R. Co.*, 24 South. 200, 203, 77 Miss. 194, 60 L. R. A. 33.

A merger, rightly understood, is not the equivalent of consolidation at all, but exists only where one of the constituent companies remains in being, absorbing or merging in itself all the other constituent companies. *Vicksburg & Y. C. Tel. Co. v. Citizens' Tel. Co.*, 30 South. 725, 728, 79 Miss. 341, 89 Am. St. Rep. 656.

Estates.

A merger, at law, is defined to be where a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate. The less estate is immediately annihilated, or, in the law phrase, is said to be merged—that is, sunk or drowned—in the greater. Thus, if there be a tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance. The rule in equity is the same as at law, with this modification: that at law it is invariable and inflexible; in equity it is controlled by the expressed or implied intention of the party in whom the interest or estates unite. *James v. Morey* (N. Y.) 2 Cow. 246, 300, 14 Am. Dec. 475; *Clift v. White* (N. Y.) 15 Barb. 70, 75; *Clift v. White*, 12 N. Y. (2 Kern.) 519, 527; *Asche v. Asche*, 21 N. E. 70, 71, 113 N. Y. 232 (cited in

Strever v. Earl, 15 N. Y. Supp. 350, 353, 60 Hun, 528; *Hayden v. Brock*, 57 S. W. 721, 723, 157 Mo. 88; *Bassett v. O'Brien*, 51 S. W. 107, 108, 149 Mo. 381 (quoting and approving 1 Jones, *Mortg.* [4th Ed.] § 848); *Strong v. Garrett*, 57 N. W. 715, 716, 90 Iowa, 100; *Watson v. Dundee Mortg. & Trust Co.*, 8 Pac. 548, 552, 12 Or. 474; *Johnson v. Hines*, 61 Md. 122, 135 (quoting *Prest. Est.* 7); *Wehrhane v. Safe Deposit & Trust Co.*, 42 Atl. 930, 931, 89 Md. 179; *Frick Coke Co. v. Laughead*, 52 Atl. 172, 174, 203 Pa. 168; *Shelton v. Hadlock*, 25 Atl. 483, 484, 62 Conn. 143 (citing *Bl. Comm.*); *Garland v. Pamplin* (Va.) 32 Grat. 305, 315.

"Merger," at law, follows upon a union of a greater and a lesser estate in the same owner, but does not so follow in equity. *Henry & Coatsworth Co. v. Bond*, 37 Neb. 207, 55 N. W. 643, 647.

It is only in those cases where it is perfectly indifferent to the party in whom the interests had united whether the charge or term should or should not subsist that in equity the term is merged. But if the owner has an interest in keeping them distinct, or there is an intervening right, there will be no merger. Where the fee is acquired by a mortgagee, merger will not take place where it is to his interest that it should not do so, and such merger would work flagrant injustice. *Watson v. Dundee Mortg. & Trust Inv. Co.*, 8 Pac. 548, 552, 12 Or. 474.

The true idea of merger consists in a thorough coalescence and indissoluble union of the merging estates; each still retaining its rights and advantages, or perhaps, more properly speaking, each imparting to the whole its peculiar attributes. That unity of ownership of two estates in the same land which occasions merger does not of necessity destroy either of such estates. Its effect often is to blend or combine them together. Therefore the payment of a debt secured by a mortgage by the purchaser of the equity of redemption, not being the mortgagor, does not necessarily merge the estates created by the mortgage, but it becomes a question of intention, and such estate will be considered as destroyed or kept alive as will best subserve the justice of the case. *Duncan v. Smith*, 31 N. J. Law (2 Vroom) 325, 327. See, also, *Burhans v. Vanness*, 10 N. J. Law (5 Halst.) 102, 106.

In order to produce a merger, there must be two distinct estates meeting in the same person. *Clift v. White*, 12 N. Y. (2 Kern.) 519, 527.

Where land is purchased and the vendee enters into possession, but the purchase price is not paid until after his death, when it is paid out of the personal property of his estate, the interest of his heirs in such property, before payment, cannot be said to be

merged in the legal title which the administrator acquired by such payment. *H. C. Frick Co. v. Laughead*, 52 Atl. 172, 174, 203 Pa. 168.

An intervening incumbrance or equity of any kind is generally sufficient to prevent a merger of the equity of redemption, provided the incumbrance be not one which the owner has assumed to pay, or one against which he can be estopped from defending, whether such an incumbrance be an attachment a levy of execution, another mortgage, or any other lien or equity. *Hayden v. Lauffenburger*, 57 S. W. 721, 723, 157 Mo. 88 (quoting 1 Jones, *Mortg.* [4th Ed.] § 848).

A decree of foreclosure of a mortgage merges the mortgage as a cause of action, but not the special lien of the mortgage. *Evansville Gaslight Co. v. State*, 73 Ind. 219, 38 Am. Rep. 129. A general rule is that foreclosure and sale of mortgaged premises invests the purchaser with the fee simple, and the mortgage becomes extinct. The title passes when the deed is made. The judgment of foreclosure, with or without a sale, except a sale consummated by a deed, does not discharge the lien. *Alden v. White* (Ind.) 66 N. E. 509, 511.

Same—Surrender distinguished.

The doctrine of merger applies as well where the remainder interest comes into the possession of the life tenant, as when the life estate comes into the ownership and possession of the remainderman. In either event, the two estates become merged in one. A distinction is pointed out between "surrender", and "merger," and it is said that "merger" is a wider term than "surrender," in that it takes place when the two estates are united, either in the hands of the remainderman or reversioner, or in the hands of the tenant of the particular estates, without regard to the method in which the two estates were united, while "surrender" is confined to the relinquishment by the tenant of the particular estate to him in reversion or remainder. *Harrison v. Johnston*, 70 S. W. 414, 417, 109 Tenn. 245 (citing *Fisher v. Edington*, 80 Tenn. [12 Lea] 189).

Judgments.

A judgment of a lower court is not merged in the judgment of a court of appeals affirming the judgment of the lower court, since both judgments are of equal dignity, and no merger can take place unless one of the rights be inferior to the other. *Planters' Bank v. Calvit*, 11 Miss. (3 Smedes & M.) 143, 194, 41 Am. Dec. 616.

MERINO YARN.

Merino yarn is yarn which is made by carding together wool and cotton, and spin-

ning. By this process an article of commerce distinct from either wool or cotton is produced, which is known as "merino," and goods made of such yarn are known as "merino goods." Articles made of such goods come within Tariff Act (22 Stat. § 2504) Schedule M, relating to clothing other than wool, etc. *Greenleaf v. Worthington* (U. S.) 26 Fed. 303.

MERIT.

"Merit," as used in reference to merit as a qualification for office, is not necessarily synonymous with "fitness," since a person, by reason of his faithful service in the army, and his good citizenship since his discharge therefrom, can very properly be said to merit any appointment in the civil service for which he is fitted. If he were blind or deaf or dumb he would, in a certain sense, be unfit for the position which he seeks. *People v. Knauber*, 60 N. Y. Supp. 298, 300, 43 App. Div. 342; *Id.*, 57 N. Y. Supp. 782, 783, 27 Misc. Rep. 253.

MERITORIOUS DEFENSE.

Under a ruling that a substantial meritorious defense against a claimant under a purchase at tax sale cannot be denied or cut off by the Legislature, the words "meritorious defense" mean any act or omission of the revenue officers in violation of law, and prejudicial to the former owner's rights or interests, as well as those jurisdictional and fundamental defects which affect the power to levy the tax or to sell for the nonpayment. *Cooper v. Freeman Lumber Co.*, 61 Ark. 304, 31 S. W. 981.

MERITS.

See "Affidavit of Merits"; "Pleading to the Merits."

"Merits" is defined as a matter of substance, as distinguished from matter of form. *Rahn v. Gunnison*, 12 Wis. 528, 529; *Clawson v. Hutchinson*, 14 S. C. 517, 521.

The word "merits" should be understood as meaning the strict legal rights of the parties, as contradistinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court. *St. Johns v. West* (N. Y.) 4 How. Prac. 329, 331; *Megrath v. Van Wyck*, 5 N. Y. Super. Ct. (3 Sandf.) 750, 751; *Tracey v. New York Steam Faucet Mfg. Co.* (N. Y.) 1 E. D. Smith, 349, 357; *Cruger v. Douglass* (N. Y.) 8 Barb. 81, 84; *Hirshbach v. Ketchum*, 80 N. Y. Supp. 143, 145, 79 App. Div. 561 (citing *Tallman v. Hinman* [N. Y.] 10 How. Prac. 89, 90); *Chouteau v. Parker*, 2 Minn. 118, 121 (Gil. 95); *Plano Mfg. Co. v. Kaufert*,

89 N. W. 1124, 1125, 86 Minn. 13; *Holmes v. Campbell*, 13 Minn. 66, 68 (Gil. 58, 64).

Where the word "merit" is used in speaking of the determination of a prosecution on the merits, it implies a consideration of substance, not of form; of legal rights, not of mere defects of procedure, or the technicalities thereof. *People v. Lyman*, 65 N. Y. Supp. 1062, 1065, 53 App. Div. 470.

The term "merits," as used by the profession when applied to actions, usually denotes the subject or grounds of an action as stated in the complaint, or the grounds of the defense as stated in the answer; and a trial of the merits of an action generally means the elicitation of evidence in support of the averments of fact set out in the pleadings. But the courts, in construing statutes governing appeals from interlocutory orders have frequently enlarged this meaning, and have held that the phrase "involves the merits" must be so interpreted as to embrace orders which pass upon the substantial legal rights of the suitor, whether such rights do or do not relate directly to the cause of action or subject-matter in controversy. *Bolton v. Donovan*, 84 N. W. 357, 358, 9 N. D. 575.

As a technical legal term, "merits" has been defined as matter of substance, in law, as distinguished from matters of form, and as the real or substantial grounds of action or defense, in contradistinction to some technical or collateral matter raised in the course of the suit. The judgment is upon the merits when it amounts to a declaration of the law as to the respective rights and duties of the parties, based on the ultimate facts or state of facts disclosed by the pleadings, and evidence upon which the right of recovery depends, irrespective of formal, technical, or dilatory objections or contentions. *Ordway v. Boston & M. R. R.*, 45 Atl. 243, 244, 69 N. H. 429.

The term "merits" is not very clearly defined. It certainly embraces more than questions of law and fact constituting a cause of action or defense. As it regards the principles of construction, the necessary means of attaining an end stand upon the same ground or privilege as the end itself. If, then, a party is entitled to an appeal as a means of securing a proper judgment, he is presumably entitled to such appeal in order to secure that without which the judgment could not be rightfully had. The word "merits" naturally bears the sense of including all that the party may claim of right in reference to his case. *Blakely v. Frazier*, 11 S. C. 122, 134; *Bolin v. Southern R. Co.*, 43 S. E. 665, 666, 65 S. C. 222.

By a "decree upon the merits" is not meant 'on the merits,' in the moral sense of those words. It is sufficient that the status of the suit was such that the parties might have had their suit disposed of on its merits

if they had presented all their evidence, and the court had properly understood the facts. *Rogers v. Rogers*, 16 S. E. 633, 638, 37 W. Va. 407.

The merits of an action do not relate to the moral and abstract rights of the case, without reference to the constitution of judicial tribunals, or their mode of investigating facts, or their well-established rules of practice. Of course, there are many things in the proceedings of courts of justice which are mere matters of form, not in any way affecting any substantial right, nor touching the real merits of the controversy; but we can hardly say that a right secured to a suitor by the Constitution is an immaterial matter, to be regarded, or not, as the courts may think proper. *Oatman v. Bond*, 15 Wis. 20, 26.

Under a Code provision providing that a decree pro confesso shall not be absolute for a certain time, but that within that period the defendant may be admitted to answer the bill upon petition showing merits, it is held that merits need not be facts additional to those disclosed in the original suit, but any issues of law or fact which might arise if the suit were merely begun. *Brown v. Brown*, 6 S. W. 869, 86 Tenn. (2 Pickle) 277.

Dismissal.

Where a petition was dismissed for want of jurisdiction and the absence of proper parties so far as it related to the special relief sought by the suit—vacation and surrender of a patent—and was dismissed generally on the ground that it was defective, uncertain, and insufficient in the statement of the cause of action, it was not a decision on the merits, so as to be a bar to a subsequent suit involving the same subject-matter. *Hughes v. United States*, 71 U. S. (4 Wall.) 232, 237, 18 L. Ed. 303.

A judgment dismissing the complaint is not a "judgment on the merits," where those words do not appear in the judgment, though they do appear in the motion for a judgment, and are recited in the findings. *Whiteside v. Noyac Cottage Ass'n*, 23 N. Y. Supp. 63, 65, 68 Hun, 565.

Involuntary nonsuit.

A judgment upon an involuntary nonsuit, ordered on the ground that the plaintiff's own evidence conclusively showed that he knew of the danger which caused his injury complained of, and that, with such knowledge, he assumed the risk thereof, as a matter of law, is a judgment upon the merits, and a bar to another action between the same parties for the same cause. *Ordway v. Boston & M. R. R.*, 45 Atl. 243, 244, 69 N. H. 429.

Permitting answer after judgment.

An order permitting defendants to answer, made under section 105, c. 66, Gen. St.,

more than one year after the entry of judgment, involves the "merits of the action, or some part thereof," within subdivision 3, § 8, c. 86., Gen. St., by which an appeal is allowed "from an order involving the merits of the action, or some part thereof." *Holmes v. Campbell*, 13 Minn. 66, 68 (Gil. 58, 64).

Refusing application for judgment nunc pro tunc.

An order involving the merits of an action is an order involving matters in controversy in the suit, and hence an appeal will not lie from an order denying an application before judgment for a judgment nunc pro tunc. *Fairchild v. Dean*, 13 Wis. 329, 331.

Refusing to set aside service.

An order denying the motion of the defendant appearing specially for that purpose to set aside the service of the summons upon him is an order involving the merits of the action, within Gen. St. 1934, § 6140, subd. 3, for it determines his positive legal rights, and compels him to take upon himself the burden of defending the action on the merits when the court has no jurisdiction over him. *Plano Mfg. Co. v. Kaufert*, 89 N. W. 1124, 1125, 86 Minn. 13.

Refusing to strike immaterial averments.

An order refusing to strike out immaterial averments in a pleading does not involve the merits of the action, so as to be appealable. *Whitney v. Waterman* (N. Y.) 4 How. Prac. 313, 314. The word "merits," in a statute limiting appeals from orders to those involving the merits of the action, does not include an order refusing to strike out matter in the pleading as irrelevant and redundant. *Bedell v. Stickles* (N. Y.) 4 How. Prac. 432, 434.

Refusing to suspend proceedings.

An order denying a motion for an order that all proceedings in a case for the recovery of possession of land be suspended until the trial of a case to recover the value of the last improvements on the land was an order involving the merits. *Dill v. Moon*, 14 S. C. 338, 339.

Retaxation of costs.

An order for the retaxation of costs is not an order involving the merits of an action. *Ernst v. The Brooklyn*, 24 Wis. 616, 617.

Vacating default judgment.

A final judgment determines the rights of the parties to the action, and any order which vacates or modifies it necessarily affects the legal rights of the party in whose favor it is, and hence involves the merits of the action. An order vacating a judgment

on default, and granting defendant leave to answer, is such an order, and therefore appealable. *People's Ice Co. v. Schlenker*, 52 N. W. 219, 50 Minn. 1.

Vacating final judgment.

Orders vacating or modifying a final judgment are orders involving the merits of the action. *People's Ice Co. v. Schlenker*, 52 N. W. 219, 50 Minn. 1.

MEROLI.

"Meroli" is defined in the dictionary as the essential oil obtained from the flowers of the bitter orange, but there was evidence introduced in a tariff duties case that, within the meaning of the trade, the words "oil meroli" were generally used to designate oil not made from the flowers, but from the leaves, twigs and immature fruit, of orange trees. *Dodge v. Hedden* (U. S.) 42 Fed. 446, 447.

MESH.

"Mesh," as used in St. 1 Eliz. c. 17, § 3, prohibiting fishing except with a net whereof every mesh or mask shall be 2½ inches broad, was used in its ordinary sense, meaning the space from thread to thread. *Thomas v. Evans*, El. Bl. & El. 171, 174.

MESNE.

The word "mesne" signifies merely intervening, intermediate. *Birmingham Dry Goods Co. v. Bledsoe*, 21 South. 403, 113 Ala. 418.

MESNE LORDS.

The term "mesne lord" is used in the English law to designate a lord holding lands immediately under the King, who grants out portions of such lands to inferior persons, and who thus becomes a lord with respect to such inferior persons. They are called "mesne lords" because, while tenants with respect to the King, they were lords in respect to their own tenants. *De Peyster v. Michael*, 6 N. Y. (2 Seld.) 467, 495, 57 Am. Dec. 470.

MESNE PROCESS.

Mesne process, strictly speaking, embraces all writs and orders of the court necessary for the carrying on of the suit after it has been instituted, from and after the summons, which is original process, up to, but not including, those writs which are necessary to secure the benefits of the suit to the successful party, which are final process; but, in the sense in which the phrase mesne process has come to be used, it em-

braces all writs preceding execution, and describes any and all writs except final process. *Birmingham Dry Goods Co. v. Bledsoe*, 21 South. 403, 113 Ala. 418; *Reeves v. Ferguson*, 31 N. J. Law (2 Vroom) 289, 291; *Arnold v. Chapman*, 13 R. I. 586, 589; *Place v. Washburn*, 40 N. E. 853, 854, 163 Mass. 530.

Mesne process is sometimes put in contradistinction to final process or process of execution, and it then signifies all such process as intervenes between the commencement and end of the suit. *Pennington v. Lowinstein* (U. S.) 19 Fed. Cas. 168.

The technical phrase "mesne process" is commonly used in contradistinction to "final process," so as to include the process by which the defendant is brought into court. The summons or the *capias* is usually spoken of as mesne process, where, under an existing practice, it is actual primary process, and not intermediate process at all. *Hirscher v. Tinsley*, 9 Mo. App. 339, 342.

A subpoena for a witness is mesne process. *Birmingham Dry Goods Co. v. Bledsoe*, 21 South. 403, 113 Ala. 418.

Where a laborer's lien was foreclosed, the execution issued thereunder levied, and a counter affidavit interposed and returned for trial, the process was mesne, and an adjudication and discharge in bankruptcy operated to discharge the debtor from the debt. *Cosgrave v. Mitchell*, 74 Ga. 824.

A writ of attachment is mesne process, and must be returned by the officer, and, when so returned, remains in the custody of the clerk, as part of the files of the case. *Fletcher v. Morrell*, 44 N. W. 133, 134, 78 Mich. 176.

An attachment of the real and personal estate of the husband in proceedings by the wife for her separate maintenance is an attachment on mesne process, within the meaning of the statute providing that an involuntary assignment shall dissolve any such attachment made within four months before the first publication of the notice of the filing of the petition in the assignment proceedings. *Place v. Washburn*, 40 N. E. 853, 854, 163 Mass. 530.

MESNE PROFITS (Action for).

The action for mesne profits is not, in substance, an action for use and occupation. *Noble v. Fairs*, 26 N. W. 157, 158, 58 Mich. 637 (citing *Woodhull v. Rosenthal*, 61 N. Y. 382, 394).

The action for mesne profits differs from an action for use and occupation in this: That the latter is founded upon a promise, express or implied, while the former springs from a trespass, an entry *vi et armis* upon

premises, and a tortious holding. The action to recover mesne profits is an action where a *quare clausum fregit* cannot be maintained without proof of the trespass. It is founded on the action of ejectment, most generally, and follows a recovery in that action. *Thompson v. Bower* (N. Y.) 60 Barb. 463, 477.

It is well settled that in an action to recover mesne profits the plaintiff must show in the best way he can what those profits are, and there are two modes of doing so, to either of which he may resort. He may either prove the profits actually received, or the annual rental value of the land. *West v. Hughes* (Md.) 1 Har. & J. 574, 576, 2 Am. Dec. 539; *Mitchell v. Mitchell*, 10 Md. 234. The latter is the mode usually adopted. Where there is occupation of a farm or land used only for agricultural purposes, and the income and profits are of necessity the produce of the soil, the owner may have an account of the proceeds of the crops and other products sold or raised thereon, deducting the expense of cultivation. These are necessarily rents and profits in such cases, but even there it is more usual to arrive at the same result by charging the occupier, as tenant, with a fair annual money rent. *McLaughlin v. Barnum*, 31 Md. 425, 452. But the proprietor of city lots, with improvements upon them, can only derive therefrom, as owner, a fair occupation rent for the purposes for which the premises are adapted. This constitutes the rents and profits, in the legal sense of the terms, of such property, and is all the owner can justly claim in this shape from the occupier. *Worthington v. Hiss*, 16 Atl. 534, 536, 70 Md. 172.

MESS PORK.

"Mess pork" has a precise meaning in trade, and comprises only that pork which is taken from the sides of the hog, between the shoulder and hams, and no other part of the animal. Hence a contract for the sale of a certain quantity of mess pork is not complied with by furnishing pork containing the neck, rump, and shoulder pieces. *Hoadley v. House*, 32 Vt. 179, 181, 67 Am. Dec. 167.

A warehouse receipt read in the following form: "Received in store from M., for account of bearer, fifty-four barrels of mess pork, deliverable on return of this receipt and payment of storage." Held, that the words "mess pork" were clearly words of description, being inserted for the purpose of identification. They signified no more in that connection than that the 54 barrels received, and which are to be delivered to the bearer on return of the receipt, etc., are described and marked as barrels of mess pork. They

do not signify that the barrels actually contained that article, to the knowledge of the warehousemen; and hence the obligation of the warehousemen was discharged by delivering or tendering the same property actually received in store, and described as mess pork, though the barrels in fact contained salt. *Hale v. Milwaukee Dock Co.*, 29 Wis. 482, 488, 9 Am. Rep. 603.

MESSAGES.

See "Domestic Message."

"Messages," as used in Comp. Laws, § 3881, providing that every person who offers to the public to carry persons, property, or messages is a common carrier of whatever he thus offers to carry, includes telegraphic messages. *Kirby v. Western Union Tel. Co.*, 55 N. W. 759, 760, 4 S. D. 105, 30 L. R. A. 612, 624, 46 Am. St. Rep. 765.

MESSENGER.

A messenger is defined to be one who bears a message or an errand; the bearer of a verbal or written communication, notice, or invitation from one person to another or to a public body; an office servant. The term, by its fair import and significance, does not apply to a public officer acting in an original capacity in the discharge of duties imposed on him by law, but presupposes a superior in authority, whose servant the messenger is, and whose mandate he executes, not as a deputy, with power to discriminate and judge, or to bind his superior, but as a mere bearer and communicator of the will of his superior. *Pfister v. Central Pac. Ry. Co.*, 11 Pac. 686, 690, 70 Cal. 169, 59 Am. Rep. 404.

MESSENGER COMPANY.

As common carrier, see "Common Carrier."

The term "messenger or signal company," as used in the chapter relating to the listing of personal property for taxation, includes any person or persons, joint-stock association, or corporation, wherever organized or incorporated, when engaged in the business of supplying messengers, or of signaling or calling by electrical apparatus, or in a similar manner, for any purpose. *Bates' Ann. St. (Ohio) 1904*, § 2780-17.

MESSUAGE.

"Messuage" is synonymous with "house," and embraces within its meaning an orchard, garden, and curtilage, adjoining buildings, and other appendages of a dwelling house. *Grimes v. Wilson (Ind.)* 4 Blackf. 331, 333.

In Board of Education of City of Topeka v. State, 67 Pac. 559, 561, 64 Kan. 6, it is said that the best writers represent the word "messuage" as synonymous with "house," and as embracing an orchard, garden, curtilage, adjoining buildings, and other appendages of a dwelling house. "In legal acceptance, the word 'messuage' is defined as a dwelling house, with the adjacent buildings and curtilage." *Marmet Co. v. Archibald*, 17 S. E. 299, 300, 37 W. Va. 778.

"Messuage" consists of two things—the land and the edifice. By a devise of a messuage or house, the land on which it stands will pass with it, unless there be something to indicate that such was not the intention. *Derby v. Jones*, 27 Me. (14 Shep.) 357, 360.

"In *Shep. Touch. 94*, it is said that the grant of a messuage, or of the messuage with the appurtenances, passes the house and buildings adjoining, together with the close upon which the dwelling house is built, and the little garden, yard, field, or piece of void ground lying near and belonging to the messuage. Coke says: 'By the grant of a messuage or house, the orchard, garden, and curtilage do pass,' and so an acre or more may pass by the name of a house." *Gibson v. Brockway*, 8 N. H. 465, 470, 31 Am. Dec. 200.

The word "messuage," as used in Magna Charta and by the older authorities, meant simply a mansion house. It subsequently extended by later use to include other structures. But the structures which may be properly included within its meaning are such only as are useful in making the mansion house itself more comfortable and beneficial. *Davis v. Lowden*, 38 Atl. 648, 650, 56 N. J. Eq. 126.

"In *Moore*, 24, pl. 82, a grant of a messuage, which was formerly thought to be of more significance than the word 'Domus' or 'house,' was held to include and pass nothing but the house and the circuit of the house." *Bennet v. Bittle (Pa.)* 4 Rawle, 339, 342.

"Messuage" denotes all that is occupied together at one and the same time, and no more. *Kerslake v. White*, 2 Starkie, 508.

A messuage properly signifies a dwelling house, with some adjacent land assigned to the use of it. The term is not properly used to signify a dwelling without land adjacent. *Applegate v. Applegate*, 16 N. J. Law (1 Har.) 321, 322.

"Messuage" is a term of large significance, always including land. *Riddle v. Littlefield*, 53 N. H. 503, 509, 16 Am. Rep. 388.

The term "messuage" will often include land, but not necessarily so unless there is something in the conveyance to rebut such

presumption. *Sparks v. Hess*, 15 Cal. 186, 196.

Where a deed conveyed a hotel and lands adjoining it, being two or three acres, more or less, it was held that the words "land adjoining" were not synonymous with "mesuage" and "curtilage," and that, if they were, these latter terms were not broad enough to include a small island in the river, back of the land on which the same stood. *Miller v. Mann*, 55 Vt. 475, 479.

METAL

All other metals, see "All Other."

A metal and its oxide or sulphate are totally distinct and unlike. Any substance subjected to a chemical change by uniting with another substance loses its identity. It becomes a different mineral species. The basis of common clay is the metal aluminum, and the basis of lime is the metal calcium; but no one would think of calling clay and lime metals, nor, if artificially made, would he call them manufactures of metals. They have lost their metallic qualities. White lead, nitrate of lead, oxide of zinc, and dry or orange mineral are not metals. They have no metallic qualities. *Meyer v. Arthur*, 91 U. S. 570, 577, 23 L. Ed. 455.

The lease of a salt well provided that, should the wells fail within the term of three years, the lessees might take away "all the metal and improvements" of the work. Held, that the words "metals and improvements" might comprehend all permanent fixtures of iron or other metal and buildings, whether dwelling house, sheds, stables, walls, or of whatever kind, set up for the purpose of carrying on the business more conveniently, and that any implication in the lease that, if the well should not fail within three years, the lessee should not remove such metal and improvements, should be referred to such permanent fixtures, the right to remove which might have been considered as questionable, rather than to a steam engine set up by the tenant on the demised premises, and used in lieu of horse power. *Lemar v. Miles* (Pa.) 4 Watts, 330, 333.

Metal beads are assessable under Tariff Act 1897, par. 193, as articles composed wholly or in part of iron, steel, or other metal, and not under paragraph 408, as articles composed wholly or in part of beads. *Steinhardt v. United States* (U. S.) 113 Fed. 996.

In its common and ordinary significance, the word "mineral" is not a synonym of "metal," but is a comprehensive term, including every description of stone and rock deposits, whether containing metallic sub-

stances, or entirely nonmetallic. *Northern Pac. R. Co. v. Soderberg* (U. S.) 99 Fed. 506, 507.

METALLIC.

The Standard Dictionary defines "metallic" as being contained or having characteristics of a metal, as a metallic mineral. Admittedly, there are certain mineral substances wherein metal is found. Gold, silver, copper, and a number of other metallic minerals were instanced by counsel in his argument. Tungsten ore, the primary extracted product of which is used as a mordant in dyeing cloth, and to make high-grade steel, imparting thereto extreme hardness, is free from duty, under the Tariff Act 1897, § 14, which embraces crude minerals. *Hempstead & Son v. Thomas* (U. S.) 122 Fed. 538, 540, 59 C. C. A. 342.

METALLIC OXIDE.

A metallic oxide is composed of oxygen and a metal, as a base. *Jenkins v. Johnson*, 13 Fed. Cas. 525, 527.

METALLIC PINS.

"Metallic," as used in Tariff Act Oct. 1, 1890, par. 206, relating to the duties on metallic bonnet or lace or belt pins, includes hat and lace pins having heads of glass or similar material; metal being of chief value in the hat pins, and glass or glue in the lace pins. *United States v. Wolff* (U. S.) 69 Fed. 327, 328.

Fancy pins, with metal shafts, and metal, glass, or paste heads are dutiable under paragraph 206 of the tariff law of 1890 as "pins, metallic," and not under paragraph 108, as "manufactures of which glass is the component of chief value, not specially provided for." *Worthington v. United States* (U. S.) 90 Fed. 797.

METAPHYSICAL HEALING.

Metaphysical healing is not the practice of medicine, and one who is a believer in metaphysical healing, and practices healing in that method, does not violate the provisions of Gen. Laws, c. 165, regulating the practice of medicine. *State v. Taft*, 20 R. I. 645, 40 Atl. 758.

METER.

See "Water Meter."

METES AND BOUNDS.

"Metes and bounds" means the boundary line or limit of a tract, which boundary may

be pointed out and ascertained by rivers and objects, either natural or artificial, which are permanent in character and erection, and so situated with reference to the tract to be described that they may be conveniently used for the purpose of indicating its extent. The metes and bounds of a tract are as definitely fixed by locating its center line and naming the width of the tract as if the lines of its true boundary had been given by acres and distances, and the description thus given would in such a case prevail over a description given by acres and distances. *People v. Guthrie*, 46 Ill. App. 124, 128.

"By 'metes,' in strictness, may be understood the exact length of each line, and the exact quantity of land, in square feet, rods, or acres." *Rollins v. Mooers*, 25 Me. (12 Shep.) 192, 196 (quoting *Buck v. Hardy*, 6 Me. [6 Greenl.] 162).

Where a lot was in rectangular form, a description in a levy of execution on a certain number of acres off the east end was a sufficient description by metes and bounds. *Rich v. Elliot*, 10 Vt. 211, 213.

METHOD.

See "Ordinary Method"; "Usual Method."

"Method," properly speaking, is only placing and performing several operations in the most convenient order, but it may signify a contrivance or device, as where Watt applied for and obtained a patent for an "engine or mechanical contrivance for lessening the consumption of steam in fire engines," and the letters patent recited that he had invented a "method of lessening the consumption of steam," and granted him the sole right of using the said invention, "engine" and "method" meant the same thing, and might be the subject of a patent. *Hornblower v. Boulton*, 8 Durn. & E. 95, 103.

METHOMANIA

An irresistible craving for alcoholic or other intoxicating liquors, accompanied by peculiar symptoms described by medical authors, and manifested by the periodical recurrence of drunken debauches. *State v. Savage*, 7 South. 183, 184, 89 Ala. 1, 7 L. R. A. 426.

MEXICAN.

A naturalized foreigner is a Mexican, within the meaning of the Mexican statute which declares that the government shall sell to Mexicans and to them only, the land which they shall wish to purchase. *Ruls' Heirs v. Chambers*, 15 Tex. 586, 588.

Within the meaning of that stipulation in the treaty of Guadalupe Hidalgo which guaranteed to Mexicans their rights of property in the territory ceded by Mexico to the United States, the term "Mexican" includes either a citizen, subject, or native of Mexico. *Baldwin v. Goldfrank*, 31 S. W. 1064, 1067, 88 Tex. 249.

MEXICAN GRANTEE.

Act Cong. July 23, 1866, entitled "An act to quiet land titles in California," declared that where persons, in good faith, and for a valuable consideration, had purchased lands of Mexican grantee or assigns, such purchasers might purchase the same lands surveyed under existing laws at the minimum price established by law, etc. Held, that the term "Mexican grantee" did not mean a person to whom a grant had actually been made by the Mexican government, but one who in good faith and for a valuable consideration had purchased lands which were supposed to have been granted by the Mexican government, and had used, improved, and continued in the actual possession thereof. *Bascomb v. Davis*, 56 Cal. 152, 154.

MEXICAN LEAGUE.

A Mexican league is not the same as the American league. The old legal league by the laws of Spain, and which was adopted in Mexico, consisted of 5,000 varas; and a vara, in Texas, has always been regarded as equivalent to $33\frac{1}{4}$ English inches, making the league equal to a little more than 2.63 miles, and the square league equal to 4,428.4 acres. *United States v. Perot*, 98 U. S. 428, 429, 25 L. Ed. 251.

MEXICAN PUEBLO.

Mexican pueblo is a settlement or town under the control of the Mexican government. *City of San Francisco v. Le Roy*, 11 Sup. Ct. 364, 366, 138 U. S. 656, 34 L. Ed. 1096.

MEXICAN SHORE.

In a case involving the construction of a deed fixing a boundary as the shore of the bay of San Francisco, the court mentions the fact that counsel used the term "Mexican shore" to designate the shore line known to the civil law, which is the law of Mexico, which is the line of extraordinary high tides. *Valentine v. Sloss*, 37 Pac. 326, 327, 103 Cal. 215.

MICHAELMAS.

A lease conditioned to hold from the feast of St. Michael generally must be taken

to be from New Michaelmas, since the act of Parliament for altering the style. *Doe v. Lea*, 11 East, 312, 313.

MICROBE.

Microbes are germs of disease so infinitesimal that they derive their name, microbes, from the powerful glass by the aid of which it is claimed they may be detected. In this case a chemical analysis showed no indications of impurities from sewage, and the court did not seem to think that microbes would be present in water after the chemical evidences of sewage had disappeared. *Newark Aqueduct Board v. City of Passaic*, 18 Atl. 106, 111, 45 N. J. Eq. (18 Stew.) 393.

MICROBE KILLER.

The words "microbe killer" are English words in common use, of known signification and fixed meaning. Such words cannot be used as a trade-mark when they are sought to be so employed in their ordinary, and not in any arbitrary or fanciful, sense. *Alff v. Radam*, 14 S. W. 164, 77 Tex. 530, 9 L. R. A. 145, 19 Am. St. Rep. 792; *Radam v. Capital Microbe Destroyer Co.*, 16 S. W. 990, 993, 81 Tex. 122, 26 Am. St. Rep. 783.

MIDDLE.

Channel or river.

The "middle of the channel," in defining a boundary, is the space within which ships can and usually do pass, and not the thread of the deepest water. *Rowe v. Smith*, 51 Conn. 266, 271, 50 Am. Rep. 16. A like construction is given to the terms "mid-channel," "middle of the main channel," and "middle thread of the channel." *Buttenuth v. St. Louis Bridge Co.*, 17 N. E. 439, 444, 123 Ill. 535, 5 Am. St. Rep. 545.

The expression "middle of the Mississippi river" and "center of the main channel of that river," as used respectively in the enabling acts under which the states of Illinois and Wisconsin were admitted into the Union, and "middle of the main channel of the Mississippi river" as used in the enabling acts of Missouri and Iowa, all being descriptive of the boundaries of those states, are synonymous terms, and mean the middle of the main navigable channel, or channel most used, and not the middle of the great bed of the stream, as defined by the banks of the river. *Iowa v. Illinois*, 13 Sup. Ct. 239, 147 U. S. 1, 37 L. Ed. 55.

MIDDLE LETTER.

The middle letter between the Christian and sur name is very common for the purpose of distinction, and in the use and understanding of the people at large, and therefore, in

presumption of fact, J. M. and J. S. M. are not the same, but different persons. *Bowen v. Mulford*, 10 N. J. Law (5 Halst.) 230.

MIDDLE LORD.

The term "middle lord" is used in the English law to designate a lord holding lands immediately under the King, but who grants out portions of such lands to inferior persons, and who thus becomes a lord with respect to such inferior persons. They are called "middle lords" because, while tenants with respect to the King, they are lords in respect to their own tenants. *De Peyster v. Michael*, 6 N. Y. (2 Seld.) 467, 495, 57 Am. Dec. 470.

MIDDLEMAN.

The middleman is employed to bring two or more parties together; the parties, when they meet, to do their own negotiating and make their own bargains. He sustains no confidential relation to either party, and his fees are always fixed by contract or stipulation, as the law does not regulate them, and in that respect he differs from an agent, for there the law fixes the compensation. If he acts as an agent, he is entitled to recover, as such, for the services performed. *Southack v. Lane*, 65 N. Y. Supp. 629, 631, 32 Misc. Rep. 141.

A middleman is an agent who merely brings the parties to the sale together, and upon whom does not devolve the duty of negotiating for either, and who may contract for and receive commissions from both. *Synott v. Shaughnessy*, 7 Pac. 82, 89, 2 Idaho (Hasb.) 122.

MIDSHIPMAN.

A midshipman "is not a common seaman, but occupies a middle position between that of a superior officer and a common seaman." *United States v. Cook*, 9 Sup. Ct. 108, 109, 128 U. S. 254, 32 L. Ed. 464.

MIDDLESEX.

See "Bill of Middlesex."

MIGHT.

The word "might" is the preterit of the word "may," and is equivalent to "had power" or "was possible." As used in Act Cong. Feb. 10, 1855, § 2, declaring that any woman who might lawfully be naturalized under the existing law shall be deemed a citizen, the word has relation to the power or ability of the woman to become a citizen under the existing law. *Owens v. Kelly*, 6 D. C. 191, 193.

"Might," as used in the comment of a judge to the jury in an action for personal

injuries by a passenger against a carrier, that if the jury should take the version given by the defendant, that the car had not yet come to a stop when the plaintiff undertook to get out, then they might find plaintiff guilty of contributory negligence, does not put or intimate a qualification upon the defendant's right to a verdict in case the jury should find that the plaintiff left the car while it was in motion. The literal meaning of the words used is only that the jury might find for the defendant in the event stated, and not that they should or must so find in that event. *Neff v. Harrisburg Traction Co.*, 43 Atl. 1020, 1021, 192 Pa. 501, 73 Am. St. Rep. 825.

An instruction that a person was bound to exercise ordinary care—such care as a person of average prudence would exercise under like circumstances—and if a person of average prudence, put exactly in the place he was, possessed of the same knowledge of the danger and means of avoiding it, would or might have done as he did, he was without fault, could not have caused the jury to understand that the decree of care required to be used was lower than if the word would had been used in place of "might." *Davis v. Concord & M. R. R.*, 44 Atl. 388, 391, 68 N. H. 247.

The use of the word "might" in an instruction in an action against a city for injuries caused by a defective sidewalk, that if, by the exercise of reasonable diligence, the party might have discovered, etc., has been criticised; the court saying that the "word may be used in many cases, and perhaps is, but it seems to us the meaning is not exactly the same as it would be if the expression was 'if by the exercise of reasonable diligence he would have discovered,' or 'should have discovered.' He might have discovered by the use of reasonable diligence, or might not have discovered by the exercise of the same diligence. The question in such a case is, if he had exercised reasonable diligence, would he have discovered; would it have resulted as a fact, with sufficient certainty, that this condition would have been ascertained or noticed?" *Monroeville v. Wehl*, 6 O. C. D. 188, 196.

In an action for personal injuries against a railroad company by an employé, evidence that there was dew-covered grass on the track; that there was no sand in the dome of the engine, and that it was going faster than it should; that, under the circumstances, the wheels might have become locked, and the engine might have slipped, might have been uncontrollable, and might have gone too fast by reason of these things—will not support a verdict against the company as for failure to keep the track safe, without evidence that the wheels were in fact locked, and the engine did slip, and so produced the injury. *Water Valley Bank v.*

Southern Exp. Co., 16 South. 800, 301, 71 Miss. 741.

MIGHT HAVE BEEN LITIGATED.

The expression "might have been litigated," as used in determining the conclusiveness of a judgment, is one that may be quite misleading when applied to the facts of particular cases. When parties are real adversaries on issues that are or may be litigated, then the adjudication on such issues as have been litigated is final, and the failure to litigate such as might have been litigated is fatal to further litigation. That this is the sense in which the phrase "might have been litigated" is used by the courts is illustrated by *Malloney v. Horan*, 49 N. Y. 111, 10 Am. Rep. 335; *Clemens v. Clemens*, 87 N. Y. 59. *Earle v. Earle*, 66 N. E. 898, 400, 173 N. Y. 480.

MIGRATION.

"Migration," as used in Const. art. 1, § 9, providing that the migration and importation of such persons as any of the states now existing shall think proper to permit shall not be prohibited, etc., means the voluntary emigration of such persons to the United States. *People v. Campagne Generale Transatlantique*, 2 Sup. Ct. 87, 89, 107 U. S. 59, 27 L. Ed. 383.

MILCH COW.

The term "milch cow" in a statute exempting milch cows from execution, includes heifers which are being raised, kept, and intended for family use as milch cows. *Nelson v. Fightmaster*, 44 Pac. 213, 214, 4 Okl. 38.

MILE.

A measure of length or distance, containing 8 furlongs, or 1,760 yards, or 5,280 feet. *Black, Law Dict.*

"The Arabs in the north of Africa consider it a mile when so far as not to be able to distinguish a man from a woman." *United States v. New Bedford Bridge* (U. S.) 27 Fed. Cas. 91, 119.

Marine mile.

A contract for the building of a steamboat which specified that it should be built to attain a speed of 15 miles an hour—the trial trip to be made at sea—meant marine miles or admiralty knots. *Rockland, Mt. D. & S. S. Co. v. Fessenden*, 8 Atl. 550, 552, 79 Me. 140.

Straight line.

In construing a constitutional provision that a new county may be established out of

fractions of certain other counties, but no line of such new county shall approach a certain courthouse nearer than 10 miles, the term "miles" means in a straight line, and not by the usual method of travel. *Macon & Smith Counties v. Trousdale County*, 61 Tenn. (2 Baxt.) 1, 10.

"Mile," as used in an agreement wherein A. engaged not to open a shop for business within one mile of B.'s shop, means that the distance is to be estimated by the shortest way of access by the footpath. *Woods v. Dennett*, 2 Starkie, 89.

"Miles," as used in St. 9 & 10 Vict. c. 97, § 128, enacting that actions may be brought as if the act had not passed, where the "plaintiff dwells more than twenty miles from the defendant," requires the distance to be measured in a straight line from one to the other of the dwellings on the horizontal plane, and does not mean the distance by the road. *Lake v. Butler*, 5 El. & Bl. 92, 99.

MILEAGE.

As fees, see "Fees."

The term "mileage" is defined to mean a compensation allowed by law to officers for their trouble and expenses in travelling on public business. *Howes v. Abbott*, 78 Cal. 270, 272, 20 Pac. 572 (citing *Bouv. Law Dict.*).

"'Mileage' is defined in the Century Dictionary as payment allowed to a public functionary for the expenses of travel in the discharge of his duties, according to the number of miles passed over. The same definition substantially is found in *Bouvier's* and other law dictionaries." *Richardson v. State*, 63 N. E. 593, 594, 68 Ohio St. 108.

The term "mileage" has a well-defined legal meaning, and signifies usually compensation allowed by law to officers for their travel, and expenses in traveling on public business. *Richardson v. State*, 10 O. C. D. 458, 460 (citing *Bouv. Law Dict.*, vol. 2, p. 409).

In construing a statute providing that whenever a court is appointed by the Supreme Court to be held in any county it shall be the duty of the county commissioners to pay to the Chief Justice or Associate Justice so holding said term "mileage" at the rate of 20 cents per mile in going from his residence to the place where the court is to be held, and returning therefrom, as his expenses therefor, and on account of travel incurred for the benefit of said county, the court said: "The holding of the term of court necessarily requires some period of time for attention to, and completion of, the business. This may be a long or a short period, as the necessities of the case require for this purpose. Expenses are necessarily incurred by the judge,

and it is for this expense, and not alone for the expense of travel, that the act provides. The act providing for mileage to be paid to the judges allows the mileage not only for the actual travel and its attending expenses, but also for expenses incurred for the benefit of the county, which plainly includes not only the traveling but also the expenses of living and all other expenses which the judge is necessarily put to while holding his court. *Power v. Choteau County Com'rs*, 7 Mont. 82, 88, 14 Pac. 658.

MILITARY.

Pertaining to war or to the army; concerned with war; also the whole body of soldiers; an army. *Black, Law Dict.*

MILITARY DEPARTMENTS.

The term "military departments," as used in an order directing double rations to be allowed to officers commanding military departments, means the geographical sections of country in which the two divisions of the army was divided, and which were denominated "departments." *Parker v. United States*, 26 U. S. (1 Pet.) 293, 298, 7 L. Ed. 150.

MILITARY EXPEDITION OR ENTERPRISE.

"The definitions of the lexicographers substantially agree that a military expedition is a journey or voyage by a company or body of persons having the position or character of soldiers for a specific warlike purpose, also the body and its outfit, and that a military enterprise is a martial undertaking, involving the idea of a bold, arduous, and hazardous attempt. The word 'enterprise' is somewhat broader than the word 'expedition,' and although the words are synonymously used, it would seem that, under the rule that its every word should be presumed to have force and effect, the word 'enterprise' was employed to give a slightly wider scope to the statute." *Wilborg v. United States*, 16 Sup. Ct. 1127, 1134, 163 U. S. 632, 41 L. Ed. 289; *United States v. Nunez* (U. S.) 82 Fed. 599, 601.

"The term 'expedition' signifies a journey or voyage by a body of men for some definite purpose. There are various kinds of expeditions. We have had expeditions of exploration, like Wilkes' expedition, Fremont's expedition, Greely's expedition, and Peary's expedition, and so there have been many military expeditions. We speak of Xerxes' expedition into Greece. A military expedition, therefore, is an undertaking by a body of men, of a military character. There must be a body, because one or two men cannot constitute an expedition. * * * The essential elements of a military body are, first, soldiers, as is indicated by the very

word 'military,' derived from 'miles,' a soldier. The fundamental idea of a military enterprise or expedition is that it is undertaken by soldiers or in some military service; next is the relation of the soldier to the commander, which imports officers, and the duty of military obedience; next, arms; such arms as are appropriate to the enterprise; such as will enable the body to do the military work contemplated; next, that it shall act as a unit in a military way; and finally a military purpose; a purpose of attack or defense; a hostile purpose." *United States v. Hart* (U. S.) 74 Fed. 724, 727.

The words "military enterprise" are somewhat broader in meaning than the words "military expedition." Where a number of men, whether few or many, combine and band themselves together, and thereby organize themselves into a body, within the limits of the United States, with a common intent or purpose on their part at the time to proceed in a body to foreign territory, there to engage in carrying on armed hostilities, either by themselves or in co-operation with other forces, against the territory or dominions of any foreign power with which the United States is at peace, and with such intent or purpose proceed from the limits of the United States on their way to such territory, either provided with arms or implements of war, or intending and expecting and with preparation to secure them during transit, or before reaching the scene of hostilities, in such case all the essential elements of a military enterprise exist. It is not necessary that the men shall be drilled or uniformed or prepared for efficient service, nor that they shall have been organized, according to the tactics, as infantry, artillery or cavalry. It is sufficient that the military enterprise shall be begun or set on foot within the United States; and it is not necessary that the organization of the body as a military enterprise shall be completed or perfected within the United States. Nor is it necessary that all of the persons composing the military enterprise should be brought in personal contact with each other within the limits of the United States; nor that they should all leave those limits at the same point. It is sufficient that by previous arrangement or agreement, whether by conversation, correspondence or otherwise, they become combined and organized for the purposes mentioned, and that by concerted action, though proceeding from different portions of this country, they meet at a designated point either on the high seas or within the limits of the United States. Under such circumstances a military enterprise to be carried on from the United States exists within the meaning of the law. *United States v. Murphy* (U. S.) 84 Fed. 609, 614.

There is no precise definition given by any recognized authority of what constitutes
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a military expedition or enterprise. There would be no question that a military company organized as infantry, artillery, or cavalry, with officers, arms, and equipments, would constitute such a military force that the transportation of it from within our territory or jurisdiction would come within the prohibition of Gen. St. § 5286, declaring guilty of a misdemeanor every person who, within the territory or jurisdiction of the United States, begins or sets on foot any military expedition to be carried on from thence against a foreign state with whom the United States is at peace; the uncombined elements of such a force—that is to say, individually, not drilled or organized or capable of being put into a state of efficacy for warlike operations—would not constitute a military expedition, within the meaning of the statute, and the transportation of such individuals as passengers would be legitimate commerce, such as the laws permit. *United States v. Hughes* (U. S.) 75 Fed. 267, 268.

A combination of men organized in the United States to go to a foreign country and make war upon its government, provided with means—with arms and ammunition—constitutes a military expedition. It is not necessary that the men shall have been drilled or put in uniform or prepared for efficient service, nor that they shall have been organized according to the regulations which ordinarily govern armies. If they have been combined and organized, it is not necessary that the arms shall be carried upon their persons here or on their way. It is sufficient that arms have been provided for their use when occasion requires. It is unimportant that the organization is rudimentarily imperfect and inefficient. It is enough that the men have united and organized with the purpose and object stated, voluntarily agreeing to submit themselves to the orders of such person or persons as they have selected. In the nature of things, the organization must be voluntary and imperfect. It is unimportant whether the expedition intends to make war as an independent body or in combination with others in the foreign country. *United States v. Hart* (U. S.) 78 Fed. 868, 870. See, also, *Wiborg v. United States*, 16 Sup. Ct. 1127, 1134, 163 U. S. 632, 41 L. Ed. 289.

An enterprise, in the sense in which the word is used in connection with the law forbidding the beginning and setting on foot of a military expedition or enterprise, is an undertaking of hazard—an arduous attempt. The proper meaning of this word also describes the general undertaking, and not the armament with which that undertaking is to be accomplished. *United States v. Burr* (U. S.) 25 Fed. Cas. 187, 198.

MILITARY FORCES.

The use of the words "military and naval forces," in the title of an act relating to the

organization of troops, does not show that such act was not intended to deal with the whole military system of the state, the words being an exact equivalent for the word "militia," so that a system of militia in existence was not abrogated but confirmed by such act, and the constitutional provisions relating to the militia are applicable to it. *Smith v. Wanser*, 52 Atl. 309, 312, 68 N. J. Law, 249.

MILITARY GOVERNMENT.

Military government is the dominion exercised by a general over a conquered state or province. It is therefore a mere application or extension of the force by which the conquest was effected, to the end of keeping the vanquished in subjection, and, being a right derived from war, is hardly compatible with a state of peace. *Commonwealth v. Shortall*, 55 Atl. 952, 954, 206 Pa. 165.

MILITARY LAW.

"Military law" is defined to be a code of rules and ordinances prescribed by competent authority for the government of the military state considered as a distinct community, and in the United States is chiefly statutory. *State v. Rankin*, 44 Tenn. (4 Coldw.) 145, 156.

The military law is the rules and articles of war provided by Congress for the government and discipline of troops, under the power given Congress by the federal Constitution to raise and support armies and make rules for the government thereof. *Johnson v. Jones*, 44 Ill. 142, 153, 92 Am. Dec. 159.

Military law is a branch of law as valid as any other, and it differs from the general law of the land in authority only in this: that it applies to officers and soldiers of the army, but not to other members of the body politic, and that it is limited to breaches of military duty. *In re Bogart* (U. S.) 3 Fed. Cas. 796, 801 (citing Attorney General Cushing in 6 Op. Atty. Gen. 425).

Military law consists of the rules prescribed legislatively for the government of the land and naval forces, which, operating both in war and peace, and defined by Congress, are an offshoot of the civil or municipal law. *Commonwealth v. Shortall*, 55 Atl. 952, 954, 206 Pa. 165.

Military law, as it exists in the United States, is an exceptional code, applicable to a class of persons in a given relation, and not abrogating or derogating from the general law of the land, but the latter is left in full force and virtue. *Neall v. United States* (U. S.) 118 Fed. 699, 704, 56 C. C. A. 31.

Martial law distinguished.

"Military law" is distinguished from "martial law," which is not law in any proper sense, but the will of a military commander on the actual scene of military operations, and where hostile armies are confronting each other, arising from the necessities of the case. *Johnson v. Jones*, 44 Ill. 142, 153, 92 Am. Dec. 159; *State v. Rankin*, 44 Tenn. (4 Coldw.) 145, 156.

By "military law" is not meant "martial law." Martial law presupposes the existence of a state of actual war, and the occupation of the district where it exists by a hostile force, interrupting the civil courts in the administration of law in their accustomed mode. Military law does not do this. It is a part of our body of law, fully recognized by the civil courts, and is enforced in time of peace as well. It is that law which relates to the organization, government, and discipline of the military forces in the state. It is a rule superadded to the civil law, for regulating the citizen in his character of soldier, and is binding on those to whom it is intended to apply. *Grove v. Mott*, 46 N. J. Law (17 Vroom) 328, 331, 50 Am. Rep. 424.

MILITARY OFFICE.

Civil office distinguished, see "Civil Office."

MILITARY POST.

A military post is a place at which troops are posted or intended to be posted. *Lee v. Kaufman* (U. S.) 15 Fed. Cas. 162, 191.

MILITARY RESERVATION.

A military reservation is an act of the President of the United States, under authority of law, withdrawing so many acres of the public domain from the immediate administration of the commissioner of public lands—that is, from sale at public auction, and from pre-emption, or general private entry—and appropriating it for the time being to some special use of the government. *Burgess v. Territory*, 19 Pac. 558, 564, 8 Mont. 57, 1 L. R. A. 808.

"Military reservation" is a term unknown to the law, and does not mean anything, except that it may have been intended for a fort, magazine, arsenal, camp, post, or other military use. *United States v. Tichenor* (U. S.) 56 Fed. 415, 424.

MILITARY SERVICE.

See "Actual Military Service."

"Military or naval service," within a policy of life insurance which provides that the policy shall be void in case the insured

shall enter in any military or naval service without the consent of the insurer, means only such service as will require the person entering into it to do duty as a combatant, and hence an employment by the military authorities in constructing a railroad bridge is not within the prohibition of the policy. *Welts v. Connecticut Mut. Life Ins. Co.*, 48 N. Y. 34, 39, 8 Am. Rep. 518.

"Military service," as used in Rev. St. § 1117, providing that no minor shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, includes the volunteer army of the United States. In *re Burns* (U. S.) 87 Fed. 796, 797.

"Military service of the United States," as used in Act Cong. March 3, 1849, § 2, providing for an indemnity for the loss of any horse, mule, ox, wagon, etc., arising from capture or destruction by an enemy, or where the property has been abandoned or destroyed by the order of a commanding officer while such property was in the military service of the United States, means in battle or service as soldiers under the command of officers of the army. A contractor with the government to transport from port to port, remote from any seat of war, stores and supplies not forming any portion of the stores or supplies of an advancing or retreating army, is not a person "in the military service of the United States." *Stuart v. United States*, 85 U. S. (18 Wall.) 84, 89, 21 L. Ed. 816.

One employed by the counsel of administration at an army post prior to Act Cong. March 2, 1867, to officiate as a chaplain, was in the service, and if afterwards regularly commissioned under the act of March 2, 1867, the period of his service under the prior appointment should be included in computing his longevity pay. *United States v. La Tourrette*, 14 Sup. Ct. 422, 423, 151 U. S. 572, 38 L. Ed. 274.

MILITARY OR USURPED POWER.

A loss caused by the commander of a town during the Civil War setting fire thereto to prevent valuable property falling into the hands of the Confederates was a loss resulting from "military or usurped power," within a fire policy providing that there should be no liability for loss caused by such means. *Ætna Ins. Co. v. Boon*, 95 U. S. 117, 128, 24 L. Ed. 395 (reversing *Boon v. Ætna Ins. Co.*, 40 Conn. 575, 584, in which it was held that the word "military" had no reference to the lawful acts of the military power of the government, but was employed as synonymous with "usurped power" intended to be described, or as qualifying and explaining what was meant by "usurped power"). See, also, *Portsmouth Ins. Co. v. Reynolds' Adm'x* (Va.) 32 Grat. 613, 625.

MILITIA.

Army distinguished, see "Army."

"Militia," as used in Const. art. 1, § 8, cls. 15, 16, giving the Confederate government the right to call forth the militia to execute the laws of the Confederate States, etc., does not mean that body of men organized under state authority who are known as "state militia," but signifies that portion of the people who are capable of bearing arms—the arms-bearing population. *Ex parte McCants*, 39 Ala. 107, 112; *In re Strawbridge*, 39 Ala. 367, 375.

The "militia" are composed of men of military age, whereas the "posse comitatus" is composed of able-bodied persons of sound mind and of sufficient ability to assist the sheriff, and may be younger or older than the military age. The militia, when called out, retains its own officers and organization, and is commanded by and acts under its own officers. When the posse comitatus is called out by the sheriff, he is its head and commander, and it acts under his authority. *Worth v. Craven County Com'rs*, 24 S. E. 778, 779, 118 N. C. 112.

The term "militia," in the New Jersey act of May 11, 1861, entitled "An act for the relief of such portion of the militia as may be called into service," is not confined to such persons as, previous to the call of the President for troops, belonged to the organized militia, but applies to all persons by law liable to military duty, and all accepted by the state as such, whether previously resident there or not. *Brown v. City of Newark*, 29 N. J. Law (5 Dutch.) 232, 238.

MILITIA OFFICER.

The term "officers of the militia," in Const. art. 4, § 20, providing that no person holding any lucrative office under the United States or any other power shall be eligible to any civil office of profit under this state, provided that officers in the militia who receive no annual salary, local officers, or postmasters whose compensation does not exceed \$500 per annum, shall not be deemed to hold lucrative offices, "probably means such officers when called into the federal service." *People v. Leonard*, 14 Pac. 853, 855, 73 Cal. 230.

"On November 19, 1863, Judge Advocate General Holt declared that the words 'militia officers,' as employed in the ninety-seventh article of war, providing that the officers and soldiers of any troops, whether militia or others, being mustered and in the pay of the United States, shall, at all times and in all places, when joined or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to

be tried by court-martial in like manner with the officers and soldiers of the regular forces, save only that such courts-martial shall be composed entirely of militia officers only, have been interpreted since the commencement of the Rebellion as synonymous, so far as the organization of courts-martial is concerned, with 'volunteer officers.' This construction undoubtedly accords with the spirit of the article, and in its practical enforcement the object of the rule is accomplished." Under such article no officer of the regular army is competent to sit on courts-martial, and judgment in case such officer so acts is void. *Deming v. McClaughry* (U. S.) 113 Fed. 639, 643, 51 C. C. A. 349.

The word "office," as used in Const. art. 11, § 5, declaring that no commissioned militia officer shall be removed from office except by the Senate, should be construed as synonymous with "commission." It is the commission which constitutes a man a militia officer. *People v. Hill*, 27 N. E. 789, 790, 126 N. Y. 497.

MILITIAMEN.

As soldiers, see "Soldier."

MILK.

See "Impure Milk"; "Unwholesome Milk."

"Milk" is a white fluid of female mammals, secreted for the nourishment of the young, and the court will take judicial notice that, where such word is used, milk of that character is intended, and not other kinds of milk, such as the white juice of plants, which is a remote definition. *Briffitt v. State*, 16 N. W. 39, 40, 58 Wis. 39, 46 Am. Rep. 621.

"Milk," as used in Pub. St. c. 57, § 5, which makes it an offense "to have in one's possession, with intent to sell, milk to which a foreign substance has been added," is used in a general sense, and would include cream, or milk from which the cream has not been removed. *Commonwealth v. Gordon*, 33 N. E. 709, 159 Mass. 8.

MILL

See "Corn Mill"; "Flouring Mill"; "Grist-mill"; "Paper Mill"; "Planing Mill"; "Public Mills"; "Rolling Mill"; "Saw-mill"; "Tide Mill."

A "mill," as defined by Webster, has two significations: (1) "A complicated engine or machine for grinding and reducing to small particles grain, fruit, or other substance, or for performing other operations by means of wheels and a circular motion, as a

gristmill for grain, a coffee mill, a cider mill, a barkmill. The word is now extended to engines or machines moved by water, wind, or steam, for carrying on many other purposes." (2) "The house or building that contains the machinery for grinding." *State v. Livermore*, 44 N. H. 386, 387.

The term "mill," in modern usage, includes various machines or combinations of machinery, as cotton mills, fulling mills, powder mills, etc., to some of which the term "manufactory" or "factory" is also applied. *Lamborn v. Bell*, 32 Pac. 989, 991, 18 Colo. 346, 20 L. R. A. 241.

A mill "is an engine or machine for grinding or comminuting any substance, usually having a word prefixed denoting the particular object to which it is applied. The original purpose of mills was to comminute grain for feed, but the word 'mill' is now extended to engines or machines moved by water, wind, or steam, for carrying on many other operations." *Home Mut. Ins. Co. v. Roe*, 36 N. W. 594, 596, 71 Wis. 33.

"Mill," as used in a policy of fire insurance on mill machinery and apparatus apart from the building in which it was contained, providing that if a building covered by a policy should become vacant or unoccupied, or if a "mill" or manufactory should stand idle without notice to and with the consent of the company, all liability on the policy should cease, does not mean the machinery, and its standing idle does not create a forfeiture. It would not be a natural or ordinary use of language to describe machinery used in milling as a "mill." While the word "mill" is used to describe a machine for grinding, it is also defined as a building, with its machinery, where grinding or some process of manufacturing is carried on. The term would not be understood or used by the mass of mankind to describe simply machinery and apparatus used in the business of manufacturing leather and morocco. The word "mill" refers only to a building used for milling or manufacturing. *Halpin v. Insurance Co. of North America*, 23 N. E. 989, 120 N. Y. 73, 8 L. R. A. 79.

"Mill," as used in a contract for the sale of a tile factory, speaking of only one "mill," though there were two on the premises, one of which was outside the factory, is a specific term, and cannot be construed to mean two mills or more, so as to include the mill outside the factory. *Thomas v. Troxel*, 59 N. E. 683, 685, 26 Ind. App. 322.

In using the word "mill" in Act Dec. 3, 1822, referring to mills and milldams, there can be no doubt as to the kind of mills the Legislature had in mind. Gristmills were the only kind that the people of the state in those early days had any practical familiarity with. When they used the word "mill,"

it was in that sense, and that is the original and only natural meaning of the word. The signification that is derived from its modern application to various manufacturing machines is artificial. Webster thus defines the word "mill": "An engine for grinding or comminuting any substance, as grain, by rubbing or crushing it between two hard, indented surfaces, generally of stone or metal." In modern usage the term "mill" includes various other machines and combinations of machinery which resemble the flouring mill, to which the term was first applied, not in its circular or grinding action, but in the more general one of transforming some raw material by mechanical process into a condition for use. *Southwest Missouri Light Co. v. Scheurich*, 73 S. W. 496, 497, 174 Mo. 235.

The term "factory" or "mill" means any premises where steam, water, or other mechanical power is used in aid of any manufacture or printing process there carried on. *Gen. St. Minn. 1894, § 2264*.

Easements included.

"Mill," as used in a conveyance of a mill, includes the waters, flood gates, and the like, which are all necessary to the use of the mill. *Le Roy v. Platt* (N. Y.) 4 Paige, 77, 82.

The conveyance of a mill includes the free use of the head of water existing at the time of its conveyance, or any other easement which has been used in it and which is necessary to enjoy it. *Blake v. Clark*, 6 Me. (6 Greenl.) 436, 440; *Rackley v. Sprague*, 17 Me. (F. Shep.) 281, 285.

The word "mill," as used in a grant of a mill, embraces the right to use the water course furnishing power to the mill, and the raceway thereof, to the extent of the grantor's prior rights. *Richardson v. Bigelow*, 81 Mass. (15 Gray) 154, 156.

In common sense and in legal interpretation a "mill" does not mean merely the building in which the business is carried on, but includes the site, dam, and other things annexed to the freehold necessary for its beneficial enjoyment. *Whitney v. Olney* (U. S.) 29 Fed. Cas. 1108, 1110 (citing *Leonard v. White*, 7 Mass. 6, 5 Am. Dec. 9; *Luttrell's Case*, 4 Coke, 86a); *Wilcoxon v. McGhee*, 12 Ill. (2 Peck) 381, 386, 54 Am. Dec. 409.

Factory distinguished.

See "Factory."

Land included.

The word "mill," as used in a grant of a mill, embraces the land under the mill and that adjacent thereto, so far as necessary to its use and commonly used with it. *Forbush v. Lombard*, 54 Mass. (13 Metc.) 109, 114.

The land under a mill and its overhanging projections passes under a conveyance of the mill. *Blake v. Clark*, 6 Me. (6 Greenl.) 436, 440.

The conveyance of a mill, or of a mill privilege, or of the privilege of the mill, will operate to convey the land occupied for the purpose, unless there be in the conveyance something indicating a different intention. *Farrar v. Cooper*, 34 Me. 394, 397.

A deed of a farm, together with all the buildings thereon, including "mills," water power, machinery, and fixtures belonging thereto, is sufficient to convey the mill, with the land on which it stands, and the adjacent land necessary to the enjoyment of it. *Deacons of Auburn Congregational Church v. Walker*, 124 Mass. 69, 70.

The term "mill" will often include land, if not necessarily so, unless there is something in the conveyance to rebut such presumption. *Sparks v. Hess*, 15 Cal. 186, 196; *Gibson v. Brockway*, 8 N. H. 465, 470, 31 Am. Dec. 200.

A devise of a "mill, with appurtenances," conveys not only the building, but the land under and adjoining it which is necessary to the use and is actually used with it. *Whitney v. Olney* (U. S.) 29 Fed. Cas. 1108, 1110; *Indianapolis, D. & W. R. Co. v. First Nat. Bank* (Ind.) 33 N. E. 679, 680, 134 Ind. 127; *Maddox v. Goddard*, 15 Me. (3 Shep.) 218, 224, 33 Am. Dec. 604.

Machinery included.

The term "mill," in a policy of insurance, embraces not only the mill building, but the machinery, etc. *Phoenix Fire Ins. Co. v. Gurnee* (N. Y.) 1 Paige, 278, 279, 19 Am. Dec. 431.

The terms "mill" and "flouring mill" include the machinery necessary for the operation of the same, as well as the buildings. *Cook v. Condon*, 51 Pac. 587, 589, 6 Kan. App. 574.

"Mill," as used in reference to the lien of laborers on certain mills, and the sale of such mills in satisfaction thereof, is to be construed as including "all engines, boilers, and machinery, and every kind of hardware, implements, tools, etc., connected with, or used, or proper for use in the mill, treating it as a going concern for the purposes for which it was erected." *Empire Lumber Co. v. Kiser*, 17 S. E. 972, 91 Ga. 643.

The word "mill" is defined by Webster as a complicated engine or machine for grinding, or for performing other operations by means of wheels and a circular motion, and in a popular sense we all speak of cotton, woolen, or other manufactures as "mills," undoubtedly meaning to include all the machinery ordinarily used in constructing the

fabric made in the mills. The term as used in R. S. Comp. 1854, p. 839, providing that "mills" shall be subject to taxation, includes not only the mill building, but the machinery as well. *Sprague v. Town of Lisbon*, 30 Conn. 18, 20.

Where a sawmill is so constructed that a considerable portion of the machinery and power is designed to be applied to draw up logs into the mill, such machinery and power being useless without a chain, the chain becomes and is an essential part of the mill, and will be included in a conveyance under the description of "a mill." *Farrar v. Sackpole*, 6 Me. (6 Greenl.) 154, 156, 157, 19 Am. Dec. 201.

Broom factory.

The making of brooms to a small extent does not make the place wherein they are made a mill or manufactory. A manufactory or a factory is a building, the main or principal design or use of which is a place for producing articles as products of labor. When we speak of a "factory" or "manufactory," we mean something more than a place where things are made. *Franklin Fire Ins. Co. v. Brock*, 57 Pa. (7 P. F. Smith) 74, 82.

Smelter.

A "mill," as contained in the lien law, includes a smelter. *McAllister v. Benson Mining & Smelting Co.* (Ariz.) 16 Pac. 271.

Well drill.

A boiler, engine, shafting, beam, derrick, reel, ropes, and drill, when put in place and action for the purpose of drilling a gas well, constitute a structure, but not a "mill" within the meaning of the statute, providing that wages of laborers employed about a mill shall be a first lien on all the machinery, etc., in such mill. *McElwaine v. Hosey*, 135 Ind. 481, 35 N. E. 272-276.

MILL FLUME.

As building, see "Building."

MILL HOUSE.

As shop, see "Shop."

The term "mill house" means a building or house used for milling purposes. *Ford v. State*, 14 N. E. 241, 244, 112 Ind. 373.

The term "mill house" designates only the mere covering of the substantial part of the mill. A policy of insurance on a "mill" includes not only the mill house but the machinery, while a policy on the "mill house" will only include the building. *Phoenix Fire Ins. Co. v. Gurnee* (N. Y.) 1 Paige, 278, 279, 19 Am. Dec. 431.

MILL IRON.

"Mill iron," as used in a bill rendered to a vendee, in which the property sold is described as "mill iron," is a mere statement or expression of opinion as to quality, and cannot be regarded as a warranty. *Carondelet Iron Works v. Moore*, 78 Ill. 65, 81.

MILL OWNER.

"Mill owner," as used in the statutes giving mill owners appropriating the use of a stream certain prior privileges, means a person who erects his dam in connection with his mill, or with intent to immediately erect a mill, and does not include a person who seeks to avail himself of the protection of the act merely by erecting a dam across a stream that runs through his land. *Fitch v. Stevens*, 45 Mass. (4 Metc.) 426, 428.

MILL PRIVILEGE.

A "mill privilege" is the right to the use of a water power in its existing state, and therefore where the owner of a parcel of land to which mill privileges are appurtenant, is so seised of such land, and he conveys the same, he cannot convey therewith the right of flowing lands above the lands conveyed, though such land is held by the grantor in common with another. *Hutchison v. Chase*, 39 Me. 508, 511, 63 Am. Dec. 645.

The grant of "mill privileges" without special mention of water rights, gives a right to the actual flow of the stream, subject to its reasonable use by upper owners. *Whitney v. Wheeler Cotton Mills*, 24 N. E. 774, 775, 151 Mass. 396, 7 L. R. A. 613.

The raising of the head of water to drive a mill constitutes a mill privilege. *Pettee v. Hawes*, 30 Mass. (13 Pick.) 323-326.

A grant of a mill privilege does not give the grantee the right to flow other lands of which the grantor still retains the possession. *Knapp v. Douglas Axe Co.*, 95 Mass. (13 Allen) 1, 5, 6.

The term "mill privilege" means the land and water used with the mill, and on which it and its appendages stand. *Moore v. Fletcher*, 16 Me. (4 Shep.) 63, 65, 33 Am. Dec. 633.

It is held that the term "mill privilege" in a conveyance or grant embraces the right which the law gives the owner to erect a mill thereon, and to hold up or let out the water, at the will of the occupant, for the purpose of operating the same in a reasonable or beneficial manner. It is said that it must of necessity include a reasonable amount of fall below the mill for the purpose of letting the water flow off without obstruction, and that it is not reasonable to confine the right of

the mill owner to the exact amount of the fall, to the fractional part of an inch, which will enable the water to flow away from his wheels without obstruction. *Gould v. Boston Duck Co.*, 79 Mass. (13 Gray) 442, 452.

The conveyance of a mill privilege will operate to convey the land occupied for the purpose, unless there be in the conveyance something indicating a different intention. *Farrar v. Cooper*, 34 Me. 394, 397.

MILL PROPERTY.

The term "mill property," in a conveyance of mill property, carries with it all the incidents and privileges connected with its use, and this includes the right to maintain a dam, so as to produce a head or power equal to that which existed at the time when the conveyance was executed. The right to maintain a dam at the height it exists at the time of a conveyance of mill property is of itself property, and a part of the thing sold. *Scott v. Michael*, 28 N. E. 546, 547, 129 Ind. 250.

A contract to sell the purchaser all the vendor's interest in "the property known as the 'mill property,' now owned and occupied as common and undivided by said parties," should be construed to cover all the bargainor's interest in the lands on which the mill stood or adjacent thereto, and necessary for its use and actually used with it, though a portion thereof was owned by the bargainor in severalty. *Van Horn v. Richardson*, 24 Wis. 245, 248.

MILL RACE.

As a water course, see "Water Course."

MILL RUN.

"Mill run," as used in a contract for the purchase of lumber at a certain price per thousand feet, board measure, "mill run," indicates and specifies all the grades of lumber as they came from the mill. *Wonderly v. Holmes Lumber Co.*, 23 N. W. 79, 83, 56 Mich. 412.

MILL SITE.

It is held that the term "mill site," in a conveyance or grant, embraces the right which the law gives the owner to erect a mill thereon, and to hold up or let out the water, at the will of the occupant, for the purpose of operating the same in a reasonable or beneficial manner. It is said that it must of necessity include a reasonable amount of fall below the mill for the purpose of letting the water flow off without obstruction, and that it is not reasonable to confine the right of the mill owner to the exact amount of the fall, to the fractional

part of an inch, which will enable the water to flow away from his wheels without obstruction. *Occum Co. v. A. & W. Sprague Mfg. Co.*, 35 Conn. 496, 512.

A fall below a mill, of such extent as to furnish a reasonable addition to the fall already in use, and purchased or held by the owner of the mill for such use at some future time, with the design in good faith to so apply it, will be considered as part of a mill site lawfully in use, and entitled to protection as such under the mill act. *Elting Woolen Co. v. Williams*, 36 Conn. 310, 318.

Land included.

A conveyance of a certain "mill site," with the sawmill, machinery, etc., thereon standing, "meaning to convey all the premises which A. B. purchased of C. D. by deed, dated, etc., with all the privileges and subject to all the restrictions therein expressed, reference thereto being had for a more particular description of the premises," should be construed to include the whole land under the mill, notwithstanding the land acquired by the deed to which reference was had, covered but a part of the premises on which the mill was erected. The term "mill site" embraces all the land the mill covers. *Crosby v. Bradbury*, 20 Me. (7 Shep.) 61, 65.

An exception of a "mill site" in a grant or lease should be construed to operate as an exception of the soil of the mill site, and so much land as is necessary for the mill pond and erecting and carrying on the business of the mill. *Hasbrouch v. Vermilyea* (N. Y.) 6 Cow. 677, 681; *Burr v. Mills* (N. Y.) 21 Wend. 290, 294.

Water power included.

The grant of a "mill site" to one exclusively, entitled him to the exclusive use of the water power. *Mandeville v. Comstock*, 9 Mich. 536, 537.

The grant of a "mill site," etc., should be construed to include a water power, together with the right to maintain a dam wherever such dam would be suitable for the convenient and beneficial appropriation of the water power. *Stackpole v. Curtis*, 32 Me. 383, 385.

MILL TALLY.

In construing a contract whereby plaintiff was to be paid for cutting and delivering logs at a certain rate per thousand feet, board measure, according to the mill tally thereof, it was held that the evidence introduced showed that the term "mill tally" included all that portion of the logs that was sawed and set apart as property proper to be classed as lumber, including mill culls, and the court say that the word naturally

refers to what is usually tallied, and that the court has no judicial or other knowledge of a contrary meaning. *Cornell v. New Era Lumber Co.*, 39 N. W. 7, 8, 71 Mich. 350.

MILL YARD.

The "mill yard" of a sawmill is a place appropriated for the deposit of logs to be sawn, and for the piling of lumber which has been manufactured from such logs. It is not necessary that it should be inclosed by fences in order to be within 1 Rev. St. p. 514, § 57, providing that no public road shall be laid out through any building or any fixtures or erections for the purpose of trade or manufacture, or any "yards" or inclosures necessary to the use and enjoyment thereof, without the consent of the owner; but one cannot form a clear notion of a yard whose boundaries are not defined in any way, either by an inclosure or visible marks, or by definite occupation within certain exterior lines. If the mill be situated in or adjacent to a field of much larger extent than would be necessary for the mill yard, no one would pretend that every part of it would be wholly shielded from the action of the authorities intrusted with the laying out of highways. *People v. Klugman*, 24 N. Y. 559, 562.

MILLDAM.

A dam built at the outlet of a lake to raise the waters for purposes of navigation, although used to propel mills, is not a "milledam" within the milledam acts, under which owners of such dams acquire rights according to their priority of location, etc. *Arlmond v. Green Bay & M. Canal Co.*, 35 Wis. 41, 47.

A reservoir dam for the benefit of mills on the same stream is within the meaning of the mill act, authorizing the erection of dams, though such a dam may not be immediately connected with or very near the mill. *Dingley v. Gardiner*, 73 Me. 63, 68.

MILLING.

"Milling," as used in Const. art. 2, § 14, providing that private property shall not be taken for private use, unless by the consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches on or across the lands of others, for "milling" purposes, is synonymous with the word "manufacturing." *Lamborn v. Bell*, 32 Pac. 989, 991, 18 Colo. 346, 20 L. R. A. 241; *Denver Power & Irrigation Co. v. Denver & R. G. R. Co.*, 69 Pac. 568, 569, 30 Colo. 204, 60 L. R. A. 383.

Mining and "milling" would seem to be, taken together, one industry, having for its object to obtain possession of material prod-

ucts in the state in which they were fashioned by nature. Mining, the process of extracting from the earth the rough ore, would seem to be the first step in the process; milling or reducing, the second step, to wit, the further separating of the materials found together, the one from the other, and extracting from the mass the particular natural product desired. In *re Rollins Gold & Silver Min. Co.* (U. S.) 102 Fed. 982, 985.

MILLWRIGHT.

A "millwright" is an engineer who designs, constructs, and erects mills, their motors, machinery, and appurtenances, particularly flouring and grist mills. *Cole v. Warren Mfg. Co.*, 44 Atl. 647, 648, 63 N. J. Law, 626 (citing Cent. Dict.).

MILLINERY ESTABLISHMENT.

A "milliner," in common usage, is a woman who makes and sells bonnets and other headgear for women. The distinctive feature of the business is that she is not only a dealer, but in a sense a manufacturer. A merchant may sell articles of millinery, such as hats, ribbons, artificial flowers, etc., in the form in which he purchases them, and not be a milliner; and hence a merchant who sold millinery, but did not make hats, is not conducting a "millinery establishment," within statute requiring merchants selling millinery to pay an additional license besides a merchant's license. *City of Tuscaloosa v. Holczstein*, 32 South. 1007, 1008, 134 Ala. 636.

MIND.

See "Sound Mind and Memory."

The words "mind" and "memory," as used in 2 Rev. St. 56, providing that every male person of sound mind and memory, and no others, may give, bequeath, etc., are convertible terms. "The use of the words 'mind' and 'memory' as convertible terms is not so unphilosophical as might at first seem, for without memory there could be no mind, properly speaking, and without any memory a person would be the mere recipient of a succession of present sensations, like the lowest type of animal life." In *re Forman's Will* (N. Y.) 54 Barb. 274, 286.

There was an early impression that inasmuch as malice was an element in every libel, and as a corporation was an entity without mind, so no bad mind or malice could be attributed to a corporate body. But there is no reason why there should exist any immunity for corporations for malicious torts. For all torts not malicious, it has been held that a corporation is responsible. The reason assigned for the exception of

malicious torts from the general rule is that the corporation has no soul or mind, but it is obvious that "mind" in its legal sense means only the ability to will, to direct, to permit, or assent. A corporation exercises its mind each time that it consents to the terms of a contract. It is true that the corporate mind must be exercised on a matter within the range of its corporate ability, and that it must act through the intervention of agents, but if the agent's act is induced by the direction given by the corporate will, either by a direct order to do the act or order to do some other act which comprises in its execution the doing of the act, then the corporation is answerable in the same manner that any other party is responsible under like conditions for the acts of its servants. *McDermott v. Evening Journal Ass'n*, 43 N. J. Law, 488, 490, 39 Am. Rep. 606.

MINE.

See "Anthracite Mine"; "Coal Mine"; "Placer Mines."

Other mine, see "Other."

A mine is a pit or excavation in the earth from which metallic ores or other similar substances are taken by digging. *Marvel v. Merritt*, 6 Sup. Ct. 207, 208, 116 U. S. 11, 29 L. Ed. 550; *McCurtain v. Grady*, 38 S. W. 65, 70, 1 Ind. T. 107; *Springside Coal Min. Co. v. Grogan*, 53 Ill. App. 60, 65; *Coleman v. Coleman* (Pa.) 1 Pears. 470, 474.

A "mine" is defined by Bouvier as an excavation made for obtaining minerals from the bowels of the earth. *Coleman v. Coleman* (Pa.) 1 Pears. 470, 474.

A mine is a work for the excavation of minerals by means of pits, shafts, levels, tunnels, etc. *Murray v. Allred*, 43 S. W. 355, 358, 100 Tenn. 100, 39 L. R. A. 249, 66 Am. St. Rep. 740.

"Mines," according to Jacob's Law Dictionary, "are quarries or places where anything is digged." *Earl of Rosse v. Walman*, 14 Mees. & W. 859, 872; *Coleman v. Coleman* (Pa.) 1 Pears. 470, 474.

To "mine" is defined to dig a pit or mine, to dig in the earth for minerals, etc., and appears to apply more specially to underground work. *Commonwealth v. Brookwood Coal Co.*, 25 Pa. Co. Ct. R. 55, 56.

The term "mine," as used in the act relating to mines, includes every shaft, slope, or drift which is used or has been used in the mining and moving of coal from and below the surface of the ground. *Horner's Rev. St. Ind.* 1901, § 5458.

The term "mine," as used in the act relating to mines and mining, includes all

underground workings and excavations, and shafts, tunnels, and other ways and openings; also all such shafts, slopes, tunnels, and other openings in course of being sunk or driven, together with all roads, appliances, machinery, and materials connected with the same below the surface. *P. & L. Dig. Laws* (Pa.) 1894, vol. 2, col. 3110, § 193.

As land.

Mines are land, and subject to the same laws of possession and conveyance. *Byers v. Byers*, 38 Atl. 1027, 1028, 183 Pa. 509, 39 L. R. A. 537, 63 Am. St. Rep. 765.

As lode or vein.

The term "mine," as used in mining law, is synonymous in its meaning with the term "vein" or "lode." *Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co.*, 11 Pac. 515, 523, 5 Utah, 3.

As dependent on mode of working.

Whether any excavation be a mine or not depends on the mode in which it is worked, and not on the substance obtained from it. *Rex v. Dunsford*, 2 Adol. & E. 568.

When limestone was obtained and raised by sinking shafts perpendicularly to the stratum 40 or 50 yards below the surface, and the stratum was worked by rods and gateheads, and the stone raised to the surface by machinery or carried underground through a tunnel, which mode was the same used in obtaining coal and ironstone, the property was a limestone mine, and not ratable, within the meaning of a statute exempting mines other than coal mines. *Rex v. Sedgley*, 2 Barn. & Adol. 65.

A perpendicular shaft sunk from the surface of the land for the purpose of raising clay out of the strata, which was done by a steam engine and other mining apparatus, the excavation being similar to those made for working coal and metallic mines, and the mode of raising the clay the same as that used in a coal mine, is a clay mine, and hence not ratable for the poor. *Rex v. Brettell*, 3 Barn. & Adol. 424.

As paying mine.

Rev. St. U. S. § 2392 [*U. S. Comp. St.* 1901, p. 1459], provides that no title shall be acquired to any "mine of gold, silver, cinnabar, copper," or to any valid mining claim or possession held under existing laws. Held, that the term "mine of gold, silver, cinnabar, or copper," as used in such section, meant a paying mine known to exist at the time of the grant, or one which there was good reason to believe then existed. *Smith v. Hill*, 26 Pac. 644, 645, 89 Cal. 122. See, also, *Francœur v. Newhouse* (U. S.) 40 Fed. 618, 621, 43 Fed. 236, 240; *Davis v. Wiebold*, 11 Sup. Ct. 628, 633, 139 U. S. 507, 35 L. Ed. 238;

Richards v. Dower, 22 Pac. 304, 306, 81 Cal. 44.

Under the unvarying decisions of the courts, federal and state, the term "mine" is defined as including only mines valuable for minerals, or, as expressed in Act May 10, 1872, c. 152, § 2, 17 Stat. 91 [U. S. Comp. St. 1901, p. 1424], valuable mineral deposits. Callahan v. James (Cal.) 71 Pac. 104, 105.

Quarry distinguished.

"A mine" is defined by Webster to be "a pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging, as distinguished from the pits from which stones only are taken, and which are called 'quarries.'" Marvel v. Merritt, 6 Sup. Ct. 207, 208, 116 U. S. 11, 29 L. Ed. 550.

As a structure.

See "Structure."

As the whole claim.

The word "mine," as used in mining law, may be used to designate "the whole claim or body of the mining ground." Smith v. Sherman Min. Co., 31 Pac. 72, 73, 12 Mont. 524.

A "mine," properly speaking, is the pit or excavation in the earth from which the ore is taken. The term is certainly used to include the bed or vein of ore into which the pit enters, so far as may be necessary to the working of the mine, and the whole series of shafts and subterranean passages and chambers connected with it, but neither in ordinary parlance nor in strict technical language is a "mine" understood to indicate the entire ore bed with which the shaft may be connected. The ore may extend indefinitely, but the mine is the pit from whence it is extracted. Shaw v. Wallace, 25 N. J. Law (1 Dutch.) 453, 461.

A "mine" is not to be limited to "the subterranean cavity or passage, especially a pit or excavation in the earth, from which metal, ore, or mineral substances are taken by digging, but the whole claim or body of mining ground." Tredinnick v. Red Cloud Consolidated Min. Co., 13 Pac. 152, 153, 72 Cal. 78.

As a worked vein of coal.

The term "mine," when applied to coal, is generally equivalent to a "worked vein," for by working the vein it becomes a mine. It therefore follows that, if a mine be opened and worked, the tenant for life may pursue that vein to the boundaries of the tract on which it is found. The right to mine is limited or restricted to the particular tract or body of lands on which the mine has been opened, and does not extend to a body of lands entirely separated and removed from the other. A vein of the same quality and character, extending from the former land to

the latter, does not constitute a mine. Appeal of Westmoreland Coal Co., 85 Pa. 344, 346.

Mine being prepared.

A "mine," within the meaning of *Sess. Laws* 1883, p. 114, requiring that the owner, agent, or operator of every coal mine, whether operated by shaft, slope, or drift, shall in all mines where fire damp is generated have the mine examined every morning with a safety lamp before any persons are allowed to enter, includes a coal mine, though no coal is being dug, but in which men are engaged in preparing it for mining operations. Coal Run Coal Co. v. Jones, 19 Ill. App. 365, 370.

Nonmineralized rock.

"Mines," as the term is known to the mineral laws of the United States, "embrace nothing but deposits of valuable mineral ores, and do not include mere masses of non-mineralized rock, whether rock in place or scattered through the soil." Wheeler v. Smith, 32 Pac. 784, 785, 5 Wash. 704.

Production of mine.

A "mine," within the meaning of a statute exempting mines from taxation, does not include the production of the mine. Hope Min. Co. v. Kennon, 3 Mont. 35, 44.

Salt lakes and springs.

"Mines," as used in Const. 1866, whereby the state released to the owner of the soil all "mines and mineral" substances, would include salt lakes, springs, etc., as well as gold, silver, and copper mines. State v. Parker, 61 Tex. 265, 268.

Slatework.

A slatework is not a "mine" in the proper sense of the word. Rex v. Inhabitants of Woodland, 2 East, 164, 167.

Surface improvements.

Nev. Const. art. 10, restricts the power of taxation of "mines and mining claims" to the proceeds derived therefrom alone. Held, that the words "mines and mining claims," as so used, do not include the surface improvements on a mining claim, which improvements are subject to taxation. Gold Hill v. Caledonia Silver Min. Co. (U. S.) 10 Fed. Cas. 550, 551.

MINE FOREMAN.

The term "mine foreman," as used in the acts relating to mines and mining, means the person who shall have, on behalf of the operators, immediate supervision of a coal mine. 4 P. & L. Dig. Laws Pa. 1897, col. 1249, § 33.

MINE MANAGER.

The term "mine manager," in Act June 18, 1891, providing for the examination of

mine managers, etc., is defined by the act as intended to mean any person who is charged with the general direction of the underground work, or of both the underground and top work, of any coal mine, and who is commonly known and designated as "mine boss" or "foreman" or "pit boss." *Woodruff v. Kellyville Coal Co.*, 182 Ill. 480, 482, 483, 55 N. E. 550.

MINE-RUN COAL.

A mining lease, stipulating for the payment to a lessor of the royalty on all "mine-run coal" of a certain number of pounds, means the coal as it comes from the mines, embracing lump, nut, and slack coal. *Hardin v. Thompson* (Ky.) 57 S. W. 12.

MINER.

As workman, see "Workman."

The term "miner" is defined by Webster to be "one who mines; a digger of metals and other minerals." *Watson v. Lederer*, 19 Pac. 602, 604, 11 Colo. 577, 1 L. R. A. 854, 7 Am. St. Rep. 263; *In re Mine Foremen's Qualifications*, 17 Pa. Co. Ct. R. 99, 100.

The word "miner" imports neither skill nor learning. *Watson v. Lederer*, 19 Pac. 602, 604, 11 Colo. 577, 1 L. R. A. 854, 7 Am. St. Rep. 263.

A miner need not necessarily be a digger of metals. The definition is satisfied if he is a digger for metals. A person might be a long time digger for minerals and yet never actually mine them. The word "miner," as used in the anthracite mining law, is not confined in its application to the person who actually mines and cuts the coal, but may include laborers, loaders, starters, roadmen, repairmen, and others who work in the mines but do not actually cut coal. *In re Mine Foremen's Qualifications*, 17 Pa. Co. Ct. R. 99, 100.

MINER'S INCH.

The term "miner's inch" cannot be definite without specification of the head or pressure. *Longmire v. Smith*, 67 Pac. 246, 250, 26 Wash. 439, 58 L. R. A. 308.

MINER'S WEIGHT.

"Miner's weight," as used in a coal mining lease, stipulating for a specified royalty per ton, "miner's weight," means such quantity of coal as was computed as a ton in paying the miner who mined by the ton. It did not mean a net ton of 2,000 pounds. The phrase "miner's weight" meant such quantity of coal, slate, and dirt as was agreed on to be sufficient to make a ton of prepared coal. *Drake v. Lacoe*, 27 Atl. 538, 540, 157 Pa. 17.

MINERAL

As included in term "land," see "Land."

A "mineral" is defined by the Century Dictionary to be any constituent of the earth's crust, more specifically an inorganic body occurring in nature, homogeneous, and having a definite chemical composition, which can be expressed by a chemical formula, and, further, having certain distinguishing physical characteristics. *Bainb. Mines* (4th Ed.) p. 1, defining the term, says that it may, however, in the most enlarged sense, be described as comprising all the substances which now form or which once formed a part of the solid body of the earth, both external and internal, and which are now destitute of or incapable of supporting animal or vegetable life. *Northern Pac. R. Co. v. Soderberg* (U. S.) 104 Fed. 425, 428, 43 C. C. A. 620.

In the most general sense of the term, "minerals" are those parts of the earth which are capable of being got from underneath the surface for the purpose of profit. The term, therefore, includes coal, metal, ores of all kind, clay, stone, slate, and coprolites. *Williams v. South Penn. Oil Co.*, 43 S. E. 214, 217, 52 W. Va. 181; *Murray v. Allred*, 43 S. W. 355, 358, 100 Tenn. 100, 39 L. R. A. 249, 66 Am. St. Rep. 740.

A mineral is a natural body destitute of organization or life. *Jenkins v. Johnson* (U. S.) 13 Fed. Cas. 525, 527.

A mineral is anything that grows in mines and contains metals. *Coleman v. Coleman* (Pa.) 1 Pears. 470, 474 (citing Jacob's Law Dict.).

"Mineral," is defined by Webster to be "any inorganic species having a definite chemical composition." *Marvel v. Merritt*, 6 Sup. St. 207, 208, 116 U. S. 11, 29 L. Ed. 550.

Metal distinguished.

In its common and ordinary signification, the word "mineral" is not a synonym of "metal," but is a comprehensive term, including every description of stone and rock deposits, whether containing metallic substances or entirely nonmetallic. *Northern Pac. Ry. Co. v. Soderberg* (U. S.) 99 Fed. 506, 507.

Ore distinguished.

"The term 'minerals,' though frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines. In its enlarged sense it comprises all the substances which formed or have formed a solid body of the earth. There is a difference, both in common and scientific parlance, between 'minerals' and 'ore,' ore being a compound of a metal and some other substance. Hence iron ore is not included in a lease granting the right

to take minerals." *Doster v. Friedensville Zinc Co.*, 21 Atl. 251, 252, 140 Pa. 147.

Chromate of iron.

"Minerals" means all ores and other metallic substances which are found beneath the surface of the earth, and all substances which are the object of mining operations, and includes chromate of iron. *Gibson v. Tyson* (Pa.) 5 Watts, 37, 38.

Coal.

"Mineral," as used in Rev. St. § 3921, giving treble damages for the unlawful digging or removal of minerals, includes coal; the word embracing all minerals. *Henry v. Lowe*, 73 Mo. 96, 99.

"Mineral land," as used in a treaty with the Cherokee Indians July 19, 1866, by which certain lands were ceded to the United States, but in which it was provided that, whenever there were improvements of a certain value made on lands other than mineral lands which were owned and personally occupied by any persons for agricultural purposes, such persons should be entitled to purchase such lands, was construed to mean lands containing deposits of lead and zinc, as it was known at the time of the treaty that such deposits existed near, if not within, the territory ceded, but not to include coal lands. *Stroud v. Missouri River, Ft. S. & G. R. Co.* (U. S.) 23 Fed. Cas. 257, 260.

"Mineral lands," as used in grants by the United States reserving mineral lands, would include coal land which was known to be such at the time the grant was made. *Mullan v. United States*, 6 Sup. Ct. 1041, 1044, 118 U. S. 271, 30 L. Ed. 170.

Gas.

As used in Tariff Act 1890, par. 651, "minerals" is to be read in its common acceptance, in the absence of a different commercial signification, and does not include a gas, but means something which in ordinary parlance is "mined." *United States v. Buffalo Natural Gas Fuel Co.* (U. S.) 78 Fed. 110, 112, 24 C. C. A. 4.

A reservation, in a conveyance of lands of mines, minerals, and metals, includes natural gas. *Murray v. Allred*, 43 S. W. 355, 356, 100 Tenn. 100, 39 L. R. A. 249, 66 Am. St. Rep. 740.

The term "mineral" includes gas and water, "but they are minerals with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions." *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 18 Atl. 724, 727, 130 Pa. 235, 5 L. R. A. 731; *Ridgway Light & Heat Co. v. Elk County*, 43 Atl. 323, 324, 191 Pa. 465; *Manufacturers' Gas & Oil Co. v.*

Indiana Natural Gas & Oil Co., 57 N. E. 912, 915, 155 Ind. 461, 50 L. R. A. 768; *Ohio Oil Co. v. State of Indiana*, 20 Sup. Ct. 576, 582, 177 U. S. 190, 44 L. Ed. 729.

Granite and stone.

The words "minerals and ores" in a deed, standing alone, will be construed to include granite, but where the surface rights granted are only "sufficient land to erect suitable buildings for machinery and other buildings necessary and usual in mining and raising ores," they will be understood to include only minerals obtained by underground working. *Armstrong v. Lake Champlain Granite Co.*, 42 N. E. 186, 187, 147 N. Y. 495, 49 Am. St. Rep. 683.

Land chiefly valuable for granite which it contains, suitable for quarrying and of good merchantable quality, is "mineral land," within the exception in the grant of July 2, 1864, to the Northern Pacific Railroad Company, and did not pass under such grant. *Northern Pac. Ry. Co. v. Soderberg*, 104 Fed. 425, 428, 43 C. C. A. 620.

"Minerals," as used in 33 Geo. II, providing that, if the lord of a manor enter upon any of the lands for the purpose of digging any coals or other minerals, he should make satisfaction to the proprietors of the lands for the damage done, includes stones dug from quarries. *Micklethwait v. Winter*, 6 Exch. 644, 654.

"Minerals," as used in the Inclosure Act, 55 Geo. III, c. 18, reserving to the lord of the manor all mines and minerals within certain commons, being construed according to the object of the act, which was to give to the commoners the surface for cultivation, is not to be understood in its general sense, as signifying substances containing metals, but in its proper sense, as including all fossil bodies or matter dug out of the mines—that is, quarries or places where anything is dug—and the clause reserved to the lord the right to the stratum of stone in the lands. *Wainman v. Earl of Rosse*, 2 Exch. 800; *Earl of Rosse v. Wainman*, 14 Mees. & W. 855, 872.

The term "mineral," within the rule that not only the ore, but other mineral product, becomes the property of one acquiring a mining claim, includes stone, and therefore one who files a coal declaratory statement on public lands, and enters into possession thereunder, becomes the owner of all building stone taken from such land in developing the claim, even though the statement is not filed in good faith. *Johnston v. Harrington*, 31 Pac. 316, 318, 5 Wash. 73.

Iron ore.

"Mineral substance," as used in U. S. Rev. St. 1874, tit. 33, p. 478, which provides that the duty on mineral and bituminous substances in a crude state, not otherwise pro-

vided for, shall be 20 per cent. ad valorem, includes iron ore. *Marvel v. Merritt*, 6 Sup. Ct. 207, 208, 116 U. S. 11, 29 L. Ed. 550.

Magnesia.

A deed by which B. conveyed to F. a tract of land in fee simple, "excepting and reserving for himself," etc., all "mineral or magnesia of any kind," etc., is not to be construed as including magnesia only within the reservation, but includes magnesia and all other minerals, since ordinarily magnesia is not considered a mineral, and apparently was used by the parties as not being. *Gibson v. Tyson* (Pa.) 5 Watts, 34, 41.

Oil.

Oil in place under the soil is a mineral, and a part of the realty. *Caldwell v. Fulton*, 31 Pa. (7 Casey) 475, 72 Am. Dec. 760; *Appeal of Stoughton*, 88 Pa. 198, 201 (citing *Funk v. Haldeman*, 53 Pa. [3 P. F. Smith] 229); *Marshall v. Mellon*, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601; *Blakley v. Marshall*, 174 Pa. 425, 34 Atl. 564; *Jennings v. Bloomfield*, 49 Atl. 135, 136, 199 Pa. 638; *Wilson v. Youst* (W. Va.) 28 S. E. 781, 39 L. R. A. 292, 43 W. Va. 826; *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222; *Southern Oil Co. v. Colquitt*, 28 Tex. Civ. App. 292, 69 S. W. 169, 171.

In a deed, a reservation of "all minerals" will be construed to mean only minerals of a metallic nature, such as gold, silver, copper, lead, etc., and not petroleum oil, that being the meaning placed on the word generally, though technically it would include salt, rocks, clay, sand, petroleum, oil, etc. *Dunham v. Kirkpatrick*, 101 Pa. 36, 43, 47 Am. Rep. 696, 40 Leg. Int. 318.

Act April 25, 1850, providing that in all cases in which any coal or ore mines or minerals have been or shall be held by two or more persons as tenants in common, and have been or shall be taken from the land, it shall be lawful for any one or more of the tenants in common to apply for an account, should be construed to include coal oil, which is enough mineral in its character to bring it within the term "minerals." *Thompson v. Noble* (Pa.) 3 Pittsb. R. 201, 203.

Lands from which petroleum is obtained may with propriety be called "mining lands." *Gill v. Weston*, 1 Atl. 921, 110 Pa. 312.

A reservation, in a conveyance of lands, of "mines, minerals, and metals," includes petroleum. *Murray v. Allred*, 43 S. W. 355, 356, 100 Tenn. 100, 39 L. R. A. 249, 66 Am. St. Rep. 740; *Wagner v. Mallory*, 62 N. E. 584, 585, 169 N. Y. 501; *Kelley v. Ohio Oil Co.*, 49 N. E. 399, 401, 57 Ohio St. 317, 39 L. R. A. 705, 63 Am. St. Rep. 721.

Paint stones.

A conveyance of "mines and minerals" includes a paint stone which is found in

strata below the surface of the soil, and distinct from the ordinary earth, and worked by the ordinary means of mining. The words "mines and minerals," as so used, should not be confined to the metals or to the metallic ores merely. *Hartwell v. Camman*, 10 N. J. Eq. (2 Stockt.) 128, 136, 64 Am. Dec. 448.

Salt lakes and springs.

"Minerals," as used in Const. 1866, whereby the state released to the owner of the soil all "mines and mineral" substances, would include salt lakes, springs, etc., as well as gold, silver, and copper mines. *State v. Parker*, 61 Tex. 265, 268.

Water.

Water is a mineral. *Ridgway Light & Heat Co. v. Elk County*, 43 Atl. 323, 324, 191 Pa. 465.

Water, like gas and oil, is a mineral, but a mineral with peculiar attributes. "The decisions in ordinary cases of mineral rights, etc., have never been held as unqualified precedents in regard to flowing, or even to percolating, waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy is not too fanciful, as minerals *ferre naturæ*. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner. *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 18 Atl. 724, 727, 130 Pa. 235, 5 L. R. A. 731.

MINERAL DISTRICT.

All other mineral districts, see "All Other."

"Mineral district," as used in United States statutes, being neither known in law or in fact as the designation of any well-defined or exact locality, is a word of no meaning, and as incapable of application as the phrase "tree district," "stone district," or "water district." There is no method known to the law by which a district of country can be prospected, surveyed, or declared to be a mineral district, and, though there are some mineral lands and mining districts in a state, it is not known that there are any considerable sections of the country to which the term "mineral district" could properly be applied, and it is certain that there are none to which it is applied by law. *United States v. Smith* (U. S.) 11 Fed. 487, 490.

MINERAL LAND.

As to what constituents make land mineral land, see *supra*, under main title "Mineral."

Mineral lands include not merely metallic lands, but all such as are chiefly valuable for their deposits of a mineral charac-

ter, which are useful in the arts or valuable for purposes of manufacture. *Northern Pac. R. Co. v. Soderberg*, 23 Sup. Ct. 365, 367, 188 U. S. 526, 47 L. Ed. 575.

As known mineral lands.

In a grant of lands excepting mineral lands, the term "mineral lands" means lands known to be mineral lands when the grant took effect, or which there was then good reason to believe were mineral lands. *Northern Pac. Ry. Co. v. Barden* (U. S.) 46 Fed. 592; *Francoeur v. Newhouse* (U. S.) 40 Fed. 618, 621, 43 Fed. 236; *Cowell v. Lammers* (U. S.) 21 Fed. 200, 206; *Davis v. Wiebbold*, 11 Sup. Ct. 628, 633, 139 U. S. 507, 35 L. Ed. 238; *Mullan v. United States*, 6 Sup. Ct. 1041, 1044, 118 U. S. 271, 30 L. Ed. 170; *Hermocilla v. Hubbell*, 26 Pac. 611, 89 Cal. 5.

As dependent on quantity of minerals.

Within the meaning of the statute providing that lands containing valuable mineral deposits shall be free and open to exploration and purchase, lands in which mineral of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them, are not included within the designation of "mineral lands." *Deffenback v. Hawke*, 6 Sup. Ct. 95, 100, 115 U. S. 392, 29 L. Ed. 423.

"Mineral lands," as used in grants by the United States which except from their operation mineral lands, do not include all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to the richness of the land and to justify expenditure for its extraction, and this fact must be known at the date of the grant in order to bring the land within the exception. *Smith v. Hill*, 26 Pac. 644, 645, 89 Cal. 122.

The term "mineral lands" includes land which is worth more for mining than for agriculture. The fact that the land contains some gold or silver would not constitute it mineral lands if the gold and silver did not exist in sufficient quantities to pay to work it. *Davis v. Wiebbold*, 11 Sup. Ct. 628, 633, 139 U. S. 507, 35 L. Ed. 238.

The mere fact that land contains particles of gold or veins of gold-bearing rock does not necessarily impress it with the character of "mineral land," within the meaning of Act Cong. July 1, 1862, and Act Cong. July 2, 1864, granting alternate sections to the Pacific Railroad, but reserving from the grant mineral lands. *Alford v. Barnum*, 45 Cal. 482.

By the term "mineral land," in acts of Congress, is meant only valuable mineral lands available for mining purposes. The mere fact that portions of the land contain particles of gold or veins of gold-bearing

quartz would not impress it with the character of mineral land. It must at least be shown that the land contains mineral in quantities sufficient to render it available and valuable for mining purposes. *Merrill v. Dixon*, 15 Nev. 401, 406.

Rights of way.

"Mineral lands," as used in the charter of the Northern Pacific Railway Company granting to the railroad, for the purpose of aiding in the construction, certain lands, with the exception of mineral lands covered by the description, should be construed to mean mineral lands not covered by the right of way. Nothing could possibly be given in lieu of any lands which might be needed for the right of way, and it would be destructive of the rights of the railway company if mining claims could at any time be located and worked upon the tract and land covered by the right of way. *Wilkinson v. Northern Pac. R. Co.*, 6 Pac. 349, 352, 5 Mont. 538.

MINERAL LAND ENTRY.

The phrase, "entry of mineral land," in Act July 1, 1898, authorizing the entry of mineral lands in the Colville Indian reservation, implies the discovery of precious metals in paying quantities in the lands to be entered, and the doing of work upon the claims necessary to develop and successfully operate mines. It requires labor and the use of implements, and carries with it the right to go upon the land for the purpose of working mines therein; the right to have a habitation for workmen, and to take their implements and conveniences for doing work. The word "entry" as it has been heretofore used in the land laws of the United States, means that act by which an individual acquires a receptive right to a portion of the unappropriated soil of the country by filing his claim. The act in question certainly was not intended to authorize any person to file in the land office a claim to a piece of land unless he had previously discovered and developed a mine thereon. *United States v. Four Bottles Sour Mash Whisky* (U. S.) 90 Fed. 720, 723.

MINERAL LEASE.

See "Mining Lease."

MINERALS FERÆ NATURÆ.

"Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals feræ naturæ. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their fugitive and wandering existence within the limits of a particular tract was uncertain, as said by Chief Jus-

lice Agnew, in *Brown v. Vandegrift*, 80 Pa. 142, 147, 148. They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come into another's control, the title of the former owner is gone." *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 18 Atl. 724, 727, 130 Pa. 235, 5 L. R. A. 731.

MINIMUM.

"Minimum," as used in an instruction that damages were reduced to the minimum in a certain fund, does not mean that the damages are nominal damages, but that they are the least damages which the party has suffered. *Austin v. Hyndman*, 78 N. W. 663, 664, 119 Mich. 615.

The corporation commission fixed freight rates for fertilizers, declaring that 20 per cent. higher rates than those fixed might be charged for shipments less than a car load, and that ten tons should be regarded as the minimum car load. Held, that the meaning was that the public rates were based on individual shipments of ten tons or over, and that when less than ten tons were shipped the carrier might charge 20 per cent. more than standard rates; the term "minimum car load" clearly being a misnomer, it being in common knowledge that an actual car load can be more cheaply and conveniently transported than one containing several shipments consigned to different persons, there being less handling and less risk of mistake or loss. *Corporation Commission v. Seaboard Air Line System*, 37 S. E. 266, 268, 127 N. C. 283.

MINING.

See "Hydraulic Mining."

Mining and milling would seem to be, taken together, one industry, having for its object to obtain possession of material products in the state in which they were fashioned by nature. Mining, the process of extracting from the earth the rough ore, would seem to be the first step in the process; milling, or reducing, the second step, to wit, the further separating of the materials found together the one from the other, and extracting from the mass the particular natural product desired. In *re Rollins Gold & Silver Min. Co.* (U. S.) 102 Fed. 982, 985.

The term "mining" by the express provision of Act Feb. 21, 1889, is made to include the sinking of gas wells. *State v. Indiana & Ohio Oil, Gas & Mining Co.*, 22 N. E. 778, 120 Ind. 575, 6 L. R. A. 579; *Williams v. Citizens' Enterprise Co.*, 55 N. E. 425, 426, 153 Ind. 496.

As mercantile pursuit or trade.

See "Mercantile"; "Trade."

As public use.

See "Public Use."

MINING CLAIM.

See "Lode Mining Claim"; "Placer Claim."

"Mining claim" is the name given to the portion of the public mineral lands which the miner for mining purposes takes up and holds in accordance with mining laws, local and statutory. It is not merely a vein or lode, but that with a certain quantity of surface ground. *Mt. Diablo Mill. & Min. Co. v. Callison* (U. S.) 17 Fed. Cas. 919, 924; *Morse v. De Adro*, 40 Pac. 1018, 1019, 107 Cal. 622; *Williams v. Santa Clara Min. Co.*, 5 Pac. 85, 88, 66 Cal. 193; *Salisbury v. Lane*, 63 Pac. 383, 384, 7 Idaho, 370.

A mining claim is a parcel of land containing precious metal in its soil or rock. *Poire v. Wells*, 6 Colo. 406, 412; *Territory v. McKey*, 19 Pac. 895, 396, 8 Mont. 168.

A mining claim is a parcel of land containing precious metal in its soil or rock, and extends by the common-law principles *usque ad cœlum* in one direction, and *usque ad orcum* in the other. *Mammoth Min. Co. v. Juab County*, 37 Pac. 348, 10 Utah, 232 (citing *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636, 649, 26 L. Ed. 875; *Treadway v. Sharon*, 7 Nev. 37; *Fisher v. Dixon*, 12 Clark & F. 312; *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.*, 15 Colo. 29, 31, 24 Pac. 920, 22 Am. St. Rep. 373).

The word "claim" in mining parlance, when employed as a noun, has a definite and particular meaning, denoting a particular piece of ground to which that miner has a recognized, vested, and exclusive right of possession for the purpose of extracting precious metals therefrom. *Northern Pac. Ry. Co. v. Sanders* (U. S.) 49 Fed. 129, 135, 1 O. C. A. 192.

A mining claim includes the soil, rocks, and works beneath the surface and machinery fixed thereto as well as the surface. *Mammoth Min. Co. v. Juab County*, 37 Pac. 348, 10 Utah, 232.

In considering the essential attributes and constituent elements of a mining claim under Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, p. 1424], defining the method of location of mining claims, it was held that a piece of land laid out and defined upon the surface of the ground is necessary to the location of a mining claim, although it is conceded that the vein is the principal thing, and the surface but an incident thereto, in the sense that it is for the sake of the vein

that the location is made, but the location itself is of a piece of land including the vein. *Gleeson v. Min. Co.*, 13 Nev. 442, 470.

A mining claim is an estate of inheritance, and subject to dower. *Black v. Elkhorn Min. Co.* (U. S.) 49 Fed. 549, 550.

A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent. *Sullivan v. Iron Silver Min. Co.*, 12 Sup. Ct. 555, 556, 143 U. S. 431, 36 L. Ed. 214.

In all grants of mineral land made by the government, two fees are granted—one of the lode as principal, and one of the surface ground as ancillary. Both taken together constitute a "claim," which is required by law to be established by courses, distances, and monuments. The superficial area is definitely established, and is sold by the acre and fractions of an acre to the purchaser, and, unless some error is shown to exist, is the claim. *Cochrane v. Justice Min. Co.*, 35 Pac. 752, 754, 4 Colo. App. 234.

"Work on a claim," in mining law, means work done anywhere within the lines on the surface, and anywhere within those lines below the surface when they are carried down vertically into the earth. *Mt. Diablo Mill. & Min. Co. v. Callison* (U. S.) 17 Fed. Cas. 918, 924.

Deposits synonymous.

The term "mining claim," as used in 14 Stat. U. S. 54, declaring that no title for a town site may be acquired to any mine of gold, silver, etc., is synonymous with "deposit," or with the words "lands containing deposits." *Hawke v. Diefenbach*, 22 N. W. 480, 486, 4 Dak. 20.

As freehold or property.

See "Freehold"; "Personal Property"; "Property."

Location distinguished.

The term "mining claim" does not always represent the same thing as the term "location," as used in Mining Acts July 9, 1870, c. 235 (16 Stat. 217), and Mining Act May 10, 1872, c. 152 (17 Stat. 91), prescribing the extent of a location of a placer claim thereafter made; but they often mean very different things. A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel according to certain established rules. The location which is the act of taking the parcel of mineral land in time became among the miners synonymous with the mining claim originally appropriated. So now, if the miner has only the ground covered by one location, his mining claim and location are identical, and the two desig-

nations may be indiscriminately used to denote the same thing. But if by purchase he acquires the adjoining location of his neighbor—that is, the ground which his neighbor has taken up—and adds it to his own, then his mining claim covers the ground embraced by both locations, and henceforth he will speak of it as his claim. Indeed, his claim may include as many locations as he can purchase, and the ground covered by all will constitute what he claims for mining purposes; or, in other words, will constitute his mining claim, and be so designated. Such is the general understanding of miners and the meaning they attach to the term. *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636, 648, 26 L. Ed. 875.

A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, according to certain established rules. It usually consists in placing on the ground in a conspicuous position a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel according to the local custom, or, since the statute of 1872, according to the provisions of that act. *Lockhard v. Asher Lumber Co.* (U. S.) 123 Fed. 480, 493 (citing *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875).

Mining claim means a parcel of mineral land containing precious metals, and is often used in mining parlance as synonymous with "location," which means the act of appropriating a mining claim upon the public domain according to law or established rules. *McFeters v. Pierson*, 24 Pac. 1076, 1077, 15 Colo. 201, 22 Am. St. Rep. 338.

"Location," as the term is used in a mining law, is the initial steps taken by the locator to indicate the place and extent of the surface which he desires to acquire. It is a means of giving notice. That which is located is called in Rev. St. § 2320 [U. S. Comp. St. 1901, p. 1424], providing that no location of a mining claim shall be made until the discovery of the vein or lode, etc., and elsewhere, a "claim" or "mining claim." Indeed, the words "claim" and "location" are used interchangeably. *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.*, 18 Sup. Ct. 895, 902, 171 U. S. 55, 43 L. Ed. 72.

As unpatented claim.

The word "claim," as used in Rev. St. U. S. §§ 2325, 2326, relating to mining claims, and providing that, if no adverse claim shall have been filed with the register and receiver of the land, it shall be assumed that the applicant is entitled to a patent on payment, etc., in all the legislation of Congress on the subject has been used to mean a claim

not yet perfected by title from the government by way of patent, and the purpose of the statute seems to be that, where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property in the manner prescribed in the statute before some judicial tribunal for trial. *Iron Silver Min. Co. v. Campbell*, 10 Sup. Ct. 765, 769, 135 U. S. 286, 34 L. Ed. 155.

As vein or placer location.

The term "claim," as applied to mining operations, means either a vein or placer location. *Sweet v. Webber*, 4 Pac. 752, 755, 7 Colo. 443.

Mine.

Code Civ. Proc. § 1183, giving a lien on mining claims to persons performing labor thereon, etc., gives a lien on a mine, the title to which has been acquired in fee, as well as a mining claim in its technical sense. *Bewick v. Muir*, 23 Pac. 389, 390, 83 Cal. 368.

Production of mine.

A "mining claim," within the meaning of the statute exempting mines and mining claims from taxation, is to be construed as meaning the definite piece or parcel of ground to which the claimant has a possessory title existing before acquiring final title from the United States, and only extends to the mere possessory right of the claimant in the ground, and does not include the production of the mine. *Hope Mfr. Co. v. Kernon*, 3 Mont. 35, 44.

Surface improvements.

Const. Nev. art. 10, restricts the power of taxation to the proceeds alone of "mines and mining claims." Held, that the term "mines and mining claims" do not include the surface improvements on mining claims, and therefore such improvements were subject to taxation. *Gold Hill v. Caledonia Silver Min. Co.* (U. S.) 10 Fed. Cas. 550, 551.

The term "mining claim," within the meaning of a statute exempting mining claims from taxation, does not include a flume constructed along the bank of a river leading to a mining claim, as the mere fact that it is some sort of an auxiliary to the working of the mining claim does not operate to exempt it. It is not affixed to the claim so as to be a part of it. It is rather to be regarded as apparatus useful in mining. It may be indispensable to the working of the claim, but so are many articles of personal property. The machinery of a quartz mill is not exempt, nor are ditches conveying water to the mining claims, though the claims and ditches are both owned by the

same persons. *Hart v. Plum*, 14 Cal. 148, 154.

Tunnel location.

A tunnel location constitutes a "mining claim" within the meaning of Rev. St. U. S. § 2323 [U. S. Comp. St. 1901, p. 1426], relating to lands on which may be located mining claims. *Back v. Sierra Nevada Con. Min. Co.*, 17 Pac. 83, 86, 2 Idaho (Hasb.) 420.

MINING DÉBRIS.

Clay, sand, stones, gravel, rocks, and boulders dislodged in the course of placer mining are called "mining débris." *United States v. North Bloomfield Gravel Min. Co.* (U. S.) 81 Fed. 243, 245.

MINING DISTRICT.

Mining district is a section of country usually designated by name and described or understood as being confined within certain natural boundaries, in which gold or silver or both are found in paying quantities, and which is worked therefor, under rules and regulations prescribed by the miners therein; as the White Pine, the Humboldt, etc. *United States v. Smith* (U. S.) 11 Fed. 487, 490.

MINING GROUND.

"Mining ground," as used in St. 1880, p. 131, providing that mining corporations cannot dispose of any mining ground owned by them except under certain conditions, means that land in which a mining corporation in good faith works by ordinary mining processes deposits of stone and other mineral on the land owned by it with a view of utilizing the products for commercial purposes, regardless of whether the undertaking results in loss or profit. *Johnson v. California Lustral Co.*, 59 Pac. 595, 597, 127 Cal. 283.

A ditch and water right by means of which a mine is operated as an appurtenance thereof is "mining ground" under the statute. *McShane v. Carter*, 22 Pac. 178, 179, 80 Cal. 310.

As the court will take judicial notice of facts which are a part of the history of the territory, and that the government originally owned all of the land in the territory, and has never parted with the title to any which is known to be mineral lands, the words "mining ground" in a tax assessment of so many feet of mining ground do not convey the idea of the ultimate right to the land on which or in which the mine is located, but merely convey the idea of the possessory right in the person to whom it is assessed. The word "ground" is used in all deeds for possessory claims. *Hale & Nor-*

cross Gold & Silver Min. Co. v. Storey County, 1 Nev. 104, 108.

MINING LEASE.

The term "mining lease" is properly used to designate an instrument which purports in consideration of a fixed annual rental to lease and convey for a term of years all the coal on or under certain described land. Such an instrument only authorizes the grantee to take out all the coal he can mine during the term, and is not an absolute grant of all the coal in the land. *Austin v. Huntsville Coal & Min. Co.*, 72 Mo. 535, 541, 37 Am. Rep. 446.

The term "mining lease" includes a contract between the mining company and miner, whereby the former promises the latter to dig for mineral on certain of its property for a stipulated royalty, although there is no determinate term fixed. *Buchanan v. Cole*, 57 Mo. App. 11.

A "mining lease," within the meaning of a statute authorizing the President to lease lead mines, includes an instrument in the form of a license for smelting for a determinate period for a rent reserved in kind. *United States v. Gratiot*, 39 U. S. (14 Pet.) 526, 538, 10 L. Ed. 573.

License distinguished.

A "mining lease" is a distinct conveyance of the actual interest or estate in lands, while a license to work mines is only a mere incorporeal right to be exercised in the lands of another. In order to ascertain whether an instrument may be construed as a lease or a license, it is only necessary to determine whether the grantee has acquired by it any estate in the land in respect of which he might bring ejectment. *Knight v. Indiana Coal & Iron Co.*, 47 Ind. 105, 113, 17 Am. Rep. 692.

Ordinary lease distinguished.

A mineral lease differs from an ordinary lease in that, although both convey an interest in land, the latter merely conveys the right to its temporary use and occupation, while the former conveys a portion of the land itself. *Sanderson v. City of Scranton*, 105 Pa. 469, 473.

MINING LOCATION.

"Location," as used in mining law, "is the act of appropriating, according to certain established rules, a parcel of land containing precious metal." *Poire v. Wells*, 6 Colo. 406, 412; *McKay v. McDougall*, 64 Pac. 660, 672, 25 Mont. 258, 87 Am. St. Rep. 395.

"Location," as used in mining law, "is the act of appropriating a parcel of land containing precious metal. It usually consists

in placing on the ground, in a conspicuous position, a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel according to the local customs, or according to the provisions of law. *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636, 649, 26 L. Ed. 875; *Territory v. McKey* (Mont.) 19 Pac. 395, 396.

A location of a mining claim is constituted by marking on the ground, recording, and doing whatever else is required for the purpose by the acts of Congress and the local laws and regulations. A valid location is not made by taking possession alone. *Garfield M. & M. Co. v. Hammer*, 8 Pac. 153, 155, 6 Mont. 53.

Under the miners' rules formerly in force a location of a mining claim could be made and actually was made by posting a notice in reasonable proximity to the point at which the lode was discovered or exposed, stating that the undersigned claimed so many feet of the vein extending so far and in such direction or directions from the discovery point, together with the amount of adjacent surface ground allowed by the rules of the district. This notice, so posted, had the effect, under the rules, of holding the ground described a certain length of time—commonly ten days—after which it was necessary to have the notice recorded by the district recorder in order to keep the claim good, and to follow up the record by doing a certain amount of work every month or every year. *Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co.*, 12 Nev. 312, 328.

A valid location of a mining claim is equivalent to a contract of purchase. The location, together with the necessary work, is the purchase, and the patent is the evidence of the title so acquired. The location, therefore, has the effect of a grant from the government to the locator and this grant cannot be defeated or abridged by an unauthorized exception contained in the patent, for the patent must always be in accordance with, and the consummation of, the grant evidenced by a valid location. *Talbott v. King*, 9 Pac. 434, 436, 6 Mont. 76.

A mining location is a piece of land including the vein, sufficiently marked on the ground so that its boundaries can be readily traced, as required by Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], when the four boundaries of the location are marked by setting stakes at the four corners of the claim. *Gleeson v. Martin White Min. Co.*, 13 Nev. 442, 456.

"A mining location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else

is required for that purpose by the acts of Congress and the local laws and regulations." *Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735 (cited and approved in *Silver Bow Mining & Milling Co. v. Clark*, 5 Pac. 570, 575, 5 Mont. 378).

The term "location," as applied to mining claims, means and includes either a vein or placer location. *Sweet v. Webber*, 4 Pac. 752, 755, 7 Colo. 443.

"Location," as used in Acts 1866 and 1872, relating to mining claims, and providing that mining locations should be along the lode lengthwise, refers to the surface ground as well as to the vein or lode. *Walrath v. Champion Min. Co.* (U. S.) 63 Fed. 552, 556.

Claim distinguished.

See "Mining Claim."

MINING PARTNERSHIP.

A mining partnership is where several owners unite and co-operate in working the mine. *Higgins v. Armstrong*, 10 Pac. 232, 237, 9 Colo. 38; *Manville v. Parks*, 2 Pac. 212, 215, 7 Colo. 128; *Charles v. Eshleman*, 5 Colo. 107, 111; *Skillman v. Lachman*, 23 Cal. 198, 204, 83 Am. Dec. 96; *Harris v. Lloyd*, 28 Pac. 736, 739, 11 Mont. 390, 28 Am. St. Rep. 475; *Kahn v. Central Smelting Co.*, 102 U. S. 641, 645, 26 L. Ed. 266.

A "mining partnership" is defined by statute as existing when two or more persons, who own or acquire a mining claim for the purpose of working it and extracting mineral therefrom, actually engage in working the same. *Berry v. Woodburn*, 40 Pac. 802, 803, 107 Cal. 504; *Dorsey v. Newcomer*, 53 Pac. 557, 121 Cal. 213; *Prince v. Lamb*, 60 Pac. 689, 691, 128 Cal. 120; *Haskins v. Curran*, 43 Pac. 559, 561, 4 Idaho, 573.

Where persons engage in working a mine under an agreement by which some of them are to furnish the money, others to do the work, and all to share equally in the result, it constitutes a mining partnership. *Lyman v. Schwartz*, 57 Pac. 735, 736, 13 Colo. App. 318.

An agreement between one or more persons who claim an undeveloped mine and another person that the latter will devote his labor and skill in exploring and developing the mine, the former to furnish him with tools and provisions and to give him a share in the mine if it proves valuable, and the subsequent sharing of the mine by the parties after its development, constitutes a mining partnership. *Settembre v. Putnam*, 30 Cal. 490.

Parties may be tenants in common of a mining property without constituting a

mining partnership. The partnership arises when such tenants in common or co-owners unite and co-operate in operating or working the mine. *Hartney v. Gosling*, 68 Pac. 1118, 1121, 10 Wyo. 346.

Associations for working mines are generally composed of a greater number of persons than ordinary trading partnerships; and it was early seen that the continuous working of a mine, which is essential to its successful development, would be impossible, or at least attended with great difficulties, if an association was to be dissolved by the death or bankruptcy of one of its members or the assignment of his interest. A different rule from that which governs the relations of members of a trading partnership to each other was therefore recognized as applicable to the relations to each of members of a mining association. The delectus personæ which is essential to constitute an ordinary partnership has no place in these mining associations. *Kahn v. Central Smelting Co.*, 102 U. S. 641, 645, 26 L. Ed. 266.

A mining partnership is governed by many of the rules relating to ordinary partnerships, but differs therefrom in many important particulars; as, for example, a member may assign his interest without the consent of his copartners, and the act does not work a dissolution of the partnership; the person to whom the interest is assigned becomes a member of the company, and it is not necessary that the other members consent thereto. Neither does the death of a member dissolve a mining partnership. Another peculiarity is that a partner has not the power to bind his associates by engagements with third persons to the extent that a member of a trading or commercial firm may do. *Charles v. Eshleman*, 5 Colo. 107, 111; *Higgins v. Armstrong*, 10 Pac. 232, 237, 9 Colo. 38; *Kimberly v. Arms*, 9 Sup. Ct. 355, 361, 129 U. S. 512, 32 L. Ed. 764; *Bissell v. Foss*, 5 Sup. Ct. 851, 855, 114 U. S. 252, 29 L. Ed. 126; *Kahn v. Central Smelting Co.*, 102 U. S. 641, 645, 646, 26 L. Ed. 266; *Congdon v. Olds*, 46 Pac. 261, 263, 18 Mont. 487; *Southmayd v. Southmayd*, 5 Pac. 318, 322, 4 Mont. 100; *Skillman v. Lachman*, 23 Cal. 199, 204, 83 Am. Dec. 96; *Taylor v. Castle*, 42 Cal. 367, 370, 371; *Duryea v. Burt*, 28 Cal. 569, 577.

MINING PURPOSES.

"Mining purposes," as used in Rev. St. U. S. § 2337, relating to mines, etc., and which provides that where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or mining purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, includes any reasonable use for mining purposes which the lode

mining claim may require for its proper working and development. The amount of use may be very little, or it may be a great deal. All the law requires is the reasonable use and occupation of the nonadjacent mining tract for mining purposes in connection with the mining claim. *Hartman v. Smith*, 14 Pac. 648, 650, 7 Mont. 19.

The removal of timber by a mine owner for the purpose of roasting ores at the mine is a taking of the timber for a "mining purpose," as permitted by Act June 3, 1878, c. 150, § 1, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528]. *United States v. United Verde Copper Co. (Ariz.)* 71 Pac. 954, 957.

MINING PRIVILEGES.

Testatrix owned coal property which had been partially mined, and through which a tunnel had been constructed by her consent, to be used for drainage, and for a lateral railway to another's property, by means whereof coal from the land could be taken out to market. A pit mouth or entry was used during the lifetime of testatrix, and before her will was made, on land the surface of which she devised, reserving the "coal and mining privileges" thereunder. The coal and mining privileges were part of the residuary devise, and as such were partitioned between two, one of whom was the devisee of the surface. Held, that the reservation of "mining privileges" included the use of the entry, and passes it as part of the residuum, and that the owner of each purport of the coal was entitled to use it in their mining operations, though it was wholly on the land of one of the residuary devisees, and no reference was made thereto in the partition proceedings. *Appeal of Rankin (Pa.)* 16 Atl. 82, 85, 2 L. R. A. 429.

MINING RIGHT.

A mining right is a right to enter upon and occupy land for the purpose of working it, either by underground excavations or open workings, to obtain from it the minerals or ores which may be deposited therein. By implication the grant of such a right carries with it whatever is incident to it and necessary to its beneficial enjoyment. *Smith v. Cooley*, 2 Pac. 880, 881, 65 Cal. 46.

Mining rights must include incorporeal hereditaments lying in grant, but not in seisin; such as rights of way over the surface, the right to dig and drive slopes and entries, and the like, rights of an intangible nature, incapable of being delivered by the sheriff, or of possession by the owner. *Louisville & N. R. Co. v. Massey*, 33 South. 896, 897, 136 Ala. 156, 96 Am. St. Rep. 17.

The position is not tenable that a "mining right" is a mere easement in realty, and

therefore not the subject of taxation. An estate in fee in the mineral or ores beneath the surface of a tract of land may be vested in one person and an estate in fee in the surface in another. *Sholl v. People*, 61 N. E. 1122, 1123, 194 Ill. 24.

MINING TITLE.

By mining title, as employed in 13 St. 441, c. 64, § 9, Rev. St. 1878, § 410, providing that no possessory action between persons in any court but that of the United States for the recovery of any mining title or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States, evidently is meant the title which the miner obtained by his discovery and location, followed up with a compliance with the statutory regulations to preserve his right of possession; and therefore in a possessory action between persons, notwithstanding the paramount title to the land is in the United States, the case shall be adjudged by the law of possession as between the parties. *Gillis v. Downey (U. S.)* 85 Fed. 483, 486, 29 C. C. A. 286.

MINISTER.

See "Foreign Minister"; "Ordained Minister"; "Public Minister"; "Regular Minister of the Gospel"; "Settled Minister"; "Stated Minister."

As engaged in an occupation, see "Occupation (Vocation)."

"Minister," as used in the ninety-first of the Canons of 1603, providing that the parish clerk was to be appointed "by the parson or vicar, or, where there is no parson or vicar, by the minister of that place for the time being," describes the functionary, whatever title he may bear, who, for the time being, has the cure of the parish as principal. *Pinder v. Barr*, 4 El. & Bl. 105, 115, 28 Eng. Law & Eq. 235, 239.

"Minister of the gospel," as used in Consolidated St. § 1407, providing that no marriage solemnized before any person professing to be a "minister of the gospel" shall be void on account of any authority of such minister if the marriage be consummated with a belief on the part of the persons, or either of them, that they have been lawfully married, means all clergymen of every denomination and faith. *Haggin v. Haggin*, 53 N. W. 209, 211, 35 Neb. 375.

"Minister" or "minister of the gospel" is a comprehensive term, and of uncertain significance. In Const. art. 6, ministers are spoken of as public teachers of piety, religion, and morality. In the statute they are sometimes called "ministers of the gospel" and sometimes "ordained ministers of the

gospel," a term less comprehensive in its significance. *Kidder v. French* (N. H.) Smith, 155, 156.

A person who is ordained in conformity to the customs of any organized Christian denomination is a duly ordained "minister." *Town of Londonderry v. Town of Chester*, 2 N. H. 268, 270, 9 Am. Dec. 61.

The term "minister of the gospel" in Rev. St. § 6386, authorizing the issue of a license to any minister of the gospel, authorizing him to solemnize marriage, cannot be construed to be limited to Christian ministers. Such an interpretation would deny the license to the learned and reverend Jewish rabbi and many other ministers of religion who, while not Christian in name, look upon marriage as a sacred and religious institution. The law here means to use the word "gospel" in its broad general sense, and, keeping in view the entire act and its manifest purpose, should be made to mean any minister of religion. In *re Reinhart*, 9 Ohio Dec. 441, 444.

A minister of a congregation is not merely a person employed by it. He and his family are members of it, and, where it is incorporated, he is usually a corporate officer by virtue of the charter; yet his services as a corporator are not those which are compensated by his salary as a divine, and the maintenance he receives for his ministry is consequently no part of the salary or emolument of a corporate office, and is not subject to taxation under a statute authorizing the taxation of any one holding an office under a corporation. *Commonwealth v. Cuyler* (Pa.) 5 Watts & S. 275, 276.

The word "minister," when used in the title on foreign relations, shall be understood to mean the person invested with and exercising the principal diplomatic functions. U. S. Comp. St. 1901, p. 2783.

Laborer.

See "Laborer."

Lecturer.

St. 5 & 6 Wm. IV, c. 76, § 68, directing that stipends which for seven years before June 5, 1835, have been usually paid to the "minister of any church or chapel," shall be secured by bond under the corporation seal to the person entitled or accustomed to receive the same, includes a person appointed lecturer of a church, who has read prayers, preached and administered the sacrament of the Lord's supper, and occasionally solemnized baptisms, marriages, and burials, though there is an incumbent of the same church duly appointed under a local act of Parliament, which constitutes him, and not such lecturer, the minister of that church. *Reg. v. Borough of Liverpool*, 8 Adol. & El. 176.

Methodist local preacher.

"Ministers," as used in St. 1811, c. 6, § 4 providing that all ministers ordained agreeably to the usages of the sect or denomination to which they belong shall have the same exemptions from taxation as are given to stated ordained ministers of the gospel in the town, etc., where they are settled, etc., includes a person elected by a Methodist society to be one of their local preachers, and ordained as a deacon of the Methodist Episcopal Church, though he had no authority to administer the sacrament of the communion. *Baldwin v. McClinch*, 1 Me. (1 Greenl.) 102, 107.

Pastor distinguished.

A "minister" is one who, having been ordained to the ministry, undertakes to perform certain services for another, and is not synonymous with "pastor," who is one who has been installed according to the usage of some Christian denomination, in charge of a specific church or body of churches, so that a person who has served a congregation as minister will not thereby be held to have accepted the call as the regular pastor of the congregation. *First Presbyterian Church v. Myers*, 50 Pac. 70, 75, 5 Okl. 809, 38 L. R. A. 687.

Self-supporting minister.

"Minister of religion," as used in Act Feb. 17, 1864, providing that every minister of religion, authorized to preach according to the rules of his church and regularly employed in the discharge of his ministerial duties, shall be exempt from military service, etc., includes a minister who belonged to a religious sect who performed ministerial labor gratuitously, and who resorted to secular employment as a means of subsisting himself and his family. "If regularly employed as a minister, the fact that in the interval between his appointments he pursued some other vocation, which did not according to the rules of his church disqualify him for the sacred function of the ministry, cannot take his exemption from him." *Ex parte Cain*, 39 Ala. 440, 441.

MINISTERIAL.

Judicial distinguished, see "Judicial."

MINISTERIAL ACT.

A ministerial act may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act done. *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 174, 79 Am. Dec. 468; *State v. Nash*, 64 N. E. 558, 559, 66 Ohio St. 612; *State v. Le Clair*, 30 Atl. 7, 8, 86 Me. 522; *American*

Casualty Ins. & Security Co. v. Tyler, 22 Atl. 494, 60 Conn. 448, 25 Am. St. Rep. 337; *Marcum v. Lincoln, Mingo, and Wayne Counties*, 28 S. E. 281, 42 W. Va. 263, 36 L. R. A. 296; *Lemoine v. Ducote*, 12 South. 939, 940, 45 La. Ann. 857; *In re Harris*, 33 N. Y. Supp. 1102, 1106, 12 Misc. Rep. 223; *State ex rel. North & S. Ry. Co. v. Meier*, 45 S. W. 306, 308, 143 Mo. 439; *Ex parte Batesville & B. Ry. Co.*, 39 Ark. 82, 85; *Pennington v. Streight*, 54 Ind. 376; *State v. Staub*, 23 Atl. 924, 927, 61 Conn. 553.

Official action, the result of performing a certain and specific duty arising from designated facts, is a ministerial act. *Grider v. Tally*, 77 Ala. 422, 424, 54 Am. Rep. 65; *School Dist. No. 2 v. Lambert*, 42 Pac. 221, 225, 28 Or. 209.

Administration of oath.

The administration of an oath is a ministerial act. *In re Golding*, 57 N. H. 146, 149, 24 Am. Rep. 66.

The administration of the legal oath to a poor imprisoned debtor is an act strictly ministerial. "There is," says the court, "nothing in the mode of procedure or in the nature of the power exercised showing it to be judicial. There is no plaintiff who complains of an injury, no defendant of whom satisfaction is demanded, and no action or mode of redress for an injury sustained." *Betts v. Dimon*, 3 Conn. 107, 109.

Filling vacancy.

The duty of a Governor to appoint a Lieutenant Governor to fill a vacancy was a ministerial act; there being no discretion on the part of the Governor as to making the appointment, but only as to whom he should appoint. *State v. Nash*, 64 N. E. 558, 559, 66 Ohio St. 612.

Issuance and revocation of licenses.

Acts of the Secretary of State of a state in issuing and revoking licenses to foreign insurance companies, under the statute, are ministerial, and not judicial, although he is required to ascertain the existence of the facts upon which his authority in each case is founded. *State v. Doyle*, 40 Wis. 175, 188, 22 Am. Rep. 692.

A duty is ministerial when the law exacting its discharge prescribes and defines a time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain specific duty arising from fixed and designated facts, is a ministerial act. A ministerial act may, however, be performed by an officer whose office is essentially judicial, and whose acts are generally judicial ones; and when the acts required of such an officer are of such a nature as not to require exercise and discretion

they are ministerial acts, despite the general nature of his office and of the duties which he ordinarily performs. Therefore, where a statute required a county judge to issue a liquor license upon the presentation of a proper petition, it was held that his action in issuing or refusing to issue the license was ministerial. *Grider v. Tally*, 77 Ala. 422, 424, 54 Am. Rep. 65.

Issuance of process.

A justice of the peace acts ministerially in issuing and delivering a criminal warrant to an officer to be executed. *Blythe v. Tompkins* (N. Y.) 2 Abb. Prac. 468.

A justice of the peace acts ministerially in issuing executions and in issuing process in the first instance, but when the parties appear before him, and the cause is heard, his act in rendering judgment is a judicial act. *Tompkins v. Sands* (N. Y.) 8 Wend. 462, 468, 24 Am. Dec. 46.

The issuance of an execution upon a judgment is an act purely ministerial in its character. *In re Rourke*, 13 Nev. 253, 255.

The issuance or service of legal process, such as a summons, execution, or writ of attachment, is merely a "ministerial act." *Whipple v. Hill*, 55 N. W. 227, 228, 36 Neb. 720, 20 L. R. A. 313, 38 Am. St. Rep. 742.

"Issuing of summons is a ministerial act, and not forbidden by the statute, and such summons is not void because issued on a legal holiday." *Smith v. Ihling*, 11 N. W. 408, 47 Mich. 614.

The filing of a complaint and issuance of a summons thereon by the clerk of the court is a "ministerial act," not void because done on Sunday. *Havens v. Stiles* (Idaho) 67 Pac. 919, 921, 56 L. R. A. 736.

The acts done out of court in bringing parties into court are as a general proposition ministerial acts, and hence the issuance of a precept by the mayor and clerk of a city for the collection of assessments for the grading and graveling of streets, which is merely a mode of getting into court, is a "ministerial act." *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 174, 79 Am. Dec. 468.

It is sometimes difficult to determine whether an act is judicial or ministerial. A justice of the peace performs acts of both kinds, which are clearly distinguishable. He issues process in the first instance, and in doing so he acts ministerially. His judgment is not at all exercised. When the parties appear before him, and the cause is heard, he renders judgment. He then acts judicially. After judgment, he issues execution. He then acts ministerially. *Tompkins v. Sands* (N. Y.) 8 Wend. 462, 466, 24 Am. Dec. 46. Thus the issuing of summons by a justice of the peace is a purely ministerial

and not a judicial, act. *Well v. Geler*, 21 N. W. 246, 247, 61 Wis. 414.

Judgment distinguished.

See "Judgment."

Judicial act distinguished.

See "Judicial Act."

Passage of ordinance or resolution.

The passing of an ordinance by a common council of a city for the construction of a sewer is a ministerial act, not reviewable by certiorari. *People v. City of New York* (N. Y.) 5 Barb. 43, 45.

The passage of a resolution by a borough council, awarding a contract for lighting streets, is not a legislative, but a ministerial, act of a business character, and therefore the resolution is not invalid because it has not been recorded in the ordinance books or advertised as required in the case of the passage of an ordinance. *Seitzinger v. Borough of Tamaqua*, 41 Atl. 454, 455, 187 Pa. 539.

Refusal of land commissioners to repay.

Acts done out of court in bringing parties into court are as a general proposition ministerial, and the refusal of the commissioners of the land office to repay under 1 Rev. St. p. 198, § 6, on a failure of title to the land granted, the purchase money delivered is a ministerial act. *In re Harris*, 33 N. Y. Supp. 1102, 1106, 12 Misc. Rep. 223.

Signing ordinance.

The act of the presiding officer of each of the two houses of the St. Louis council, who by the charter are required, when an ordinance bill is passed, if no objection be made thereto, to sign the same, is a ministerial act. *State ex rel. North & South Ry. Co. v. Meier*, 45 S. W. 306, 308, 143 Mo. 439.

Taxation of costs.

The taxation of costs is a clearly ministerial act, performed by the clerk of the court or other ministerial officers, and any appeal from the taxation as made by him must be in the first place to the court in which the action is pending or was tried. *Ward v. Rees* (Wyo.) 72 Pac. 581, 582.

MINISTERIAL DUTY.

A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist and imposed by law. *State v. McGrath*, 5 S. W. 29, 30, 92 Mo. 355 (citing *Mississippi v. Johnson*, 71 U. S. [4 Wall.]

498, 18 L. Ed. 437); *Enterprise Sav. Ass'n v. Zumstein* (U. S.) 64 Fed. 837, 840; *State v. Lord*, 43 Pac. 471, 478, 28 Or. 498, 31 L. R. A. 473; *State v. Rotwitt*, 37 Pac. 845, 848, 15 Mont. 29; *State v. Staub*, 23 Atl. 924, 927, 61 Conn. 553; *Sullivan v. Shanklin*, 63 Cal. 247, 251; *People v. Rosendale*, 25 N. Y. Supp. 769, 770, 5 Misc. Rep. 378; *State v. Cunningham*, 51 N. W. 724, 735, 81 Wis. 440, 15 L. R. A. 561.

A purely ministerial duty is one as to which nothing is left to discretion. Where the officer is clothed with discretionary powers, and is required to act upon his own judgment, the act is a judicial one. The exercise of judicial functions is not confined to judges, but the act of every public official is either ministerial or judicial. *People v. Jerome*, 73 N. Y. Supp. 306, 307, 36 Misc. Rep. 256.

A ministerial duty arises when an individual has such a legal interest in its performance that neglect of performance becomes a wrong to such individual. *Morton v. Comptroller General*, 4 S. O. (4 Rich.) 430, 473.

In *Walles v. Smith*, 25 Atl. 922, 923, 76 Md. 469, the court, in commenting on the rule that mandamus only lies to enforce the performance of a strictly ministerial duty, says: "By 'ministerial' we mean where one is intrusted with the performance of an absolute and imperative duty, the discharge of which requires neither the exercise of official discretion nor judgment. We take it to be settled by the best considered cases that, where the duty is such as necessarily requires the examination of evidence and the decision of questions of law and fact, such a duty is not ministerial, and, not being ministerial, the decision of a public officer to whom the discharge of such duty has been confided cannot be reviewed or reversed in a mandamus proceeding." *Duvall v. Swann*, 51 Atl. 617, 618, 94 Md. 608; *Henkel v. Millard*, 54 Atl. 657, 659, 97 Md. 24.

In holding that mandamus could not issue against the Governor of a state to compel the performance of a duty imposed on him, the court say: "As contradistinguished from judicial duties, all executive duties are ministerial. The idea seems to be entertained that the duty of the executive becomes ministerial when no discretion is left as to the manner of its performance, and that in such case the court may interfere to compel its performance. If this be the test, it follows that, wherever the executive duty is clear, the judiciary is authorized to interfere, but in all cases of doubt, or difficulty, or uncertainty, the responsibility of acting rests upon the executive alone. In many cases the law allows the executive no discretion. The duty must be performed in strict accordance with the law, but this court has not, therefore, power to order the duty

to be performed. All executive duty is required to be executed by a higher authority than the order of this court, viz., by the mandate of the Constitution. The absence of discretionary power cannot change the character of the act, or warrant the interposition of the judiciary. If by 'ministerial duties' are meant the duties performed by one acting under superior authority, or not with unlimited control, none of the duties of the executive are ministerial." *Gledhill v. Governor*, 25 N. J. Law (1 Dutch.) 331, 351.

Approval of official bond.

The duty of the probate judge to approve a sheriff's official bond is in no proper sense a judicial duty. It by no means follows that a duty is judicial because it is to be performed by a judge. If in its performance he does not exercise the powers that appropriately appertain to his judicial office, it is ministerial, and not judicial, although its performance requires the exercise of his judgment. *Ex parte Candee*, 48 Ala. 386, 399.

Ascertaining result of election.

The duty of election commissioners to ascertain the result of an election is purely ministerial, and its performance may be compelled by mandamus. *Bourgeois v. Fairchild*, 33 South. 495, 496, 81 Miss. 708.

Assessment of land.

Under that portion of Acts 1891, c. 36, § 4, which provides that when a commissioner is appointed to reassess the real estate in any county, "in ascertaining and fixing the value of any land within the limits of any city, town, or village, when laid off into or offered for sale in lots, and when in any case land is laid off into lots, the said commissioner shall adopt as the value of such land the value thereof as so laid off into such lots, valuing the same by the lot, and not by the acre or tract," the duty thus imposed upon such commissioner is a ministerial duty, and a compliance therewith may be controlled by mandamus. *State v. Herrald*, 15 S. E. 974, 36 W. Va. 721.

Canceling land entry.

An act of the Secretary of the Interior and Commissioners of the Land Office in canceling an entry for land is not a ministerial duty, but is a matter resting in the judgment and discretion of these officers as representing the executive department. *Gaines v. Thompson*, 74 U. S. (7 Wall.) 347.

Granting liquor license.

The duty of the probate judge to grant liquor licenses, properly applied for under Code, § 3520, is ministerial, and enforceable

by mandamus. *Harlan v. State*, 83 South. 858, 859, 136 Ala. 150.

Issuance of insurance certificate.

The fact that an officer uses discretion and judgment in the performance of his duties does not make his actions or powers judicial, and an Attorney General, under Laws 1893, c. 725, § 10, providing that the superintendent of insurance shall not issue a certificate until the declaration and charter of an insurance company shall have been examined by the Attorney General, exercises a duty entirely ministerial. *People v. Rosendale*, 25 N. Y. Supp. 769, 770, 5 Misc. Rep. 378.

MINISTERIAL LAND.

Ministerial land is land of which for the time being a minister is seized in the right of his parish. *Austin v. Thomas*, 14 Mass. 333, 337.

MINISTERIAL OFFICE—OFFICER.

A ministerial office is one which gives the officer no power to judge of the matter to be done, and requires him to obey the mandates of a superior. *Waldoe v. Wallace*, 12 Ind. 569, 572; *Fitzpatrick v. United States* (U. S.) 7 Ct. Cl. 290, 293; *State v. Womack*, 29 Pac. 939, 941, 4 Wash. St. 19.

Whether a person is or is not a ministerial officer depends, not on the character of the particular acts which he may be called upon to perform, or whether he exercises judgment or discretion with reference to such acts, but whether the general nature and scope of the duty devolving upon him is of a ministerial character, as distinguished from other classes of officers, such as executive, judicial, etc. *State v. Loechner*, 91 N. W. 874, 876, 65 Neb. 814, 59 L. R. A. 815.

The essential and characteristic distinction between a judicial and a ministerial officer is that the former is to give judgment, which requires perfect freedom of opinion, but the latter is to execute, which supposes obedience to some mandate prescribing what is to be done, and leaving nothing to opinion. *Reid v. Hood* (S. C.) 2 Nott & McC. 168, 169, 10 Am. Dec. 582.

Auditor of canal department.

The auditor of the canal department is not a mere ministerial officer, and he is not bound to draw his warrant for the payment of a draft made upon him by a canal commissioner, unless the latter is authorized by law to make the draft. *People v. Schoonmaker*, 13 N. Y. (3 Kern.) 238, 248.

Constable.

A constable is a ministerial, and not a judicial, officer, and it is therefore not his

duty to decide on the regularity or mere erroneousness of a judgment, or of any process directed to him for enforcing it. *Commonwealth v. O'Cull*, 30 Ky. (7 J. J. Marsh.) 149, 150, 23 Am. Dec. 393.

County solicitor.

The phrase "ministerial officer," within the meaning of Rev. Code, § 3564, fixing the punishment for the acceptance of a bribe "by any ministerial officer of any court," includes a county solicitor, whose duties are purely ministerial, and do not involve executive or judicial functions. *Diggs v. State*, 49 Ala. 311, 317.

Justice of peace.

Justices of the peace, occupying the position of inspectors of election, are simply ministerial officers, and their acts and conduct in conducting the election cannot be reviewed by certiorari. *People v. Bush*, 48 N. Y. Supp. 13, 14, 22 App. Div. 363.

Member of board of education.

A member of a board of education of a school district of a city having a population of over 1,500, organized under the provisions of Comp. St. c. 79, § 14, is a ministerial officer, within Cr. Code, § 180, declaring that any clerk, sheriff, coroner, constable, county commissioner, justice of the peace, recorder, county surveyor, district attorney, or any ministerial officer, who shall be guilty of palpable omission of duty, or who shall willfully or corruptly be guilty of malfeasance, etc., shall be fined, etc. *State v. Loechner*, 91 N. W. 874, 65 Neb. 814, 59 L. R. A. 915.

Sheriff.

A sheriff is a ministerial officer. *Walker v. Commonwealth* (Va.) 18 Grat. 13, 17, 98 Am. Dec. 631.

A sheriff is a ministerial officer, required to execute the judgments of the courts by levy, sale, and application of the proceeds according to fixed rules; and he is not to judge what circumstances may justify departures and exceptions from these rules. *Thomasson v. Kennedy* (S. C.) 3 Rich. Eq. 440, 446.

A sheriff is a ministerial officer, elected by the people, and is not identified with the court in the same sense that a receiver is. Ordinary sales by a sheriff under a common-law writ are not made by order of the court. It is not of the essence of a judicial sale that it should be made pursuant to an order of the court. *Campbell v. Parker*, 45 Atl. 116, 118, 59 N. J. Eq. 342.

A sheriff is not a judicial officer, notwithstanding the fact that his election is provided for in that article of the Constitution of California which treats of the ju-

dicial department of the state; but he is a ministerial or executive officer only. There is no constitutional prohibition against his exercising the duties of tax collector, where the law consolidating the two offices was passed prior to his election. *Merrill v. Gorham*, 6 Cal. 41, 42.

MINISTERIAL POWER.

Judicial power distinguished, see "Judicial Power."

The term "ministerial power" does not characterize the admission or exclusion of attorneys. *Ex parte Garland*, 71 U. S. (4 Wall.) 333, 378, 18 L. Ed. 366.

MINOR.

As citizen, see "Citizen."
Orphan as, see "Orphan."

The word "minor," as used in the Penal Code, signifies a person under the age of 21 years. *Pen. Code Tex.* 1895, art. 38.

The term "minor," when used in any statute, shall include any person, male or female, under 21 years of age. *Code Miss.* 1892, § 1508.

Minors are: (1) Males under 21 years of age; (2) females under 18 years of age. *Civ. Code Mont.* 1895, § 10.

The expression "minor," as used in the act relating to charities and charitable and reformatory institutions, means a male person under the age of 21 years, or a female person under the age of 18 years. *Gen. St. Kan.* 1901, § 6650.

Minors are: (1) Males under 21 years of age; (2) females under 18 years of age. The periods thus specified must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority. *Rev. St.* 1903, *Ok.* §§ 733, 3907; *Rev. Code N. D.* 1899, §§ 2698, 2699; *Civ. Code S. D.* 1903, §§ 10, 11.

"Minor heirs," as used in the grant of a homestead to the minor heirs of a deceased person who had entered the lands, will be construed to mean "minor heirs" as the term is used in *Rev. St. U. S.* § 2292 [*U. S. Comp. St.* 1901, p. 1394], providing that, in case of the death of both mother and father leaving an infant child or children under 21 years of age, a right in fee inures to the benefit of such infant child or children; and hence a daughter under 21, but over 18, years of age, is such a minor child, though she has attained her majority under a state law fixing the age of majority for females at 18 years. *Anderson v. Peterson*, 32 N. W. 861, 862, 36 Minn. 547, 1 Am. St. Rep. 698.

The word "minor," in an indictment for selling liquor to a minor without his parent's or guardian's consent, sufficiently indicates that the person to whom it was sold was under age, and hence it was not necessary to allege his age. *Waller v. State*, 38 Ark. 656, 658.

The term "minor children," in Acts 1884, p. 94, No. 71, providing that a right of action against a person who causes damage to another, in case of death, shall survive in favor of the minor children, does not include grandchildren who are minors, or those who are of age, or any other descendants more remote. *Walker v. Vicksburg, S. & P. R. Co.*, 34 South. 749, 750, 110 La. 718.

MINOR OF TENDER YEARS.

See "Tender Years."

MINORITY.

Where a testator gave his residuary real and personal estate in trust for his daughter for life, remainder in trust to pay the income for the maintenance of all and every such child or children as she might leave at her decease, during his or her minority, and when the youngest should have attained 25 to pay, assign, and transfer the income, together with the principal, to the children equally, the word "minority" means the time that would elapse before the youngest child attained 25. *Milroy v. Milroy*, 14 Sim. 48, 55.

MINORITY MEMBER.

Laws 1892, c. 171, § 15, provides for the appointment in Albany of inspectors of election by a board of election commissioners composed of three members, the mayor, president of the council, and the third member elected by members of the council of different political faith on state issues from those of the mayor. Such board is to appoint as inspectors for each district three persons, two of whom on local issues shall be of different political faith and opinion from their associates, and the inspectors of the same political faith as the minority member of such board shall be selected solely by such minority member. The mayor and president of the council were Democrats, and each presented a different list of inspectors to represent their party; the list presented by the president being adopted with the aid of the vote of the third member of the board, and that of the mayor rejected. A list of Republican inspectors was then presented by the third member of the board; said list being adopted by his vote and that of the president, the mayor declining to vote. Held, that the mayor was the minority member of the board, within the meaning of the statute,

and had the right to designate the inspectors as provided therein. In re *Manning*, 24 N. Y. Supp. 1039, 1040, 71 Hun, 236.

MINSTRELSY.

"Minstrelsy," as used in Laws 1882, c. 410, § 1998, requiring the managers of an amusement of minstrelsy to procure a license before exhibiting, includes a concert room where orchestral selections are rendered. The appellant's counsel traces to their origin what were known as minstrels, insisting that they were "strolling singers and musicians," wandering about the country, and "not to be confounded with the musical artist, or with the performer in an orchestra, having a fixed abode or domicile." Even if the test of difference between "minstrel" and "musician" was that one strolled and the other stayed at home, that one was a vagabond and the other a citizen, it is certain that the word "minstrelsy" has acquired a much wider meaning, and is used in the statute in that broader sense. The act of 1862 was confined to "negro minstrelsy," a phrase which designated a known and specific kind of musical entertainment, and so made that and the opera the subjects of license regulations, to the exclusion of what may be called "concerts." But by this act of 1872 the word "negro" was dropped, and the word "minstrelsy" purposely left to its broad and general meaning, without any qualifying or restrictive expression. It was as if the Legislature had declared that, instead of limiting the regulation to one sort or kind of "minstrelsy," it should thereafter apply to all sorts and kinds, without limitation. *City of New York v. Eden Musee American Co.*, 8 N. E. 40, 41, 102 N. Y. 593.

MINUTES.

The word "minute" is defined by Webster to be "a small portion; to set down a short sketch or note of it; to jot down; to make a brief summary of." *Hinshaw v. State*, 47 N. E. 157, 171, 147 Ind. 377.

The minutes of a court are the memoranda of what takes place in court, made by authority of the court. *Moore v. State*, 50 Tenn. (3 Helsk.) 493, 509; *Gregory v. Frothingham*, 1 Nev. 253, 260; *State v. Larkin*, 11 Nev. 314, 321; *Hinshaw v. State*, 47 N. E. 157, 171, 147 Ind. 377; *Rev. St. Tex.* 1895, art. 1872.

MISADVENTURE.

See, also, "Homicide by Misadventure."

A misadventure is an accident by which injury results to another. When applied to homicide, misadventure is the act of a man

who, in the performance of a lawful act, without any intention to do harm, and after using proper precaution to prevent danger, unfortunately kills another person. *Williamson v. State*, 2 Ohio Cir. Ct. R. 292, 1 O. C. D. 492.

"Misadventure," says Blackstone, "happens in consequence of a lawful act; involuntary manslaughter, in consequence of an unlawful act." 4 Bl. Comm. § 192. A whips a horse on which B. is riding, whereupon the horse springs out, and runs over a child and kills it. This is manslaughter in A., but misadventure in B. *Johnson v. State*, 10 South. 667, 669, 94 Ala. 35.

MISAPPLICATION.

See "Willful Misapplication—Willfully Misapply."

The terms "embezzlement" and "misapplication," used with reference to funds, are not convertible terms. "Misapplication" is the broader, and covers "embezzlement." *Jewett v. United States* (U. S.) 100 Fed. 832, 840, 41 C. C. A. 88, 53 L. R. A. 568.

An abstraction and misapplication of funds, as used in an indictment against a cashier of a bank, means a conversion to his own use of the funds of the bank, which are not especially intrusted to his care, and differs in this respect from embezzlement, which is the unlawful conversion by an officer of a bank of funds intrusted to him. *United States v. Youtsey* (U. S.) 91 Fed. 864, 867.

MISAPPLY.

The fifty-fifth section of the national banking act of 1864 provides for the punishment of those who "embezzle, abstract, and willfully misapply" the funds of the bank, "with intent to injure or defraud the association." Held, that the word "embezzle," and perhaps also the word "abstract," refers to acts done for the benefit of the actor as against the bank, while the word "misapply" covers acts having no relation to pecuniary profit or advantage of the doer thereof, and that therefore the words "with intent to injure or defraud the association" should not be so construed as to require an anticipation of a personal pecuniary benefit by the deed. *United States v. Taintor* (U. S.) 28 Fed. Cas. 7, 9.

In construing the statute which declares that a bank officer who "embezzles, abstracts, or willfully misapplies" the money of the bank is guilty of a misdemeanor, the court says: "Each of these words must be given effect. The word 'misapply' was intended to include acts not covered by the previous words 'embezzle' or 'abstract.' To give 'misapply' the same meaning as the word 'embezzle' is to eliminate a word from the stat-

ute. This cannot be done, nor can the provision that the acts prohibited shall be deemed a misdemeanor be disregarded." *United States v. Fish* (U. S.) 24 Fed. 585, 591.

"Misapply," as used in an information against a parish officer, charging that he did misapply funds belonging to the parish, does not of itself import willfulness, and the information was insufficient where it was not alleged the same was willful. *Carpenter v. Mason*, 12 Adol. & El. 629.

MISAPPROPRIATION.

"Misappropriated," as used in Const. art. 5, § 3, making the directors of corporations jointly and severally liable for moneys embezzled or misappropriated by an officer of such corporation, being used in connection with the word "embezzle," does not mean merely applying money in a manner unauthorized by law, but rather the misapplication of funds intrusted to an officer for particular purposes by devoting them to some unauthorized purposes. *Winchester v. Howard*, 64 Pac. 692, 693, 136 Cal. 432, 89 Am. St. Rep. 153.

The word "misappropriation" in Bankr. Act 1898, § 17 [U. S. Comp. St. 1901, p. 3428], providing that a discharge in bankruptcy shall not release a bankrupt for his debts created by fraud, embezzlement, misappropriation, or defalcation while acting as an officer, is not limited to misappropriation while acting as an officer but applies to debts created by fraud in any capacity. The phrase "while acting as an officer," in the statute, relates only to defalcation, and not to the words "fraud, embezzlement, and misappropriation." *Frey v. Torrey*, 75 N. Y. Supp. 40, 41, 70 App. Div. 166.

In order to constitute a misappropriation of negotiable paper, there must be a fraudulent perversion of the original object or design. It follows, therefore, that an essential ingredient of the transaction is an injury to the person who has lost his credit. *Jackson v. First Nat. Bank*, 42 N. J. Law (13 Vroom) 177, 179.

MISBEHAVIOR.

See "Gross Misbehavior;" "Manifest Misbehavior."

The term "misbehavior," in a statute providing that the award of arbitrators may be vacated if the arbitrators were guilty of misbehavior, is used to imply a wrongful intention, and not a mere error of judgment, on the part of the arbitrators. *Smith v. Cutler* (N. Y.) 10 Wend. 590, 25 Am. Dec. 580.

"Misbehavior," as used in 2 Rev. St. p. 542, § 10, providing that an award of arbi-

trators may be vacated for their misbehavior, etc., means acts which evince unfairness or a violation of all the principles of a just proceeding, and not mere error of judgment however great. The term does not include the mere admission in evidence by the arbitrators of *ex parte* testimony in behalf of one party, and their refusal to permit one party to inspect the books of the other party in respect to which testimony was being given. *Turnbull v. Martin* (N. Y.) 2 Daly, 428, 430, 37 How. Prac. 20, 21.

The "misbehavior of a jury," contemplated in the construction of a statute authorizing a new trial for such cause, was some unlawful or unauthorized acts done by them which would themselves vitiate their verdict, such as hearing evidence in the jury room, acting upon the knowledge of each other in regard to the case, or the statements of other parties not having been examined as witnesses; and the fact that the jury had disobeyed their instructions would not imply that the jury had been guilty of "misconduct," in the sense in which this term is understood in motions for new trial. *State v. Arnold*, 47 S. W. 221, 223, 100 Tenn. 307.

MISCARRIAGE.

The word "miscarriage," as used in the statute of frauds, has a broader meaning than either "debt" or "default," and includes the failure by a third party to succeed in a proposed business, regardless of the fact whether its failure to do so would entitle the plaintiff to an action at law or not. The requirement that an actionable duty shall exist was made first by the court in cases of "debt." The same requirement was later extended to "default," meaning default in any duty, and for the same reason. But the reason does not exist in the case of "miscarriage"—that is, the act of a third party; and this requirement should not be made. In other words, if any meaning is to be given to the word, it must mean something different or broader than "debt" or "default"; and this is the only distinction that can be made. *Gansey v. Orr*, 73 S. W. 477, 481, 173 Mo. 532.

In medical jurisprudence.

"Miscarriage" is, technically speaking, the expulsion of the ovum or embryo from a female within the first six weeks after conception. *Smith v. State*, 33 Me. 48, 59, 54 Am. Dec. 607.

"Miscarriage," as used in Comp. St. p. 560, c. 180, providing for the punishment of any one attempting to procure the miscarriage of a woman pregnant with child, does not necessarily imply the continued life of the foetus. The compound nature of the word seems to imply a departure from the

natural course of gestation, and the consequent destruction of the foetus. But the word has not received any such construction in the English courts. It is not so understood, either legally, medically, or popularly. Medically, this term is strictly applied to the expulsion of the embryo during the first six weeks after conception. Legally and popularly the term applies to the expulsion of the foetus at any time during the period of gestation. *State v. Howard*, 32 Vt. 380, 402, 78 Am. Dec. 609.

The word "miscarriage," both in law and philology, means the bringing forth of the foetus before it is perfectly formed and capable of living, and is rightly predicated of the woman, instead of the child, because it refers to the act of premature delivery. The word "abortion" is synonymous, and equivalent to "miscarriage" in its primary meaning. It is a flagrant crime of common law to attempt to procure the miscarriage or abortion of a woman, because it interferes with and violates the mysteries of nature, in that process by which the human race is propagated and continued. It is a crime against nature, which obstructs the fountain of life. To constitute a miscarriage it is not necessary that the woman had become quick. It is not the murder of the living child which constitutes the offense, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated. *Mills v. Commonwealth*, 13 Pa. (1 Harris) 631, 632; *Wells v. New England Mut. Life Ins. Co.*, 43 Atl. 126, 127, 191 Pa. 207, 53 L. R. A. 327, 71 Am. St. Rep. 763.

"Procuring a miscarriage," within the meaning of 17 Del. Laws, c. 226, making it criminal to procure a miscarriage, except for the purpose of saving life, is the unlawful destruction, or the bringing forth prematurely, of the human foetus before the natural time of birth. *State v. Magnell* (Del.) 51 Atl. 606, 3 Pennewill, 307.

Same—Abortion synonymous.

Miscarriage is the act of bringing forth before the time, or premature birth; and in common language procuring an abortion means substantially the same as procuring a miscarriage. *State v. Crook*, 51 Pac. 1091, 1093, 16 Utah, 212.

"Miscarriage," as used in Cr. Code, § 7177, means bringing forth the foetus before it is capable of living; and hence the use of the words "miscarriage" and "abortion" interchangeably in an information is improper and confusing. *State v. Belyea*, 83 N. W. 1, 3, 9 N. D. 353.

Where the statute makes it an offense for any person to prescribe or administer to

any pregnant woman any substance or employ any means with intent to procure a miscarriage, unless necessary to preserve life, and also speaks of procuring abortion and miscarriage as synonymous terms, to charge a physician with being "nothing but a G—d d—d abortionist" is language actionable per se. *De Pew v. Robinson*, 95 Ind. 109, 111.

MISCELLANEOUS.

The adjective "miscellaneous," as used in appropriation bills, to qualify the word "expenses," has a technical and well-understood meaning. It is usual for Congress to enumerate the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to make a small appropriation for the minor disbursements incidental to any great business, which cannot well be foreseen, and which it would be useless to specify more accurately. For such disbursements a round sum is appropriated, under the head of "miscellaneous expenses." *Dunwoody v. United States* (U. S.) 22 Ct. Cl. 269, 280.

Where a company issued scale bills, specifying in classes the charges to be made for carriage, each class containing various kinds of goods, and at the end a "miscellaneous class," comprising goods not being the aggregate of one class or kind for which a higher tonnage rate was exacted, the company could not charge under the "miscellaneous class" goods which were the aggregate of several kinds, but all contained in one class. The word "class" is larger than the word "kind," and the company, having restricted it by the more limited meaning of the word "kind," was wrong in making the additional charge. *Edwards v. Great Western Ry. Co.*, 11 C. B. 588, 648.

MISCHIEF.

See "Malicious Mischief."

Where a dog is in the act of destroying the plants in a garden by running over them, he is doing "mischief" within the meaning of that term as used in Gen. St. § 3757, justifying the killing of a dog found doing or attempting to do "mischief," when not under the care of any person. *Simmonds v. Holmes*, 23 Atl. 702, 703, 61 Conn. 1, 15 L. R. A. 253.

The "mischief or public nuisance," which will authorize the granting of an injunction to restrain a party, cannot be construed to include the carrying on of banking operations contrary to the statute. *Attorney General v. Utica Ins. Co.* (N. Y.) 2 Johns. Ch. 371, 379.

MISCHIEVOUS PROPENSITY.

A mischievous propensity is a propensity from which injury is the natural result, and is applicable to a bull, who, without any hostile feelings against the man he injured, and with no disposition to gore mankind, yet because of his mischievous propensity to rush at a red object, attacked and gored a person wearing such a handkerchief; and where a domestic bear hugged a man until his ribs were broken, though it might be the mode adopted by the animal to manifest his affection, yet if he had on other occasions previously shown his affection in that way, causing injury, and his owner knew it, it showed a mischievous propensity for which the owner was liable, because it was hurtful to those who were the objects of the bear's affection. *Evans v. McDermott*, 6 Atl. 653, 654, 49 N. J. Law (20 Vroom) 163, 60 Am. Rep. 602.

MISCONCEPTION.

"Misconception," as used in a hypothetical question as to the mental capacity of a testator, requesting a witness to assume that the statements in the question alleged to have been made by the testator were erroneous, and were so made because of a misconception on the part of the testator, may mean a delusion, or it may mean a mistake, which implies the existence of a rational and capable intellect in the person making the mistake, and therefore excludes a delusion. *Safe Deposit & Trust Co. v. Berry*, 49 Atl. 401, 404, 93 Md. 560.

MISCONDUCT.

See "Willful Misconduct."

The term "misconduct" implies a wrongful intention, and not a mere error of judgment. *Smith v. Cutler* (N. Y.) 10 Wend. 590, 25 Am. Dec. 580; *United States v. Warner* (U. S.) 28 Fed. Cas. 404.

In usual parlance, misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand; and carelessness, negligence, and unskillfulness are transgressions of some established, but indefinite, rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness, an abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite. *Citizens' Ins. Co. v. Marsh*, 41 Pa. (5 Wright) 386, 394.

Administrator.

"Misconduct," as used in a statute declaring that a discharged surety on an ad-

administrator's bond shall only be liable for such "misconduct" as happened prior to giving the new bond, does not include the mere having in the possession of the administrator of money or other assets at the time of giving the new bond. *Beard v. Roth* (U. S.) 35 Fed. 397, 399.

Arbitrator.

"Misconduct," as used in 2 Rev. St. p. 542, § 10, providing that an award of arbitrators may be set aside for their "misconduct," etc., contemplates acts evincing unfairness or contrary to all the principles of a just proceeding. The word does not include the reception as testimony on plaintiff's behalf of some ex parte affidavits, and the fact that they refuse to permit defendant to inspect those parts of plaintiff's books in respect to which testimony was being given. *Turnbull v. Martin* (N. Y.) 37 How. Prac. 20, 21, 2 Daly, 428, 430.

Attorney.

The misconduct of an attorney, which authorizes an attachment against him, includes cases where the latter retains money in his hands that justly belongs to his client. *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489, 493.

The omission by an attorney to pay over money collected for a client is "misconduct in a professional employment," within a statute providing that no person shall be arrested or imprisoned in any suit or proceeding for the recovery of money, but that the statute shall not extend to actions for any misconduct in any professional employment. *Stage v. Stevens* (N. Y.) 1 Denio, 267, 268; *Bohanan v. Peterson* (N. Y.) 9 Wend. 503, 504.

Husband or wife.

"Misconduct," as used in How. Ann. St. § 6246, which provides that a woman who obtains a divorce from her husband on the ground of his misconduct shall be allowed dower, the same as though he were dead, includes extreme cruelty; and hence the wife is entitled to dower when a divorce is granted on such grounds. *Rea v. Rea*, 29 N. W. 703, 705, 63 Mich. 257.

"Misconduct," as used in Rev. St. p. 741, § 8, providing that in cases of divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be entitled, etc., means that kind of misconduct only which the laws of New York recognize as sufficient to authorize a divorce, namely, adultery; and hence a foreign judgment of divorce for misconduct of the wife other than adultery, which has the effect to deprive the wife of dower in the state where it is rendered, will not have such effect in New York. *Van Cleef v. Burns*, 23 N. E.

881, 883, 118 N. Y. 549, 16 Am. St. Rep. 782; Id., 30 N. E. 661, 662, 133 N. Y. 540, 15 L. A. A. 542.

Refusal of a wife to return to her husband after a divorce for cruelty has been refused her is not misconduct, within Rev. St. p. 318, providing that, when the parents of minor children live apart, the court may make a decree concerning such children, and the parents' rights, in the absence of misconduct, are equal. *English v. English*, 31 N. J. Eq. (4 Stew.) 543, 547.

The term "misconduct" in a statute relating to the rights of parents living apart to the custody of their children, means such conduct as to deprive the spouse of the moral right to the custody of his or her children. *Carson v. Carson* (N. J.) 54 Atl. 149.

Juror.

The term "misconduct," as used in the provisions of the Nebraska Code relative to new trials in civil actions, does not necessarily imply an evil or corrupt motive on the part of the jury or prevailing party. *Chicago, St. P., M. & O. R. Co. v. Deaver*, 45 Neb. 307, 63 N. W. 790.

Where, in the course of a trial for murder, the jury were kept together and lodged at a hotel, which during the night caught fire, and on their escaping from the hotel they separated, some of them engaging in endeavoring to put out the fire, and were not collected together for an hour or more, such separation was such misconduct as would entitle the defendant to a new trial. *Early v. State*, 1 Tex. App. 248, 274, 28 Am. Rep. 409.

MISCONDUCT IN OFFICE.

See, also, "Official Misconduct."

The only ground of removal by impeachment is "misdemeanor in office"; and these words, we think, are used in a parliamentary sense, and mean "misconduct in office." It is something which amounts to a breach of the conditions tacitly annexed to the office, and includes any wrongful official act or omission to perform an official duty. *Yoe v. Hoffman*, 61 Kan. 265, 286, 59 Pac. 351. 355 (citing *Falloon v. Clark*, 61 Kan. 121, 58 Pac. 990, 992).

"Misconduct in office" may be defined as unlawful behavior or neglect by a public officer, by which the rights of a party have been affected. Thus a sheriff or constable is liable to a plaintiff for refusal or neglect to serve process, or want of diligence in service; for the escape of a defendant who was lawfully arrested on civil process, either mesne or final; for neglect or refusal to return process; for making a false return; for negligently caring for goods, whereby

some of them are lost; for neglect to pay over moneys collected; and the like. An action against the sheriff and an attaching creditor to recover the value of certain property levied on is not for the misconduct in office of the sheriff, if there is no allegation that the officer acted in bad faith in making the levy. *Miller v. Roby*, 4 N. W. 65, 66, 9 Neb. 471.

Stenographer.

The phrase "misconduct in office" is broad enough to embrace any willful malfeasance, misfeasance, or nonfeasance in office, and it cannot be doubted that the official stenographer who willfully sets at naught a constitutional provision by refusing to personally devote his time to the performance of his official duties, whatever his reasons therefor may be, is guilty of misconduct in office, and may be removed from office by a judge of the court of which he is such an officer. *State ex rel. Tilley v. Slover*, 20 S. W. 788, 789, 113 Mo. 208.

MISDEMEANOR.

See "Petit Misdemeanor."

A misdemeanor is an indictable offense not amounting to felony. In *re Bergin*, 31 Wis. 383, 386; *State v. Gaster*, 12 South. 739, 742, 45 La. Ann. 636; *Son v. People* (N. Y.) 12 Wend. 344, 346; *People v. Finn* (N. Y.) 26 Hun. 58, 60; *People v. Reilly*, 63 N. Y. Supp. 18, 22, 49 App. Div. 218; *People v. Upson*, 29 N. Y. Supp. 615, 617, 79 Hun. 87; *Kelly v. People*, 24 N. E. 56, 132 Ill. 363; *State v. Hunter*, 67 Ala. 81, 83; *People v. Maxon*, 1 Idaho, 330, 338; *United States v. Chapel* (U. S.) 25 Fed. Cas. 305.

The term "misdemeanor," as used in any statute, shall be construed as including every offense punishable only by fine or imprisonment in a county jail, or both. *Rev. St. Mo. 1899*, § 2395; *State v. Bockstruck*, 136 Mo. 335, 358, 38 S. W. 317; *State v. Peterson*, 41 Vt. 504, 511; *State v. Scott*, 24 Vt. 127, 130; *People v. Helbing*, 61 Cal. 620, 621.

A misdemeanor is any crime not punishable either by death or imprisonment in the state prison. *People v. Markell*, 45 N. Y. Supp. 904, 907, 20 Misc. Rep. 149; *Stevens v. Anderson*, 44 N. E. 460, 461, 145 Ind. 304; *Pillsbury v. Brown*, 47 Cal. 477, 480; *Rev. St. Utah 1898*, § 4063; *Pen. Code N. Y. 1903*, §§ 5, 6; *V. S. 1894*, 5166; *Rev. St. Okl. 1903*, § 1927; *Comp. Laws Nev. 1900*, § 3989; *Gen. St. Minn. 1894*, § 6290.

A misdemeanor is any offense not punishable by death or imprisonment in the penitentiary. *Ballinger's Ann. Codes & St. Wash. 1897*, § 6773; *Rev. Codes N. D. 1899*, §§ 6804, 7743; *Pen. Code S. D. 1903*, §§ 5, 6; *Bates' Ann. St. Ohio 1904*, § 6795; *Code W.*

Va. 1899, p. 998, c. 152, § 1; *Code Va. 1887*, § 3879.

Every offense which is not punishable by death or by imprisonment in the penitentiary, either absolutely or as an alternative, is a misdemeanor. *Pen. Code Tex. 1895*, art. 55.

When a crime punishable by imprisonment in the penitentiary is also punishable by a fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary. *Ann. Codes & St. Or. 1901*, §§ 1230, 1231; *Pen. Code Ariz. 1901*, par. 17.

The word "misdemeanor," in its usual acceptation, is applied to all those crimes and offenses for which the law has not provided a particular name; and they may be punished, according to the degree of the offense, by fine or imprisonment, or both. *Ex parte Garrison*, 15 S. E. 417, 418, 36 W. Va. 686.

A crime or misdemeanor is an act committed or omitted in violation of a public law. *Commonwealth v. Curren* (Pa.) 2 Chest. Co. Rep. 395, 397.

A crime or misdemeanor is an act committed in violation of a public law either forbidding or commanding it, which the state punishes in a criminal proceeding in its own name. *State v. McConnell*, 46 Atl. 458, 459, 70 N. H. 158.

A crime or misdemeanor shall consist in the violation of public law, in the commission of which there shall be a union or joint operation of the act and intention, or criminal negligence. *Pen. Code Ga. 1895*, § 31; *Kent v. People*, 9 Pac. 852, 857, 8 Colo. 563 (citing *Cr. Code*, § 1).

Misdemeanors comprise all offenses lower than felony, and are divided into two classes: First, such as are mala in se, or criminal at common law; and second, such as are mala prohibita, or penal by statute. *Walsh v. People*, 65 Ill. 58, 65, 16 Am. Rep. 569.

The word "misdemeanor" is generally used to denote an offense in contradistinction to a felony, comprehending all indictable offenses below felony, but does not include offenses over which magistrates have exclusive summary jurisdiction. *State v. McNally*, 21 South. 27, 28, 48 La. Ann. 1450, 46 L. R. A. 533.

Crime synonymous.

The term "misdemeanor" is synonymous with "crime," though not one of the gravest character. *Van Meter v. People*, 60 Ill. 168, 170.

A "crime" is a wrong directly or indirectly affecting the public to the commission of which the state has annexed certain pains

and penalties, and which it prosecutes and punishes in its own name, in what is called a "criminal proceeding." "Crime" is often used as comprehending "misdemeanor," and is synonymous with it, and also with "offense"; in short, as embracing every indictable offense. *State v. Thibodeaux*, 19 South. 680, 681, 48 La. Ann. 600.

Properly speaking, "crimes" and "misdemeanors" are synonymous terms. In common usage the word "crimes" is made to denote such offenses as are of a deeper and more atrocious dye, while smaller faults are comprised under the general name of "misdemeanors." *Price v. Lancaster Co.*, 24 Pa. Co. Ct. R. 225, 231; *Commonwealth v. Curren* (Pa.) 2 Chest. Co. Rep. 395, 397; *Rector v. State*, 6 Ark. 187, 190; *Slaughter v. People* (Mich.) 2 Doug. 334, 335, note (quoting 4 Bl. Comm. 5).

In the criminal procedure act some crimes are felonies, others are commonly called "misdemeanors," and often infamous crimes, as forgery and perjury, are called "misdemeanors," thereby distinguishing them from felonies. Section 13 of the act of 1791, providing that, where any person is brought before a justice of the peace on the charge of having committed a crime, and such charge shall appear to be unfounded, the costs shall be paid out of the county stock, applies to both felonies and misdemeanors. *Lehigh County v. Schock*, 7 Atl. 52, 53, 113 Pa. 373.

Criminal charge synonymous.

The word "misdemeanor" is not included in the phrase "criminal charge" in Bill of Rights, § 14, declaring that no one shall be put to answer any "criminal charge," except by presentment or indictment. *McGinnis v. State*, 28 Tenn. (9 Humph.) 43, 50, 49 Am. Dec. 697.

Felony distinguished.

See "Felony."

As misconduct or misbehavior.

Webster defines "misdemeanor" as "misconduct; misbehavior." *State ex rel. Reid v. Walbridge*, 24 S. W. 457, 458, 119 Mo. 383, 41 Am. St. Rep. 663.

The words "misdemeanor in his professional capacity," in the Missouri statute as to attorneys at law, are not used in the technical sense of offenses punishable by fine and imprisonment in jail, but as equivalent of "professional misbehavior." In *re Bowman*, 7 Mo. App. 567, 568, 569.

"Misdemeanor" has a common-law, a parliamentary, and a popular sense. In a parliamentary sense, as applied to officers, it means maladministration or misconduct, not necessarily indictable. "Demeanor" is conduct, and "misdemeanor" is misconduct, in the business of his office. It must be in mat-

ters of importance, and be of a character to show a willful disregard of duty. *State v. Hastings*, 55 N. W. 774, 791, 38 Neb. 584.

"Misdemeanor," as used in Laws 1860, c. 196, § 1, giving an action on the bond of a sheriff whenever he shall have been guilty of any default or "misdemeanor" in office, does not denote a criminal offense, but applies to a trespass committed by the sheriff while acting in his official character. The word "misdemeanor," in this connection is undoubtedly used in the sense of "misconduct." *State v. Mann*, 21 Wis. 684, 687.

"Misdemeanor," as used in How. Ann. St. § 5069, authorizing the suspension of a pupil guilty of gross misdemeanor, means gross misconduct or gross misbehavior. It is not necessary that the pupil be guilty of a criminal act before he can be suspended or expelled from school, but before he can be thus dealt with he must be guilty of some willful or malicious act of detriment to the school, and the misconduct must be gross, something more than a petty or trivial offense against the rules, or he must be persistent in his disobedience of the proper and reasonable rules and regulations of the school. *Holman v. Trustees of School Dist. No. 5*, 43 N. W. 996, 997, 77 Mich. 605, 6 L. R. A. 534.

In a statute providing that for any willful misdemeanor in office any public administrator may be indicted, etc., it is held that the word "misdemeanor" is used in its popular sense of "misconduct," and does not refer to a technical misdemeanor, which is a species of crime. *State v. Borowsky*, 11 Nev. 119, 125.

As an offense.

See "Offense."

Violation of city ordinance.

Under Rev. St. 1858, c. 155, defining a misdemeanor to be an act or omission punishable by fine or imprisonment, or by fine and imprisonment, where a municipal ordinance prohibits what was not punishable at common law or by the statute, and provides as a penalty for its violation a fine, and in default of payment imprisonment in the county jail, the violation of such ordinance is not a misdemeanor. *City of Oshkosh v. Schwartz*, 13 N. W. 552, 554, 55 Wis. 483.

Gen. Laws 1895, c. 96, § 9, in the act creating the courts of appeals, conferred on them exclusive jurisdiction in all cases of appeal from conviction for misdemeanors in the district of said courts of record. We think that the word "misdemeanor" was here used by the legislators in its general sense, and not in the particular one employed in classifying offenses under the laws of the state. Code Civ. Proc. art. 1. Bouvier says this term is used to express every offense inferior to felonies, punishable by indictment

or by particular described proceedings; and Blackstone says that in common usage the word "crime" is meant to denote offenses of a deeper and more atrocious dye, while small faults and omissions, of less consequence, are comprised under the general name of "misdemeanors." Violation of valid city ordinances are certainly "offenses," although the laws of the state do not directly prescribe a punishment, which is a requirement of the definition of that word in section 2, Cr. Code. These offenses against a city are not crimes or felonies, but are commonly classed as misdemeanors, and the procedure for the enforcement of city ordinances is criminal in its nature. *City of Burlington v. Stockwell*, 42 Pac. 828, 56 Kan. 208.

MISFEASANCE.

"Misfeasance" is the improper doing of an act which a person might lawfully do. *Bell v. Josselyn*, 69 Mass. (3 Gray) 309, 63 Am. Dec. 741.

"Misfeasance" is default in not doing a lawful act in a proper manner, or omitting to do it as it should be done. *Coite v. Lynes*, 33 Conn. 109, 114; *Minkler v. State*, 15 N. W. 330, 334, 14 Neb. 181.

"Misfeasance" is defined to be the performance of an act which might lawfully be done in an improper manner, by which another person receives injury. *Illinois Cent. R. Co. v. Foulks*, 60 N. E. 890, 894, 191 Ill. 57; *Commonwealth v. Williams*, 79 Ky. 42, 47, 42 Am. Rep. 204; *Burns v. Pethcal*, 27 N. Y. Supp. 499, 503, 75 Hun. 437.

Misfeasance is the wrongful and injurious exercise of lawful authority, or the doing of the lawful act in an unlawful manner. *Dudley v. City of Flemingsburg* (Ky.) 72 S. W. 327, 60 L. R. A. 575.

Misfeasance may involve to some extent the idea of not doing, as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances, as, for instance, when he does not exercise that care which a due regard to the rights of others may require. *Ellis v. McNaughton*, 76 Mich. 237, 242, 42 N. W. 1113, 1114, 15 Am. St. Rep. 308; *Lough v. John Davis & Co.*, 70 Pac. 491, 495, 30 Wash. 204, 59 L. R. A. 802, 94 Am. St. Rep. 848.

Nonfeasance distinguished.

A distinction exists between nonfeasance and misfeasance; the one being a total omission to do an act which one gratuitously promises to do, and the other a culpable negligence in the execution of the act. If a party makes a gratuitous engagement, and actually enters upon the execution of the business, and does it amiss, through the

want of due care, by which danger ensues to the other party, an action will lie for misfeasance. *Gregor v. Cady*, 19 Atl. 108, 82 Me. 131, 17 Am. St. Rep. 466.

A servant's careless or negligent act is called a "misfeasance." In its nature it is or becomes a trespass. But, where an injury results to a third person because the servant failed to act, it is called a "nonfeasance," in which case generally the servant is not personally liable, though his master is. In the event of a misfeasance, the servant is liable to any one injured thereby. *Cincinnati, N. O. & T. P. R. Co. v. Robertson* (Ky.) 74 S. W. 1061, 1062 (citing *Murray v. Usher*, 117 N. Y. 542, 23 N. E. 564; *Burns v. Pethcal*, 75 Hun. 442, 27 N. Y. Supp. 499).

Negligence distinguished.

See "Negligence."

MISFORTUNE.

Misfortune is any instance of adverse fortune; an unlucky accident; a calamity, mishap, or mischance. The absconding of plaintiff's attorney constitutes misfortune, within the statute authorizing the granting of new trials for unavoidable casualty or misfortune. *Ennis v. Fourth St. Bldg. Ass'n*, 71 N. W. 426, 102 Iowa, 520.

The word "misfortune" means ill luck; ill fortune; calamity; evil or cross-accident. It does not require any stretch of language to hold that one who has suffered a judgment to be taken against him by default, by reason of the dishonesty of his attorney, has suffered a misfortune within the meaning of the Code, providing for setting aside judgment in such case. *Anthony v. Karbach*, 90 N. W. 243, 244, 64 Neb. 509, 97 Am. St. Rep. 662.

"Misfortune," like its synonym, "casualty" or "accident," may proceed or result from negligence or other cause, known or unknown. *McCarty v. New York & E. R. Co.*, 30 Pa. (6 Casey) 247, 251.

"Misfortune," as used in a guaranty providing that "all drafts drawn by H. will be duly honored and paid by me, should he meet with any misfortune that he will not be able to do it himself," comprehends any cause which may prevent the principal from paying the debt. *Grant v. Hotchkiss* (N. Y.) 15 How. Prac. 292, 293.

The omission of a party pressed to trial to move for delay, when delay is needed for his preparation, is not such "accident, mistake, or misfortune," as will entitle him to a new trial. *Couillard v. Seaver*, 9 Atl. 724, 64 N. H. 614.

Where a party entitled to appeal died four days before the expiration of the time within which the appeal could be taken, and

on the day after his death his counsel claimed an appeal, being at that time ignorant of the decease of the client, the attempt to appeal was prevented through "misfortune," within a statute authorizing relief where the appellant has not unreasonably neglected to appeal. *In re Moulton*, 50 N. H. 532, 537.

Under a statute providing that a person aggrieved by a decree, who is prevented from appealing through mistake, accident, or misfortune, may petition for leave to appeal, etc., it is held that the mere fact that petitioner had forgotten material facts at the time of the hearing does not constitute a mistake, accident, or misfortune. *In re French*, 17 N. H. 472, 475.

Where a decree of the probate court allowing the settlement of an administrator's account was made after the terms of the settlement were agreed to by counsel, and there was no fraud, the only error in the act being such as would have been discovered by reasonable diligence, there was no such mistake, accident, or misfortune as to bring the case within the terms of the statute authorizing a petition for a new trial after the time for perfecting an appeal had expired, where the petitioner had failed to appeal from the decree because of accident, mistake, or misfortune. *Ahearn v. Mann*, 63 N. H. 330, 331.

A person aggrieved by a decision of the judge of probate, who failed to appeal therefrom within 60 days from the time it was made, because he did not know it had been made, may be allowed an appeal on the ground of mistake, accident, or misfortune. *Holton v. Olcott*, 58 N. H. 593.

A ward may be allowed an appeal from a probate decree, denying his petition for a revocation of his guardianship, when he was prevented from appealing by being unable to furnish an appeal bond, having no means to indemnify sureties; his property being in the hands of his guardian. This was a misfortune. *Wadleigh v. Eaton*, 59 N. H. 574.

MISJOINDER.

The improper joining together of parties to a suit as plaintiffs or defendants, or of different causes of action. *Black, Law Dict.*

The joinder in one action of defendants against whom there is no common cause of action, but that against one is totally disconnected with that against the other, except in so far as it is historically connected as one matter in a transaction, is a misjoinder. *Burstall v. Beyfus*, 53 Law J. Ch. 565, 567; *Phenix Iron Foundry v. Lockwood*, 45 Atl. 548, 548, 21 R. I. 556.

A misjoinder cannot be distinguished from a nonjoinder in principle or effect. Either fault can be searched out, found, and

cured by demurrer. *Victor Talking Mach. Co. v. American Graphophone Co.* (U. S.) 118 Fed. 50, 51.

MISLAID.

Code Cr. Proc. art. 434, provides that an indictment may be substituted only when the original has been lost, mislaid, mutilated, or obliterated. An original indictment in a prosecution was on file in the clerk's office in the Supreme Court, where it was sent on a former appeal, for the inspection of this court, which fact was within the knowledge of the parties, by whom it could have been obtained by taking proper steps. Held, that the original could not be held to have been mislaid, within the meaning of the statute. Mr. Webster defines "to mislay" as "to lay in the wrong place; to lay in a place not recollected; to lose." But the original indictment was not, as we have seen, mislaid, because the parties knew where it was. They knew it was where they themselves had sent it, and they knew it could be had by taking the proper steps. *Shehane v. State*, 13 Tex. App. 533, 535.

MISMANAGEMENT.

Any mismanagement, see "Any."

MISNOMER.

The names "Petris" and "Petric" are French, and the pronunciation the same. It was, therefore, not a "misnomer" to sue "Petric" under the name of "Petris." It was the same name, with the misspelling of one letter. *Petric v. Woodworth* (N. Y.) 3 Caines, 219.

An indictment charged the offense as having been committed upon a French Canadian named "Fourai," but in the indictment the name was spelled "Forest"; the Christian name used in the indictment being the correct one. It was held that, as "Forest" and "Fourai" were both pronounced "Foray," which pronunciation defendant was familiar with, there was no misnomer; the words being idem sonans. *State v. Timmens*, 4 Minn. 325, 331 (Gil. 241, 247).

MISPLEADING.

"Mispleading," in its immediate and more usual sense, signifies essential errors or omissions in the defendant's defense; and it is also expressly defined to comprehend any mistakes or omissions, essential either to the action or defense, occurring either in the declaration or the subsequent pleadings. According to its etymology and natural meaning, it means pleading amiss, or pleading wrongly. This is the well-known famil-

lar use and derivation of the word. *Lovett v. Pell* (N. Y.) 22 Wend. 369, 376 (quoted in *Chicago & A. R. Co. v. Murphy*, 64 N. E. 1011, 1012, 198 Ill. 462).

"Mispleading," as used in a statute providing that, where a verdict has been rendered, the judgment shall not be reversed for mispleading, includes within its sense a misjoinder of counts. *Lovett v. Pell* (N. Y.) 22 Wend. 369, 376,

A mispleading of counts in the same declaration is a "mispleading," as use in a statute providing that judgments shall not be arrested or stayed, after verdict, for any mispleading, etc. *Chicago & A. R. Co. v. Murphy*, 64 N. E. 1011, 1012, 198 Ill. 462.

MISPRISION.

"Misprision" is the act of misprising; misapprehension; misconception; mistake. *Merrill v. Miller*, 72 Pac. 423, 427, 28 Mont. 134.

According to the common law, it is the duty of every one, seeing any felony attempted, by force to prevent it; and one who fails to discharge such duty is guilty of a misdemeanor called "misprision of felony." *Carpenter v. State*, 36 S. W. 900, 906, 62 Ark. 286.

MISREPRESENTATION.

See "Actionable Misrepresentation"; "Fraudulent Misrepresentation."

As fraud, see "Fraud."

Mistake distinguished, see "Mistake."

A "misrepresentation," the falsity of which will afford a ground of action for damages, must be as to an existing fact. It must be an affirmative statement or affirmation of some fact, in contradistinction to a mere expression of opinion, which ordinarily is not presumed to deceive or mislead. *Watkins v. West Wytheville Land & Improvement Co.*, 22 S. E. 554, 556, 92 Va. 1.

Misrepresentation may consist as well in the concealment of what is true as in the assertion of what is false. If a man conceals a fact that is material to the transaction, knowing that the other party acts on the presumption that no such fact exists, it is as much a fraud as if the existence of such fact were expressly denied or the reverse of it expressly stated. *Nairn v. Ewalt*, 32 Pac. 1110, 51 Kan. 355; *Foster v. McAlister*, 58 S. W. 679, 684, 3 Ind. T. 307.

Misrepresentation, such as will avoid a contract, is asserting what is not true in whole or in part. A party to a contract is not bound to answer a question; yet, if he does answer, he must do it fully, fairly, and in good faith, so as to give the other the

benefit of the question and the information sought. Though a representation is voluntarily made, without being requested, it must be substantially true in every matter material to the contract. It is not necessary, in order to constitute a misrepresentation, that there be a fraudulent intention. If one of the parties is in fact deceived, or induced by the conduct or declaration of the other to enter into a contract which he would not have made, had he known the true state of things, the contract cannot be enforced. *Blydenburgh v. Welsh* (U. S.) 3 Fed. Cas. 771, 774.

Misrepresentation, such as will prevent a decree for specific performance, must be a statement so material to the contract built on it that, if the statement be false, the contract becomes one which it would be unconscionable for the party who has made the statement to enforce. The misrepresentation must be shown to have operated to the prejudice of the defendant. *Scott v. Shiner*, 27 N. J. Eq. (12 C. E. Green) 185, 189.

The misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must not only relate to a material matter, respecting which the complaining party did not possess at hand the means of knowledge, but it must be a misrepresentation on which the vendee relied, and by which he was actually misled to his injury. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, and the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he was deceived by the vendor's misrepresentations. *Slaughter v. Gerson*, 80 U. S. (13 Wall.) 379, 383, 20 L. Ed. 627.

An actionable misrepresentation consists in a false statement respecting a fact material to the contract, and which is influential in producing it. Statements of mere matters of opinion or judgment, though known to be false, do not amount to an actionable misrepresentation; but a statement that a greater rent is received than is in truth reserved, or that the income from a property is greater than it is in fact, being matters peculiarly within the vendor's knowledge, are actionable misrepresentations. *Wise v. Fuller*, 29 N. J. Eq. (2 Stew.) 257, 262.

A misrepresentation, in order to constitute a fraud, must be made for the purpose and with the design of procuring the other party to act; of inducing him to enter into the contract or engage in the transaction. *Brady v. Cole*, 45 N. E. 438, 439, 164 Ill. 116.

The mere expression of an opinion that a certain title was good, if one honestly be-

Heved the title to be good, was not such a misrepresentation as to entitle the other party to recover, no matter how erroneous such opinion or belief may have been. Where one, in making a trade, expresses a mere opinion, with no intent to deceive, the party to whom it is made has no right to rely thereon. It is otherwise where a party expresses an opinion that is calculated to deceive, by reason of the circumstances that surround the parties or transaction, or if he makes a positive affirmation that is false, and on which a party is, from the surroundings, authorized to rely and does rely. The party injured thereby is entitled to relief, and it is immaterial whether or not the statement was made in good faith. *Hawkins v. Wells*, 43 S. W. 816, 818, 17 Tex. Civ. App. 360.

In insurance.

Misrepresentation, according to the law of insurance, is the statement of something as fact which is untrue, and which the assured states, knowing it to be untrue and with intent to deceive, or which he states positively as true, not knowing it to be true and which has the tendency to mislead; such fact being in either case material to the risk. *Clark v. Union Mut. Fire Ins. Co.*, 40 N. H. 333, 338, 77 Am. Dec. 721; *Mascott v. First Nat. Fire Ins. Co.*, 37 Atl. 255, 257, 69 Vt. 116; *Bridgewater Iron Co. v. Enterprise Ins. Co.*, 134 Mass. 433, 438; *Fitzgerald v. Supreme Council Catholic Mut. Ben. Ass'n*, 56 N. Y. Supp. 1005, 1009, 39 App. Div. 251 (citing *Daniels v. Hudson River Fire Ins. Co.*, 66 Mass. [12 Cush.] 416, 59 Am. Dec. 192, and cases cited).

A misrepresentation is defined by Phillips to occur where a party to a contract of insurance, either purposely, or through negligence, mistake, or inadvertence, or oversight, misrepresents a fact which he is bound to represent truly. *Armour v. Transatlantic Fire Ins. Co.*, 90 N. Y. 450, 455.

A misrepresentation in insurance is a false representation of a material fact by one of the parties to the other, tending directly to induce the other to enter into the contract, or to do so on less favorable terms to himself, when otherwise he might not enter into the contract at all, or might demand terms more favorable. *Hearn v. Equitable Safety Ins. Co. (U. S.)* 11 Fed. Cas. 965, 968.

The term "misrepresentation," as used in Rev. St. 1899, § 7890, providing that no misrepresentation in obtaining a life policy shall be deemed material, unless it actually contributed to the event on which the policy became due or payable, was held in *Deane v. Southwestern Mut. Life Ass'n*, 88 Mo. App. 459, to include a misrepresentation which is warranted to be true. *Jenkins v. Covenant*

Mut. Life Ins. Co., 71 S. W. 688, 690, 171 Mo. 375.

Gen. St. c. 157, § 2, provides that no policy of insurance shall be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made. Held, that the terms of the statute are very broad; that the term "misrepresentation" might refer solely to representations made in the original application for insurance, or to representations inducing an assignment of the policy; but "mistake" is not thus limited. The terms "mistake" and "misrepresentation" are not conjoined, and made identical, or cumulative, or aggregate. They are separated by the disjunctive "or," and necessarily so; for they are totally unlike. A misrepresentation may be intentionally and fraudulently made, but a mistake cannot be intentionally and fraudulently made. Therefore the law properly and necessarily distinguishes between the two contingencies, and declares that the policy shall not be avoided by a misrepresentation, unless it appears to have been intentionally and fraudulently made, nor "by reason of any mistake"; and hence the term "mistake," as so used, applied not merely to a mistake in matters antecedent to the contract of insurance, but to any and all matters affecting its continuing validity. *Chamberlain v. New Hampshire Fire Ins. Co.*, 55 N. H. 249, 264.

St. 1887, c. 214, § 21, providing that no misrepresentations made in the negotiation of a policy of insurance shall avoid the policy, unless the misrepresentation was fraudulently made or increased the risk, applies to warranties incorporated in the policy by reference to the application. *White v. Provident Sav. Life Assur. Soc.*, 39 N. E. 771, 772, 163 Mass. 108, 27 L. R. A. 398.

A misrepresentation in a marine insurance policy, which is not averred to be material, is no bar to an action on the policy; and a misrepresentation, to have that effect, must be material to the risk of the voyage. *Hodgson v. Marine Ins. Co. of Alexandria*, 9 U. S. (5 Cranch) 100, 3 L. Ed. 48.

MISS.

"Miss" is commonly used to designate a woman who has never been married, and as used in an indictment states that fact at least inferentially; and in an action for criminal slander, on the prosecution of a female, the prefix "Miss," used in mention of her name, shows that she was unmarried. *State v. Buck*, 43 Mo. App. 443, 447.

MISSED HOLE.

A "missed hole," as used in connection with blasting, is a hole charged with dyna-

mite which has failed to explode. *Stearns v. Reidy*, 33 Ill. App. 246, 247; *Id.*, 135 Ill. 119, 25 N. E. 762.

MISSION.

See "Foreign Missions"; "Home Missions."

Mission is well understood in common language. For more than 40 years the different American churches have been engaged in establishing missions in various parts of the heathen world. The purpose is to Christianize, civilize, and educate the natives of those countries where the missions are established. This is accomplished by preaching, by oral instructions, and by schools. The whole machinery of the work at a selected spot in a foreign land is called a "mission." It is, in fine, a Christian school, so that a gift to a particular mission or school is a bequest to a definite charitable use. *Appeal of Domestic and Foreign Missionary Soc.*, 30 Pa. (6 Casey) 425, 435.

MISSIONARY.

"A missionary is one who is sent upon a mission, especially one sent to propagate religion." *Webst. Dict.* And a bequest to support a missionary, without directions as to what he should do or what place he should work in, is void for uncertainty. *In re Fuller's Will*, 44 N. W. 304, 305, 75 Wis. 431.

MISSIONARY SOCIETIES.

Act 1848, entitled "An act for the incorporation of missionary societies," and authorizing any five or more persons possessing the qualifications prescribed by the act to associate themselves for missionary purposes, cannot be construed to include societies for the purpose of carrying on medical or other colleges, or any institution whatever which is primarily and exclusively educational, and especially one in which a compensation is demanded for the instruction furnished. An institution of the latter kind could hardly be regarded as a missionary institution within the ordinary meaning of that term. *People v. Cothran* (N. Y.) 27 Hun, 344, 345.

MISSISSIPPI.

Mississippi currency, see "Currency of the State."

MISSISSIPPI RIVER.

Under Acts 23d Gen. Assem. c. 84, § 11, relating to the protection and preservation of fish, which provides that nothing herein con-

tained shall be held to apply to fishing in the Mississippi river, etc., the words "Mississippi river" will be held to include only that body or stream of water which is popularly known as that river, and will not include lakes and streams which, though connected with the main body of water known as the Mississippi river, yet form no part of the river proper. *State v. Haug*, 64 N. W. 398, 400, 95 Iowa, 413, 29 L. R. A. 390.

MISSMAILS.

In a contract to carry the mails, wherein the contractor agrees to be responsible for any mismails which occur on the part of the mail route on which he has to transport the mails, the term "mismails" means that the parties were stipulating for the accidental or casual omissions to deliver the mail within the prescribed period; that with the best possible management such failures would occur, when the travel was to be at the rate of 10 miles an hour, must have been foreseen, and such casual omissions were by the agreement provided against. The frequent occurrence of such failures was not contemplated by the parties, and would therefore be a failure on the part of the contractor to perform the agreement on his part, and would not be within the term "mismails," as used in the contract. *Davis v. Wade*, 4 Ala. 208, 211.

MISSOURI.

Current money of, see "Current Money."
Missouri currency, see "Currency of the State."

MISSPEND.

"Misspend," as used in Gen. St. tit. 51, § 75, providing a penalty for all persons who misspend what they earn and do not provide for the support of themselves and their families, does not mean a morally improper expenditure of the earnings, but it is the appropriation of the earnings to other purposes than the support of their families, with an intention to leave their families unprovided for. Misspending money is spending it differently from what he ought. *State v. Ransell*, 41 Conn. 433, 441.

MISTAKE.

See "Clerical Mistake"; "Gross Mistake"; "Mutual Mistake."

A mistake is some intentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence. *Davis v. Steuben School Tp.*, 50 N. E. 1, 5, 19 Ind. App. 694; *Allen v. Elder*, 76 Ga. 674, 677, 2 Am. St. Rep. 63; *Ward v. City of*

Philadelphia (Pa.) 6 Atl. 263, 265; Russell v. Colyar, 51 Tenn. (4 Helsk.) 154, 176, 182.

A mistake is (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract, or (2) a belief in the present existence of a thing, material to the contract, which does not exist, or in the past existence of such thing which has not existed. *Peasley v. McFadden*, 68 Cal. 611, 616, 10 Pac. 179, 182.

"Mistake" is defined to be, in a legal sense, the doing of an act under an erroneous conviction, which act, but for such conviction, would not have been done. *Cummins v. Bulgin*, 37 N. J. Eq. (10 Stew.) 476, 477; *Davis v. Steuben School Tp.*, 50 N. E. 1, 5, 19 Ind. App. 694.

A mistake, sufficient to justify the reformation of a contract, must be the mistake of both parties, and not that of one only. *Dougherty v. Lion Fire Ins. Co.*, 84 N. Y. Supp. 10, 41 Misc. Rep. 285. *Drachler v. Foote*, 84 N. Y. Supp. 977, 979, 88 App. Div. 270.

The term "mistake," in the sense of a court of equity, is that result of ignorance of law or of fact which has misled a person to commit that which, if he had not been in error, he would not have done. *Chicago & E. I. R. Co. v. Hay*, 10 N. E. 29, 33, 119 Ill. 493; *Bruse v. Nelson*, 35 Iowa, 157, 160; *Christy v. Scott*, 31 Mo. App. 331, 337.

A mistake, to entitle a party to relief on account thereof, must be material to the transaction and affecting its substance, and not merely its incidents; and the mistake itself must be so important that it determines the conduct of the mistaken party or parties. *Barker v. Fitzgerald (Ill.)* 68 N. E. 430, 432, 204 Ill. 325.

The omission of a party pressed to trial to move for delay, when delay is needed for his preparation, is not such "accident, mistake, or misfortune" as will entitle him to a new trial. *Couillard v. Seaver*, 9 Atl. 724, 64 N. H. 614.

The term "mistake," in a statute in reference to trespasses on realty which are involuntary or by negligence or mistake, is held to refer to trespasses committed when a person believes that he is doing an act upon his own land, or upon the land of another by permission, when in fact he is not, but is doing it upon land upon which he has no right to enter. *Brown v. Neal*, 36 Me. 407, 408.

"Mistake," as used in Laws 1873, c. 263, § 1, fixing the rule of damages in actions brought to recover the value of logs wrongfully cut from the lands of the plaintiff at the highest market value of such logs or timber, between the time of such cutting and the trial of the action, but providing that the

defendant may relieve himself from the obligation of this rule of damages by serving on the plaintiff an affidavit stating that such cutting was done by mistake, and by a tender of judgment for the value of such logs or timber at the time of such cutting, with interest thereon to the time of tender, embraces in its ordinary definition an unintentional act, or any omission or error arising from ignorance, surprise, imposition, or misplaced confidence. Such mistake might embrace matters of title, as well as of boundary. *Webber v. Quaw*, 49 N. W. 830, 831, 46 Wis. 118.

The mistake which is a ground for the reformation of a legal instrument in equity has been said, in *Moore v. Tate*, 21 South. 820, 114 Ala. 582, to include cases where the legal effect of the terms agreed upon by the parties to be employed in a written instrument, through a misapprehension or ignorance of their import, results in a contract different from that really entered into by them. When the instrument speaks the true agreement between the parties, equity will not reform it because one or both of them may have mistaken its legal consequence. *Orr v. Echols*, 24 South. 357, 358, 119 Ala. 340.

The term "mistake or omission," in the statute giving the court power in any stage of the proceedings to permit amendments by changing or adding the name or names of any party plaintiff or defendant, whenever it shall appear that a mistake or omission has been made in the name or names of any party, means "something done or left undone, in the bringing of the suit, that will prevent a trial of the cause upon its merits." *McLoney v. Edgar*, 7 Pa. Co. Ct. R. 27, 29.

Accident distinguished.

See, also, "Accident—Accidental."

A mistake is sometimes the result of accident in its large sense; but, as distinguished from it, it is some intentional act or omission, error arising from ignorance, surprise, imposition, or misplaced confidence. *Chicago & E. I. R. Co. v. Hay*, 10 N. E. 29, 33, 119 Ill. 493.

An "accident" in equity involves two essential requisites. The first and principal one is that by an event not expected nor foreseen one party has without fault and designedly undergone some legal loss or liability, and the other party had acquired a corresponding legal right which is contrary to good conscience for him to retain and enforce against the other. It is distinguished from "mistake," which, within the meaning of equity, is an erroneous mental condition, conception, or conviction, induced by ignorance or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously

by one or both parties to the transaction, but without erroneous character being intended or known at the time. Thus, where in an action the court decided that the bill should be allowed, but in computing the amount of it a mistake was made, which was not discovered until after judgment had been rendered, and too late for setting aside the judgment at that term, such erroneous computation constituted a mistake on the part of the judge, but an accident to the party. *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.* (U. S.) 116 Fed. 1, 7, 53 C. C. A. 513.

Error not synonymous.

The word "mistake," as used in Code, §§ 4501, 4502, allowing the Supreme Court after the term to correct mistakes in judgments given through inadvertence or oversight, means a slip or a fault. The word "mistake" in this section is not synonymous with "error." Therefore the Supreme Court cannot correct a judgment given on the deliberate consideration of the court, though it subsequently adopts a different ruling as correct. *Russell v. Colyar*, 51 Tenn. (4 Heisk.) 154, 158.

Error of judgment.

A mere error of judgment or misapprehension on the part of petitioner's counsel does not constitute a mistake or misfortune, authorizing the granting of a new trial. *Heath v. Marshall*, 46 N. H. 40, 41.

In construing Code 1873, § 841, which provided that the county auditor may correct any clerical or other error in the assessment or tax books, etc., the court said that the word "mistake," as there used, although in fact there is no such a word in the statute, and the word "error" was evidently intended, does not include errors of judgment on the part of the assessor, but is meant, perhaps, to cover all cases where the record does not disclose the true facts, and in which the matter of judgment is not involved. It includes clerical error, increasing the amount of the assessment, which was made in copying when the assessment was entered on the rolls. *Smith v. McQuiston*, 79 N. W. 130, 131, 108 Iowa, 363.

Fraud not synonymous.

It cannot be legally said that "fraud" and "mistake" are synonymous terms. They have different technical meanings. *Metador Land & Cattle Co. v. State* (Tex.) 54 S. W. 256, 258.

Ignorance distinguished.

See "Ignorance."

Latent ambiguity distinguished.

"Between a latent ambiguity and a mistake or error in description in a conveyance

there is a manifest difference. The former may be explained, and the description aided, by parol evidence in a court of law; while the other requires the jurisdiction of a court of equity for its correction. In the case of a latent ambiguity in the description of land in a conveyance, the title is not thereby defeated; but parol evidence may be introduced to show the identity of the subject-matter of the conveyance. In the case of an error or mistake in the conveyance, however, if such error or mistake is material to the description, no title passes, and the remedy of the purchaser is by bill in equity for a reformation of the instrument." *Donehoo v. Johnson*, 24 South. 888, 890, 120 Ala. 438.

Misrepresentation distinguished.

Gen. St. c. 157, § 2, provides that no policy of insurance shall be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made. Held, that the terms of the statute are very broad; that the term "misrepresentation" might refer solely to representations made in the original application for insurance, or to representations inducing an assignment of the policy; but the "mistake" is not thus limited. The terms "mistake" and "misrepresentation" are not conjoined, and made identical or cumulative or aggregate. They are separated by the disjunctive "or," and necessarily so; for they are totally unlike. A misrepresentation may be intentionally and fraudulently made, but a mistake cannot be intentionally and fraudulently made. Therefore the law properly and necessarily distinguishes between the two contingencies, and declares that the policy shall not be avoided by a misrepresentation, unless it appears to have been intentionally and fraudulently made, nor "by reason of any mistake"; and hence the term "mistake," as so used, applied not merely to a mistake in matters antecedent to the contract of insurance, but to any and all matters affecting its continuing validity. *Chamberlain v. New Hampshire Fire Ins. Co.*, 55 N. H. 249, 264.

Mistake of law.

"Mistake," as used in the statutes which confer jurisdiction in cases of "mistake" on courts of equity, is not limited to mistakes of fact, but the word is used as generally understood in equity proceedings, and includes mistakes of law, when combined with other elements not in themselves sufficient to authorize a court of equity to interpose, but which, combined with such mistake, should entitle the party to be relieved. *Jordon v. Stevens*, 51 Me. 78, 80, 81 Am. Dec. 556.

"Mistake," as used in Rev. St. § 1697, declaring with reference to the inventory of the assets of a general assignor for the benefit of creditors, which is required to be filed within

a specified time, that no mistake therein shall invalidate such assignment, should be construed to include mistakes of law as well as fact; as, for instance, a mistake as to the exemption of certain real property from liability to sale on execution. *Farwell & Co. v. Gundry*, 9 N. W. 11, 12, 52 Wis. 268.

In Rev. St. c. 170, § 7, providing that any person who was prevented from appealing from a decree in probate, within 60 days, by mistake, accident, or misfortune, and not through his own neglect, may petition this court to be allowed an appeal, the word "mistake" refers to one either of fact or of law. *Appeal of Parker*, 15 N. H. 24, 26.

"Mistake," as used in Rev. St. § 4057 [U. S. Comp. St. 1901, p. 2756], providing that the postmaster general shall bring suit to recover a payment of money made by "mistake," includes an erroneous conclusion in the construction or application of a statute. *Wisconsin Cent. R. Co. v. United States*, 17 Sup. Ct. 45, 51, 164 U. S. 190, 41 L. Ed. 399.

Act Cong. March 2, 1799 (1 St. 694), providing that no forfeiture for the false entry of goods in the office of the collector of customs shall be incurred if the false denominations happen by "mistake or accident," refers to mistakes of fact, and not mistakes as to the construction or application of the law. *United States v. Eighty-Five Hogsheads of Sugar* (U. S.) 25 Fed. Cas. 991, 995.

A "mistake" which entitles a party to maintain an action for money had and received to recover money paid must be a mistake of fact, and a mistake of fact takes place where some fact which really exists is unknown, or some fact is supposed to exist which really does not exist; but where a person is truly acquainted with the existence or nonexistence of facts, but is ignorant of the legal consequences, he is under an error of law. *Mowatt v. Wright* (N. Y.) 1 Wend. 335, 19 Am. Dec. 508.

Negligence of self or counsel.

A plaintiff is not entitled to a new trial by reason of accident, mistake, or misfortune if the mistake or accident against the consequences of which relief is sought was occasioned by his own fault or negligence, or by that of his authorized attorney appearing in the case. *Bergeron v. Dartmouth Sav. Bank*, 62 N. H. 655, 656.

Where a decree of the probate court allowing the settlement of an administrator's account was made after the terms of the settlement were agreed to by counsel, and there was no fraud, the only error in the act being such as would have been discovered by reasonable diligence, there was no such mistake, accident, or misfortune as to bring the case within the terms of the statute authorizing a petition for a new trial after the time for perfecting an appeal had expired, where the petitioner had failed to appeal from the de-

gree because of accident, mistake, or misfortune. *Ahearn v. Mann*, 63 N. H. 330, 331.

"Mistake," as used in Rev. St. 1878, § 4269, providing that a person who has cut timber on the lands of another by mistake shall not be liable to pay the highest market value of the timber so wrongfully cut, cannot be construed to include the careless and heedless cutting of timber across the line by a person on his neighbor's land, for such carelessness is a neglect of his duty, and is evidence of a want of good faith on his part. *Brown v. Bosworth*, 17 N. W. 241, 242, 58 Wis. 379.

Omission.

The word "mistake," in Rev. St. § 1697, providing that no mistake made in the inventory or list filed by an assignor for the benefit of creditors shall invalidate the assignment or affect the right of any creditors, "is not confined to inaccurately stating or describing any of the several items actually mentioned in the list or inventory, but may cover mistakes of omission as well. *Farwell & Co. v. Gundry*, 9 N. W. 11, 52 Wis. 268; *Smith v. Bowen*, 20 N. W. 917, 61 Wis. 258. In the first of those cases the assignor wholly omitted from his inventory the land on which he resided in a village, notwithstanding it comprised more than one-fourth of an acre, under the supposition that he was entitled to 40 acres as exempt by the court. Held, that the word 'mistake' in the statutes included mistakes of law, even where all the facts were known to the assignor at the time of making the assignment. In the second case certain creditors were inadvertently omitted from the list, but the assignor was upheld." The omission of property fraudulently transferred before making assignment will not invalidate the assignment, nor entitle an attaching creditor to obtain a preference over other creditors by virtue of his attachment. *Batten v. Smith*, 22 N. W. 342, 343, 62 Wis. 92.

As reasonable mistake.

"Mistake," as used in Code, § 274, providing that the judge may, in his discretion, etc., relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, does not mean any mistake, but is confined to a reasonable mistake, occasioned by some fact, or something that has or has not been done by which the complaining party ought to have knowledge, and which, if he had had such knowledge, might have prevented the judgment, order, or other proceedings of which he complains. *Skinner v. Terry*, 12 S. E. 118, 119, 107 N. C. 103.

MISTAKE OF FACT.

A mistake of fact takes place when some fact which really exists is unknown, or some

fact is supposed to exist which really does not exist. *Davis v. Steuben School Tp.*, 50 N. E. 1, 5, 19 Ind. App. 694; *Drake v. Wild*, 39 Atl. 248, 250, 70 Vt. 52.

Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or (2) belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed. Rev. Codes N. D. 1899, §§ 3853, 3855; Civ. Code S. D. 1903, §§ 1206, 1208; Rev. St. Okl. 1903, § 748; Civ. Code Mont. 1895, § 2122; Civ. Code Cal. 1903, § 1577.

Mistake of foreign laws is a mistake of fact. Rev. St. Okl. 1903, § 750; Rev. Codes N. D. 1899, §§ 3853, 3855; Civ. Code S. D. 1903, §§ 1206, 1208.

A mistake of fact in the payment of money which will authorize the payor to recover it is a mistake not caused by neglected legal duty on the part of the person making the mistake. It is not asserted that, if there be actual ignorance of facts, neglect to ascertain them will in every case preclude correction. It will not. *Simmons v. Looney*, 24 S. E. 677, 679, 41 W. Va. 738.

To say of testator that he acted under a "mistake of fact" as to the existence of an heir at law, is the equivalent of saying that he acted in ignorance of such existence. This is the meaning of the term within Civ. Code, § 3262, providing that a will executed under a mistake of fact as to the existence of the heirs at law of the testator is inoperative as to such heir. There is no difference between the mistake arising from mere ignorance and one which results from an error of judgment after investigation, or from negligent or willful failure to make a proper investigation by means of which the truth could be readily ascertained; and the section is not applicable where testator not only knew that a certain person existed and claimed to be his heir, but had full opportunity, before executing his will, to ascertain with certainty the truth of the claim. *Young v. Mallory*, 35 S. E. 278, 279, 110 Ga. 10.

Under Civ. Code, § 1577, defining "mistake of fact" to be one "not caused by the neglect of a legal duty on the part of a person making the mistake," where property was assessed in a district in which it was not situated, and the owner, having the means of discovering the mistake, voluntarily paid the tax, he could not recover it back as being paid under a mistake of fact. *San Diego Land & Town Co. v. La Presa School Dist.*, 54 Pac. 528, 122 Cal. 98.

Error in description.

There is a "mistake of fact" in a written deed when, through ignorance, inadvert-

ence, negligence, or otherwise, the description does not in fact embrace the land which the parties intended it should, and which they supposed it did. *Calton v. Lewis*, 119 Ind. 181, 183, 21 N. E. 475.

There is a mistake of fact where a father, intending and attempting to convey a tract of land owned by him to his sons, describes such tract by a description which does not describe it at all, but an entirely different tract, they supposing that the description used described the tract intended to be conveyed. Whether or not the description used covered the tract intended to be conveyed was a question of fact, as to which there was a mistake, and it was a fact about which the parties might be easily mistaken, without being guilty of such negligence as ought to defeat a reformation of the deed. *Baker v. Pyeatt* (Ind.) 9 N. E. 112, 114.

MISTAKE OF LAW.

A mistake of law occurs when a person having full knowledge of facts comes to an erroneous conclusion as to their legal effect. *Davis v. Steuben School Tp.*, 50 N. E. 1, 5, 19 Ind. App. 694; *Drake v. Wild*, 39 Atl. 248, 250, 70 Vt. 52; *Hurd v. Hall*, 12 Wis. 112, 125; *Davis v. Pryor*, 58 S. W. 660, 664, 3 Ind. T. 396.

Mistake of law presumes to know when in fact it does not. *Brock v. O'Dell*, 21 S. E. 976, 979, 44 S. C. 22.

Mistakes of law constitute a mistake within the meaning of the article relating to contracts only when it arises from (1) a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or (2) a misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify. Rev. St. Okl. 1903, § 749; Rev. Codes N. D. 1899, §§ 3854, 3855; Civ. Code S. D. 1903, §§ 1207, 1208; Civ. Code Cal. 1903, § 1578.

Mistake of law may be an ignorance or error with respect to some general rules of the municipal law applicable to all persons, which regulate human conduct, determine rights of property, of conduct, and the like; such as the rules making certain acts criminal, and those controlling the devolution, acquisition, or transfer of estates, and those prescribing the modes of entering into agreements. On the other hand, the term may mean the ignorance or error of a particular person with respect to his own legal rights and interests, which are affected by, or which result from, a certain transaction in which he engages. *Alabama & V. Ry. Co. v. Jones*, 19 South. 105, 107, 73 Miss. 110, 55 Am. St. Rep. 488.

Where executors had made a map of a tract of ground showing that a portion of it was a street, and sold lots according to such

map, and afterwards sold the ground included in the street, both parties believing that such ground could not be taken for a street without pay therefor, there was such a mutual mistake of law, and the purchaser should be relieved. *Camplin v. Laytin* (N. Y.) 6 Paige, 189, 194, 197.

Ignorance of law distinguished.

There is a distinction between mere ignorance of the law, which is incapable of proof, and a mistake of law, which can be established by evidence. The former is passive, and does not presume to reason, and, unless we are permitted to dive into the secret recesses of the heart, its presence is incapable of proof; but the latter presumes to know, when it does not, and supplies palpable evidence of its existence. *Lawrence v. Beaubien* (S. C.) 2 Bailey, 623, 649, 23 Am. Dec. 155; *Hall v. Reed* (N. Y.) 2 Barb. Ch. 500, 505.

A mere ignorance of law is not susceptible of proof, and therefore cannot be relieved, but a mistake of law may be proved, and, when proved, relief may be afforded. *Champlin v. Laytin* (N. Y.) 18 Wend. 407-423, 31 Am. Dec. 382.

There is a clear and practical distinction between ignorance and mistake of the law. Much of the confusion in the books and in the minds of professional men upon this subject has grown out of a confounding of the two. It may be conceded that at first view the distinction is not apparent; but it is insisted that upon close inspection it becomes quite obvious. It has been ridiculed as a quibble, but we shall see that it has been taken by able men, and acted upon by eminent courts. Ignorance implies passiveness; mistake implies action. Ignorance does not pretend to knowledge, but mistake assumes to know. Ignorance may be the result of laches, which is criminal; mistake argues diligence, which is commendable. Mere ignorance is no mistake, yet a mistake always involves ignorance; yet not that alone. The difference may be well illustrated by the case made in this record. If the plaintiff—the administrator—had refused to pay the distributive shares in the estate which he represented to the children of his intestate's deceased sister, upon the ground that they were not entitled in law, that would have been a case of ignorance, and he would not be heard for a moment upon the plea that, being ignorant of the law, he is not liable to pay interests on their money in his hands. But the case is that he was not only ignorant of their right in law, but he believed that the defendants were entitled to their exclusion, and acted upon that belief by paying the money to them. The ignorance in this case of their right, and the belief in the right of the defendants, and action on that belief, constitute the mistake. The distinction is a practical one, in this:

that mere ignorance of the law is not susceptible of proof. Proof cannot reach the convictions of the mind undeveloped in action; whereas a mistake of the law, developed in overt acts, is capable of proof, like other facts. *Culbreath v. Culbreath*, 7 Ga. 64, 70, 50 Am. Dec. 375.

MISTAKEN CHARITABLE USE.

A mistaken charitable use is one which is repugnant to that sound constitutional policy which controls the interest, wills, and wishes of individuals when they clash with the interest and safety of the whole community. Property given to superstitious uses is given by law to the king to dispose of as he pleases, and it falls properly under the cognizance of a court of revenue; but when property is given to a mistaken charitable use, the chancery court, seeing that the intention of the testator was charitable, carries out such intention by varying the use, and in this a mistaken charitable use differs from a superstitious use. *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 10 Sup. Ct. Rep. 792, 807, 136 U. S. 1, 34 L. Ed. 481.

MISTREATING WITH VIOLENCE.

The term "mistreating with violence," in Pen. Code, art. 570, subd. 6, providing that killing will be justifiable if done to prevent maiming, and the homicide may take place at any time while the offender is mistreating with violence the person injured, though he may have completed the offense, does not include an assault merely, for, though an assault upon a party is certainly to mistreat him, it does not constitute violence. *High v. State*, 10 S. W. 238, 242, 26 Tex. App. 545, 8 Am. St. Rep. 488.

MISTRESS.

"Mistress," as used in Code 1880, § 2700, prohibiting unlawful cohabitation with a mistress, etc., does not include a pupil who allows her teacher during a short period of time to commit a few acts of sexual intercourse with her openly in the schoolroom. *Brown v. State* (Miss.) 8 South. 257.

MISTRIAL

Mistrial is an erroneous trial on the ground of some defect in the persons trying; as, if the jury came from the wrong county, or because there was no issue formed, or if no plea be entered, etc. (3 Bouv. Law Dict. [3d Ed.] p. 155.) According to Blackstone, such an error would be ground for arrest of judgment. Thus, in a proceeding for a partition, where there was no plea filed, but the parties appeared and submitted the

cause on a mere statement of facts, and judgment was rendered for defendant, the trial was held to be a mistrial. *Wilbridge v. Case*, 2 Ind. (2 Cart.) 36, 37.

The term "mistrial" is aptly applied to a case in which a jury is discharged without a verdict. *Fiske v. Henarie* (U. S.) 32 Fed. 425, 427.

A "mistrial" is equivalent to no trial. *Baird v. Chicago, R. L. & P. R. Co.*, 16 N. W. 207, 61 Iowa, 359.

MISTRUST.

An instruction that the testimony of an accomplice ought to be viewed with "mistrust" is, in effect, a direction to the jury to discredit such testimony. *People v. O'Brien*, 31 Pac. 45, 48, 96 Cal. 171.

MISUSE.

"Misuse," as used in a statute providing that any corporation which shall abuse or misuse its franchises shall thereby forfeit them, means to use amiss, and may be defined as any positive act in violation of the charter or in derogation of public right, willfully done or caused to be done by those appointed to manage the general concerns of the corporation. *Baltimore v. Pittsburgh & C. Ry. Co. (Pa.)* 3 Pittsb. R. 20, 23.

"Misuse," is a simpler word than "abuse," but nearly synonymous with it. It signifies merely "to use amiss." He who would prove that any power has been misused must show that it has been afterwards used rightfully, or not used at all; and, as used in a corporate franchise reserving to the state the right to revoke the same for any abuse or misuse, means any positive act in violation of the charter and in derogation of public right, willfully done or caused to be done by those appointed to manage the general concern of the corporation. *Erie & N. E. R. Co. v. Casey*, 26 Pa. (2 Casey) 287, 318.

MITIGATE—MITIGATION.

Code Civ. Proc. § 536, declaring that in an action to recover damages for breach of marriage promise, for personal injury or an injury to property, the defendant may prove the facts, not amounting to a total defense, tending to "mitigate" the plaintiff's damages, if they are set forth in his answer, means such facts as tend to disprove malice, and so diminish or reduce the punitive or exemplary damages. *Wandell v. Edwards* (N. Y.) 25 Hun, 498, 500.

Mitigating circumstances are those which tend to disprove malice. *Gorton v. Keeler* (N. Y.) 51 Barb. 475, 481.

Mitigating circumstances are those which, though not proving the truth of the charge, yet tend in some appreciable degree towards such proof, and thus permit of an inference that defendant was not actuated by malice in his charge. They may be of such a nature as to show that defendant, if mistaken, believed the charge to be true when it was made. The mitigating facts must be connected with or bear upon the defamatory charge. The circumstances must otherwise be such as tend to disprove malice by showing that the words were spoken in the honest belief that they were true, with some reason for such belief, and without actual malice or evil design. *Morse v. Press Pub. Co.*, 71 N. Y. Supp. 348, 351, 63 App. Div. 61 (citing *Mattice v. Wilcox*, 42 N. E. 270, 147 N. Y. 624).

In the law of libel "mitigation" does not mean the pleading of facts entirely disconnected with the original libel, and which would of themselves constitute a separate and distinct libel, from that originally complained of. Hence it is the rule that for the purpose of thus proving actual malice and proving probable cause it is competent to show the source from which the information was derived, providing such information had been designated upon the charges made to that extraneous matter relating to other and entirely different, but distinct charges cannot be pleaded. *Hess v. New York Press Co.*, 49 N. Y. Supp. 894, 895, 26 App. Div. 73.

Under Code, § 165, declaring that in actions of libel and slander the defendant may, in his answer, allege both the truth of the matter charged as defamatory and any "mitigating circumstances" to reduce the amount of damages, the right to set up matter in mitigation is not confined to cases where the truth of the matter is alleged, but the mitigating circumstances referred to in the statute include any mitigating circumstances, though not constituting justification, and this may be pleaded though justification is not set up and there is no allegation that the alleged defamatory matter is true. *Heaton v. Wright* (N. Y.) 10 How. Prac. 79, 82.

MITTIMUS.

The name of a precept in writing issuing from a court or magistrate directed to an officer commanding him to convey to prison the person named therein and to the jailer to receive and keep such person; and "in strictness it imports that the party to be committed is in the presence of the court, and within the reach of the officer." *Connolly v. Anderson*, 112 Mass. 60, 62.

The ordinary employment of the term "mittimus" is merely a matter of brevity. The mittimus must be in writing, and under hand and seal of the court. It must be

properly directed, and must set forth the crime alleged. In *Hale*, P. C., the mittimus is constantly styled a "warrant." Upon the whole, if the offense be not bailable, or the party cannot find bail, he is to be committed to the county jail by the mittimus of the justice or warrant under his hand and seal containing the cause of his commitment. 4 Bl. Comm. 303. Then such justice shall, by his warrant, commit him to the county jail, etc. 1 Archb. Cr. Prac. & Pl. 165. These examples show clearly that in a legal sense a mittimus is a warrant. In the *International Dictionary* a "mittimus" is defined as a precept or warrant granted by a justice for committing to prison a party charged with crime; a warrant of commitment to prison. Webster's *Unabridged Dictionary* defines it in the same terms. Worcester's definition is a warrant by which a justice of the peace commits a defendant to prison. It follows, therefore, that under Rev. St. § 829 [U. S. Comp. St. 1901, p. 636], giving the marshal fees for service of any warrant, he is entitled to fees for service of a warrant of commitment. *Saunders v. United States* (U. S.) 73 Fed. 782, 786.

A "mittimus" after conviction is, in criminal cases, similar to an execution after judgment in a civil case. It is final process. It is carrying into effect the judgment of the court. *Scott v. Spiegel*, 35 Atl. 262, 263, 67 Conn. 349.

MIXED.

Formed by mixing; united; mingled; blended. Webster's Dict.

MIXED ACTION.

Mixed actions are those which are brought for the specific recovery of lands, as in real actions, but have joined with its claim one for damages in respect to such property, as actions of waste, where, in addition to the recovery of the place wasted, the demandant claims damages. *Hall v. Decker*, 48 Me. 255, 257.

Mixed actions are said in 1 Chit. Pl. 97, to "partake of the nature of the other two, [personal and real actions]. The plaintiff proceeds for the specific recovery of some real property, and also for damages for an injury thereto; as, in the instances of ejectment, or of waste," etc. In such actions the judgment is, if in favor of the plaintiff, that he have and recover, or, if against him, that he take nothing, and for defendant that he have and recover his costs. A suit brought pursuant to Rev. St. § 2326 [U. S. Comp. St. 1901, p. 1430], which provides that one who has filed in a land office an adverse claim to an application for patent shall commence proceedings in a court of competent jurisdiction to determine the question of the

right of possession is a purely statutory proceeding, cognizable in equity, and is not a mixed action. *Doe v. Waterloo Min. Co.* (U. S.) 43 Fed. 219, 221.

MIXED BLOOD.

"Mixed blood," as the term is used in its ordinary signification, means a person in whose veins is some portion of African blood. *Hopkins v. Bowers*, 16 S. E. 1, 111 N. C. 175.

MIXED CONDITION.

A mixed condition is one that depends on the will of one of the parties and on the will of a third person, or on the will of one of the parties and also on a casual event. Civ. Code La. 1900, art. 2025.

MIXED FLOUR.

As used in an act relating to internal revenue tax on mixed flour, the words "mixed flour" shall be taken and construed to mean the food product resulting from the grinding or mixing together of wheat, or wheat flour, as the principal constituent in quantity, with any other grain, or the product of any other grain, or other material, except such material, not exceeding five per centum in quantity, and not the product of any grain, as is commonly used for baking purposes; provided, that when the product resulting from the grinding or mixing together of wheat or wheat flour with any other grain, or the product of any other grain, of which wheat or wheat flour is not the principal constituent, as specified in the foregoing definition, is intended for sale, or is sold, or offered for sale as wheat flour, such product shall be held to be mixed flour within the meaning of said act. U. S. Comp. St. 1901, p. 2241.

MIXED LARCENY.

Mixed or compounded larceny includes, in addition to larceny, the aggravation of a taking from one's house or person. *State v. Chambers*, 22 W. Va. 779, 786, 46 Am. Rep. 550 (citing Bl. Com. Bk. 4, p. 229).

Larceny or theft at common law is distinguished into two sorts, the one called "simple" larceny or "plain" larceny, unaccompanied with any other atrocious circumstance, and "mixed" or "compound" larceny, which also includes in it the aggravation of a taking from one's house or person. Simple larceny, then, is the felonious taking and carrying away of the personal goods of another. Mixed or compound larceny is such as has all the properties of the former—simple larceny—but is accompanied by either one or both of the aggravations of taking from one's house or person. Larceny

from the person is either by privately stealing from a man's person, as by picking his pocket, or by open and violent assault. Open and violent larceny from a person, or robbery, is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear. *Anderson v. Winfree*, 4 S. W. 351, 352, 85 Ky. 597.

MIXED LIQUOR.

Within the meaning of a statute prohibiting the sale of any wine, rum, brandy, gin, whisky, or any spirituous liquor by any measure less than a quart, or any punch or any mixed liquor by any measure whatever, the term "mixed liquor," following, as it does, the specification of punch, any mixture of spirituous or other liquors prohibited to be sold separately, where the basis or substance of the liquor sold is spirituous and not mixed by the vender, comes within previous prohibition of selling spirituous liquor. *State v. Bennet* (Del.) 3 Har. 565, 566.

"Mixed liquor," as used in a statute prohibiting the sale of any mixed liquors by quantity less than five gallons, etc., meant a mixture of intoxicating drinks, and therefore an indictment in the words of the statute for selling mixed liquors would not be sufficient without setting forth by name the general appellation of the mixture. Liquor, as defined by the lexicographers, means anything liquid; and hence any innocent substance, like milk and water, or water and vinegar, or tea and coffee, are liquors, and may be mixed, and when mixed are mixed liquors; and, as the Legislature could not have intended to prohibit the sale of such mixtures, the term must be limited to a mixture of intoxicants. *State v. Townley*, 18 N. J. Law (3 Har.) 311, 321.

A complaint for selling a quantity of intoxicating liquor—"mixed liquor, a part of which is intoxicating"—did not properly describe any well-known kind of intoxicating liquor, but was not inconsistent with the general words "intoxicating liquor." and the whole description would be satisfied by any of the well-known forms of distilled spirits which are used as a beverage, and which contain alcohol mixed with water, and other substances, and would include whisky. *Commonwealth v. Morgan*, 21 N. E. 369, 149 Mass. 314.

MIXED MATERIALS.

"Mixed materials," as used in *Tariff Acts* March 2, 1861, § 22, and July 14, 1862, § 13, providing a duty on all goods made of mixed materials in part of cotton, silk, wool, worsted, or flax, does not include imported goods composed of cotton and silk, the latter being the component part of chief value,

but such goods are embraced in the provision of Act June 30, 1864, laying a duty on all manufactures of silk, or of which silk is the component part of chief value. *Solomon v. Arthur*, 102 U. S. 208, 211, 28 L. Ed. 147.

MIXED NUISANCE.

Mixed nuisances are those which are both public and private in their effects, —public, because they injure many persons or all the community; and private, in that they also produce special injuries to private rights. *Kelly v. City of New York*, 27 N. Y. Supp. 164, 166, 6 Misc. Rep. 516.

MIXED POLICY.

"Mixed policies," as the term is used in marine insurance, means policies on vessels for a certain designated time, while engaged in voyages at and between certain ports. *Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317, 339, 27 Am. Rep. 455.

MIXED PRESUMPTION.

A mixed presumption consists chiefly of certain inferences which, from their strength, importance, and frequent occurrence, track, as it were, the observations of the law, and they, being constantly recommended by judges and acted on by juries, become in time as familiar to the courts, and occupy nearly as important a place, as a presumption of law itself. They are in fact quasi presumptions. *Dickson v. Wilkinson*, 44 U. S. (3 How.) 56, 59, 11 L. Ed. 491.

MIXED PROPERTY.

Mixed property is that which, though falling under the definition of things real, is attended with some of the legal qualities of things personal; also property which, though falling under the definition of things personal, is attended with some of the legal qualities of things real. This is the definition of the American and English Enc. Law. A better definition, says the court, is as follows: That kind of property which is not altogether real nor personal, but a compound of both. Heirlooms, tombstones, monuments in a church, and title deeds to an estate are of this nature. *Miller v. Worral*, 48 Atl. 586, 587, 62 N. J. Eq. 776.

The term "mixed property" in a will in which testator gave all his estate and property, real, personal, and mixed, to a certain beneficiary, in trust to pay over the net income to certain beneficiaries, was construed not to include a leasehold estate, though the testator left no mixed property properly so called. "The language of the will shows that the testator had in view not only the property which he then had,

but whatever property he might afterwards acquire during his life, and intended to leave no doubt that it should pass to the trustees whatever it might be. By the use of the word 'mixed' he removed such doubt. It is not necessary, therefore, to suppose that he used it in any unnatural or unusual sense for the purpose of designating property which is clearly personalty." *Minot v. Thompson*, 106 Mass. 583, 585.

MIXED QUESTION OF LAW AND FACT.

A mixed question of law and fact is one mixed of law and fact. Thus the question of probable cause in an action for false imprisonment involves the consideration of what the facts are, and what the reasonable deductions from the facts are, and is hence a mixed question of law and fact. If the facts are not in dispute, the question is for the court. Upon the disputed facts the jury must be left to pass, but the court must determine, on the facts found, whether or not probable cause exists. *Bennett v. Eddy*, 79 N. W. 481, 483, 120 Mich. 300.

MIXED WAR.

Mixed war is war carried on between a nation on one side and private individuals on the other. *People v. McLeod* (N. Y.) 25 Wend. 482, 576, 37 Am. Dec. 328.

MIXTURE.

The noun "mixture" is defined in Webster's Dictionary as that which is mixed or mingled; a mass or compound consisting of different ingredients blended together. *Rose v. State*, 11 Ohio Cir. Ct. R. 78.

Act March 20, 1884, as amended April 22, 1890, prohibiting the adulteration of foods, contains a proviso to the effect that the statute shall not apply to "mixtures or compounds" recognized as ordinary articles of food sold in packages distinctly labeled as mixtures or compounds, and which are not injurious to health. Held, that the phrase "mixture and compound" means something resulting from the putting together of parts or ingredients other than as nature has put together in the fruits of the earth, and an article of food which is produced by abstracting from a natural fruit a valuable part is not a compound or mixture. *Rose v. State*, 11 Ohio Cir. Ct. R. 74.

MO.

Judicial notice will not be taken that the word "Mo." in a pleading describing a note sued on as having been made at St. Louis, Mo., means the state of Missouri. *Ellis v. Park*, 8 Tex. 205, 206.

MOB.

See "Common Mob"; "Rebellious Mob."

Rapalje, in his Dictionary, defines a "mob" as "an assemblage of many people acting in a tumultuous and riotous manner, calculated to put good citizens in fear and endanger their persons and property." In 15 Am. & Eng. Enc. Law, p. 693, the term "mob" has been defined as "an unorganized assemblage of many persons intent on unlawful violence; a riot involving a multitude." In the common dictionaries the word "mob" is defined as a disorderly crowd; a promiscuous assemblage of rough, riotous persons; a rabble; and they show that it is a French term imported into our language during the reign of Charles II. *Alexander v. State*, 50 S. W. 716, 717, 40 Tex. Cr. R. 390.

"The word 'mob' is not strictly a legal term, but a vernacular word, descriptive of a large and aggravated riot. The Century Dictionary defines it as a 'riotous assemblage; a crowd of persons gathered for mischief or attack; a promiscuous multitude of rioters.' It is defined in the Standard Dictionary as 'a turbulent or lawless crowd; a disorderly or riotous gathering or assembly; a rabble, throng; as, the excess of the mob.' Bouvier, in his Law Dictionary, defines it as 'a tumultuous rout or rabble; a crowd excited to some violent or wrongful act. The word, in legal sense, is practically synonymous with 'riot'; but the latter is the more correct term.' It is also described as an unorganized assemblage of many persons intent on unlawful violence. Abb. Law Dict." A crowd of men, women, and children, numbering at times from 100 to 150, who invaded plaintiff's premises, and demolished buildings thereon, and carried away materials without notice or warning, was a "mob," within the meaning of General Municipal Law, c. 17, § 21, declaring that cities shall be liable in damages for the destruction of property therein by a mob or riot without the owner's consent and contributory negligence. *Marshall v. City of Buffalo*, 64 N. Y. Supp. 411, 413, 50 App. Div. 149.

A fire occasioned approximately by lawful orders of the military authorities on account of the approach of an invading army was not a loss by fire occasioned by "mobs or riots" within an exception in an insurance policy. *Harris v. York Mut. Ins. Co.*, 50 Pa. 341, 350.

Under an act for the suppression of mob violence, making counties liable for damages caused by mobs, it is held that an instruction in an action against a county under the statute that, if the collection of individuals who lynched the deceased had assembled without any unlawful purpose, and after-

wards committed the acts of violence which resulted in the death, plaintiff could not recover, unless they had specifically agreed to be a mob after they had assembled, was erroneous. *Campaign County Com'rs v. Church*, 62 Ohio St. 318, 57 N. E. 50, 48 L. R. A. 738, 78 Am. St. Rep. 718.

Any collection of individuals assembled for any unlawful purpose, intending to do damage or injury to any one, or pretending to exercise correctional power over other persons by violence, and without authority of law, shall be regarded as a "mob," and any act of violence exercised by them on the body of any person shall constitute a "lynching." *Bates' Ann. St. 1904, Ohio, § 4426-4.*

MOB VIOLENCE.

The term "mob violence," according to the definitions as transcribed in the dictionaries of the words "mob" and "violence," means the infliction of some physical injury on a person by a multitude of people acting in a riotous and unlawful manner; so that, if two or more persons combine for the purpose of inflicting by force some injury upon another, and then, in pursuance of such combination, they unlawfully and willfully kill any person by such violence, such persons are deemed guilty of murder by mob violence. The term, as used in *Gen. Laws Sp. Sess. 25th Leg. p. 40, § 1*, providing for trial in another county of persons accused of killing by "mob violence," means those taking a prisoner from an officer and killing him, and not persons conspiring to kill another through malice. *Alexander v. State*, 50 S. W. 716, 717, 40 Tex. Cr. R. 395.

The term "mob violence," as used in *Gen. Laws Sp. Sess. 25th Leg. p. 40*, providing that wherever two or more persons shall combine together for the purpose of "mob violence," and in pursuance thereof shall take human life by such violence, they are guilty of "murder by mob violence," is so uncertain as to escape intelligible construction, and therefore the statute is inoperative and void. *Augustine v. State*, 52 S. W. 77, 82, 41 Tex. Cr. R. 59, 96 Am. St. Rep. 765.

MOCK.

To "mock," according to the lexicographers, means to deride, to laugh at, to ridicule, to treat with scorn and contempt. Where there was a controversy between the accused and another, in which the accused became grossly excited, and the next day, under the same excitement, he assailed the other party with abusive language, it was a "mocking" within *Gen. St. tit. 12, § 123*, making it a crime to mock any person with abusive or indecent language or gestures. *State v. Warner*, 34 Conn. 276, 279.

MOD.

Where a testator had previously and in express terms disposed of his models which were valuable, subsequently added a codicil disposing of all his tools, bankers, "mod," and marble in the yard, which assortment of property was of no considerable value unless the word "mod" should be construed to mean "models," it will not be construed to have that meaning. *Goblet v. Beechy*, 2 Russ. & M. 624, 625 (reversing 8 Sim. 24, 28).

MODE.

"Mode" means the customary manner; prevailing style; the manner in which a thing is done; and, as used in *Laws 1882, c. 410, §§ 1371-1381*, providing the mode of conducting a trial in district courts, indicates the progressive course of business from the commencement of the trial to its termination, and is applicable to every step of the proceedings. *Douglas v. Seiferd*, 41 N. Y. Supp. 289, 292, 18 Misc. Rep. 188.

"Mode," as used in a statute repealing several acts in relation to taxation of land to railroad companies, so far as the "mode" of taxing such lands conflicts with the provisions of the act, is used in its broader sense of "method" or "system," and does not refer to the mere machinery for taxation, such as listing, assessing, etc. *State v. Luther*, 57 N. W. 464, 466, 56 Minn. 156.

"Mode," as used in *Const. art. 19, § 24*, which provides that the Legislature shall provide a mode of contesting elections, includes place as well as manner. *Glidewell v. Martin*, 11 S. W. 882, 885, 51 Ark. 559.

"Mode," as used in the Civil Code, providing that all objections to the mode of an offer of performance which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor if not then stated, includes a condition upon which the offer of performance is made to depend. *Kofoed v. Gordon*, 54 Pac. 1115, 1118, 122 Cal. 314.

Act Cong. March 3, 1875, relating to the improvements on the Wisconsin and Fox rivers in the state of Wisconsin, providing that the officers in charge of such works may take certain lands and property lying adjacent thereto under certain circumstances, after first paying the value thereof, which may be ascertained "in the mode" provided by the laws of the state wherein such property lies, is not to be limited to the method, form, or manner of the proceedings themselves, but embraces both the proceedings to condemn land and the tribunal in which they are to be taken. Hence, proceedings under this act will be taken in

the state courts. *Jones v. United States*, 4 N. W. 519, 521, 48 Wis. 385.

The mode of the commission of a crime, the instrument with which the murder was effected, whether it was held in the right hand or the left, whether the wound was inflicted upon the head or the body, are entirely apart from the nature and cause of the accusation, within the meaning of Act March 31, 1860, § 20, providing that in all criminal prosecutions, the accused shall have a right to be informed of the nature and cause of the accusation against him. *Cathcart v. Commonwealth*, 37 Pa. St. 108, 114; *Campbell v. Commonwealth*, 84 Pa. 187, 199.

MODES OF PROCEEDING.

See, also, "Form and Mode of Proceeding."

The practice, pleadings, and forms and modes of proceedings in the uniformity of practice act (17 Stat. 197), requiring the practice, pleadings, forms, and modes of proceedings in law actions in the federal courts to correspond with such practice, etc., in the state courts, does not apply to the personal conduct and administration of the judge in the discharge of his separate functions, and therefore the refusal of the judge to allow the jury to take written instructions with them to the jury room is not erroneous, though permitted by the practice act of Illinois. *Nudd v. Burrows*, 91 U. S. 426, 442, 23 L. Ed. 286.

The expression "practice, pleadings, and forms and modes of proceeding," as used in the federal uniformity of practice act, is well satisfied without including in it the subject of evidence. At all events, it cannot be regarded as covering matters connected with the subject of evidence, which are regulated by specific provisions of law found in the same title of the same statute. *Beardsley v. Littell* (U. S.) 2 Fed. Cas. 1178, 1179.

MODES OF PROCESS.

The term "mode of process" is equivalent to "mode of proceeding" or "mode and manner of proceeding." *United States v. Martin* (U. S.) 17 Fed. 150, 155; *United States v. Rundlett* (U. S.) 27 Fed. Cas. 915, 917; *Wayman v. Southard*, 23 U. S. (10 Wheat.) 1, 27, 6 L. Ed. 253.

The words "modes of process," as used in the process act of the 27th of September, 1879, providing that modes of process in the Circuit and District Courts of the United States in suits at common law shall be the same in each state as are now used or allowed in the Supreme Courts of the same, as understood in their natural sense embrace the forms of process and the effect. It is entirely certain that by the conjoint

operation of the judicial act and the process act the means to be used in the administration of justice as to their nature, form, and effect were fixed upon a permanent basis, subject to alteration by no other legislative power than that of Congress and by the power given the courts of the United States by acts of Congress. Whoever would know what are the remedies in a given case must inquire what they were in the particular state at the time, and these remedies are exactly of the same efficacy, and have the same power, and operate now as then. The process is nothing but for the effect. The court is nothing without its process. To leave this dependent upon state legislation would be to leave the administration of justice in the federal court at the mercy of the state. The phrase "and modes of process" is applicable to every step taken in the case, and is equivalent to the mode and manner of proceeding, and relates to the progress of a suit from its commencement to its close. *Wayman v. Southard*, 23 U. S. (10 Wheat.) 1, 6 L. Ed. 253.

The expression "modes of process," as used in the federal process act of 1789, indicates the progressive course of the business in a cause from its commencement to its termination, and applies to proceedings which take place after judgment as well as before the satisfaction of a judgment, including the conduct of the officer in the execution of the process. *Koning v. Bayard* (U. S.) 14 Fed. Cas. 842.

The modes of process include all the regulations and steps incident to the process of execution from its commencement to its termination, as prescribed by the state laws, so far as they can be made to apply to the federal courts. *Duncan v. Darst*, 42 U. S. (1 How.) 301, 306, 11 L. Ed. 139.

MODEL:

A model is a copy or imitation of the thing to be represented, and where a witness testifies that he exhibits a model it is to be inferred, in the absence of all proof to the contrary, that the model is correct. *State v. Fox*, 25 N. J. Law (1 Dutch.) 566.

A model is a fac simile in three dimensions, a reproduction in miniature of objects under consideration. A miniature of the underground workings of a mine, showing the shafts, tunnels, drifts, cross-cuts, etc., in all their details, is a model, and does not fall within any definition of the word "map." *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 70 Pac. 1114, 1126, 27 Mont. 288.

MODERATE.

An order for goods "on moderate terms" is a sufficient memorandum within the

seventeenth section of the statute of frauds. *Ashcroft v. Morrin*, 4 Man. & G. 450.

In construing Laws 1856, p. 106, which provides that lands used for farming purposes, and not divided into lots and blocks, and all outlots within a municipal corporation shall be assessed at a moderate cash value by the acre, the court says that: "If there is a difference between the value and moderate cash value of property, it is difficult to define what that difference is. I suppose the meaning of a moderate cash value is a medium cash value—that is, neither the highest nor lowest cash value, but between the two—and this would be precisely where I suppose it is the duty of an assessor to fix it under a statute requiring him to assess the property at its value." *Dean v. Gleason*, 16 Wis. 1, 17.

By the common as well as the modern law, the master has authority over the mariners on board his vessel, and they are bound to obey all his lawful commands. In cases of disorderly and disobedient conduct he may lawfully correct them in a moderate and reasonable manner, and this rule of temperance and moderation in punishment must necessarily depend on the particular circumstances of each case, the urgency of the occasion, the temper and conduct of the culpable party, the dispositions, state of discipline, and habits of obedience of the crew. All are elements of the case, and may go to justify a greater or less degree of severity in the punishment. It would be holding the master to too severe a rule to amerce him in damages because in a case where punishment was deserved he may, in the opinion of the court, have somewhat exceeded the limits of a moderate and reasonable chastisement. The nature of the subject does not admit of any precise or exact measure, and the court cannot, without great injustice, make of its judgment a bed of Procrustes, and requires of all masters an exact conformity with it. *Butler v. McClellan* (U. S.) 4 Fed. Cas. 906, 907.

MODERATE SPEED.

The term "moderate speed," as used in the statute requiring vessels to be run at moderate speed in fogs, etc., is not capable of any definition which would apply to a speed of any given number of miles an hour, alike under all circumstances. What would be a moderate speed in the open sea would not be allowable in a crowded thoroughfare, or in a narrow channel; and under the same circumstances in other respects the speed should be the more moderate as the fog is more dense. The only rule that can be deduced from the decided cases is that the duty of going at a moderate speed in a fog requires a speed sufficiently moderate to enable the steamer under ordinary

circumstances seasonably, usefully, and effectually to do three things required of her in the statute, namely, to slacken her speed, or, if necessary, to stop and reverse. The *Blackstone* (U. S.) 3 Fed. Cas. 543, 544; The *City of New York* (U. S.) 35 Fed. 604, 609; The *Allianca* (U. S.) 39 Fed. 476-480; *Dolner v. The Monticello Potter*, 7 Fed. Cas. 858, 859.

The question of what is moderate speed is largely a question of circumstances, having reference to the density of the fog, the place of navigation, the probable presence of other vessels likely to be met, the state of the weather as affecting the ability to hear the fog signals of other vessels at a reasonable distance, the full speed of the ship herself, her appliances for rapid maneuvering, and the amount of her steam power kept in reserve as affecting her ability to stop quickly after hearing fog signals. The *Normandie* (U. S.) 43 Fed. 151, 156; The *Oceanic* (U. S.) 61 Fed. 338, 355.

Moderate speed means moderated speed, reduced speed, less than usual speed. *Clare v. Providence & S. S. Co.* (U. S.) 20 Fed. 535, 536; The *City of Atlanta* (U. S.) 26 Fed. 456, 461.

Moderate speed has reference to the steamer's ordinary speed and her ability to stop quickly, the density of the fog, and the means which vessels have of observing each other so as to avoid danger. It is something materially less than that full speed which is customary and allowable when there are no obstructions in the way of safe navigation. To continue at full speed until in sight of another vessel is not going at a moderate speed. The *City of New York* (U. S.) 15 Fed. 624, 628.

Moderate speed of a vessel in a fog is that rate which will permit the same to stop, after hearing a fog signal, in time to avoid the vessel which has complied with the law in giving such signal. The *Michigan* (U. S.) 63 Fed. 295, 297.

Moderate speed implies such a speed as is consistent with the utmost caution, requiring the vessel to be under complete control. The *Eleanora* (U. S.) 8 Fed. Cas. 420, 425.

Moderate speed is such speed as would admit of the boat coming to a full stop within her share of the distance that separates her from another steamboat after the latter's whistle is audible. The *Le-panto* (U. S.) 21 Fed. 651, 659.

A moderate speed is not a fixed rate for all vessels, or for all occasions. It has reference to all the circumstances which affect the ability of the steamer to keep out of the way; not merely, therefore, to the circumstances external to the ship, but also to the power and ordinary full speed of the steamer

herself, because a fast vessel with powerful engines can be handled more quickly, stop sooner, back faster, and get out of the way quicker, going at a given rate, than a steamer of less power going at the same rate. Eight knots, therefore, might be a moderate speed for a steamer whose ordinary rate was fifteen knots, and not at all moderate for another whose maximum speed was about eight. No steamer's speed is moderate so long as she is going at her ordinary full speed. The State of Alabama (U. S.) 17 Fed. 847, 952.

For a steamer whose full speed is twelve knots an hour, and which is near the entrance to New York Harbor, in a thick fog, a speed of five and one-half to six knots per hour is not a moderate speed, required of vessels in case of fog by article 22 of the New International Rules. The Martello (U. S.) 39 Fed. 505, 509.

"Moderate speed," as used in rules of navigation, providing that a steamship in a fog shall run at a moderate speed, does not mean fifteen miles an hour. The Rhode Island (U. S.) 17 Fed. 554, 557.

A vessel maintaining a speed of nine or ten miles an hour in a dense fog is not going at a moderate speed. Northwest Transp. Co. v. Boston Marine Ins. Co. (U. S.) 41 Fed. 793, 797.

Though the term "moderate speed" is difficult to define with mathematical precision, it is apparently settled that a reduction of but one knot from a full speed of sixteen is not a compliance with the International Rules of 1885, art. 13, requiring vessels navigating in a fog to do so at a moderate speed; nor is ten knots moderate speed if it does not enable the steamer to avoid a vessel sighted in her track at a distance of from twice to three times her length. The Saale (U. S.) 63 Fed. 478, 480, 11 O. C. A. 302 (citing The Pennsylvania, 86 U. S. [19 Wall.] 125, 135, 22 L. Ed. 148; The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687; The City of New York, 147 U. S. 72, 73, 13 Sup. Ct. 211, 37 L. Ed. 84).

MODERATOR.

A moderator is primarily the presiding officer at a town meeting called for the transaction of general business, and his duties as election officer, when any such duties devolve upon him, are an incidental, and often but a small, part of that of which he is to do. The office is of ancient origin, and its incumbent is chosen by a vote of the people. Wheeler v. Carter, 62 N. E. 471, 180 Mass. 382.

MODIFY.

The term "modify," in a statute authorizing the court to modify a report of commissioners as to the amount of compensation to

be paid for property injured in the construction of ditches, etc., was said to mean "change." Lucas County Com'rs v. Fulton County Com'rs, 3 Ohio Dec. 159, 163.

The term "modify," as used in St. 1867, p. 111, authorizing the board of supervisors of a county to equalize, modify, or discharge a tax, is not synonymous with the other words "equalize" or "discharge," as used in the act, so that when the supervisors had acted on a petition to modify it exhausted its powers to subsequently act on a petition to equalize or to discharge. State v. Ormsby County Com'rs, 7 Nev. 392, 397.

As amend.

Under the power given by the Constitution to the General Assembly to modify, in its discretion prior acts of incorporation for municipal purposes, the power to modify includes a power to amend a charter of a municipal corporation by enlarging the jurisdiction territorially or otherwise of such corporation. Wiley v. Corporation of Bluffton, 12 N. E. 165-168, 111 Ind. 152.

As create.

"Modify" means to change or vary, to qualify or reduce; and the power given to modify implies the existence of the subject-matter to be modified. When exercised to modify, it does not destroy identity, but effects some change or qualification in form or qualities, powers, or duties, purposes or objects, of the subject-matter to be modified, without touching the mode of creation; and the word implies no power to create or bring into existence, but only the power to change or vary in some particular and already created or legally existing thing, and is so used in Const. art. 7, § 18, providing that the Legislature may modify or abolish grand jurors. State v. Tucker, 61 Pac. 894, 897, 36 Or. 291, 51 L. R. A. 246; State v. Lawrence, 7 Pac. 116, 12 Or. 297.

As substitute.

"Modify," as used in Code Proc., giving the General Term power to modify a judgment on appeal from the Special Term, includes the power not only of altering partially the judgment which is appealed from, but of substituting in its place the exact judgment which the inferior court ought to have rendered. Astor v. L'Amoreaux, 6 N. Y. Super. Ct. (4 Sandf.) 524, 538.

MOHAMMEDAN.

A Mohammedan is a person believing in the religion of Mohammed, and in Mohammed as a true prophet. Hale v. Everett, 53 N. H. 9, 82, 16 Am. Rep. 82.

MOHAMMEDANISM.

Mohammedanism is the religion of those who acknowledge Mohammed to be the true

prophet. *Hale v. Everett*, 53 N. H. 954, 16 Am. Rep. 82.

MOIETY.

"Moiety," as used in a will directing testatrix's husband to manage their joint estate to the best advantage of himself and their daughter during her minority, and that on attaining her majority she should come into possession of her moiety, means a half. *Sutton v. Harvey*, 57 S. W. 879, 881, 24 Tex. Civ. App. 26.

The fair construction of a general conveyance of "one full moiety" of a ship, without saying more, is that the conveying parties are owners of the whole. *Reed v. Williams*, 5 Taunt. 99, 100.

The word "moiety," which is accompanied generally, whether in pleading or conveyance, by the words "half part" as synonymous or explanatory of its force, carries with it the signification of the part or interest which the party takes in any subject-matter. A bequest of "my moiety of the house" carries with it the signification of the part or interest which the party takes in the subject-matter, and the devisee took an estate in fee, and not an estate for life only. *Atkinson v. Fawcett*, 3 Man., G. & S. 274, 282.

MOLD.

A mold is a receptacle into which a softer material is injected to take its shape when hardened. *Rubber Coated Harness Trimming Co. v. Welling*, 97 U. S. 7, 10, 24 L. Ed. 942.

The words "mold" and "mould" have the same meaning. In the Century Dictionary it is said the proper spelling is "mold," like gold (which is exactly parallel phonetically), but "mould" has long been in use, and is still commonly preferred in Great Britain. *McCarty v. United States* (U. S.) 101 Fed. 113, 115, 41 C. C. A. 242.

MOLEST—MOLESTATION.

A religious Jew, who believes it is his religious duty to abstain from work on Saturday, is not "hurt, molested, or restrained" in his religious sentiments or persuasions by a statute or municipal ordinance prohibiting the sale of goods to merchants on Sunday. *Frolickstein v. City of Mobile*, 40 Ala. 725, 727.

Const. art. 2, part 1, providing that no subject shall be "hurt, molested, or restrained in his person or estate" for worshiping God in the manner and season most agreeable to the dictates of his own conscience or for his religious profession or sentiments,

means "prosecution by punishing any one for his religious opinions, however erroneous they may be. But an atheist is without any religion, true or false. Disbelief in the existence of any God is not a religious, but an antireligious, sentiment. If, however, it were otherwise, the rejection of a witness for such a disbelief or sentiment as incompetent would be no violation of this article of the Constitution. It is not within its words or meaning. It would not hurt, molest, or restrain him in his person, liberty, or life." *Thurston v. Whitney*, 56 Mass. (2 Cush.) 104, 110.

"Molestation," as used in a contract of indemnity providing that the property indemnified shall not sustain damage or molestation by reason of the acts or omissions of another, or by reason of any liability incurred through such acts or omissions, should be construed to enlarge the condition beyond what would be implied from the word "damage," and hence there is no breach until actual damage is sustained. *Gilbert v. Wilman*, 1 N. Y. (1 Comst.) 550, 563, 49 Am. Dec. 359.

MOLLIE.

"Mary" and "Mollie" are really the same, and constitute only one name, and the name "Mollie" is used as a diminutive of "Mary," and hence an averment in an indictment that medicines and drugs were administered to "Mollie B." constituted an allegation that they were administered to "Mary B." *State v. Watson*, 1 Pac. 770, 774, 30 Kan. 281.

MOLTEN METAL.

"Molten metal," as used in an application for a patent claiming that the process of refining iron applied to the art of mixing "molten metal," includes the treatment of all molten metal, whether drawn from furnace or cupola. *Cambria Iron Co. v. Carnegie Steel Co.* (U. S.) 96 Fed. 850, 851, 37 C. O. A. 593.

MOMENTUM.

Momentum is defined by Webster to be the quantity of motion in a moving body, being always proportionate to the quantity of matter multiplied into its velocity. All revolving wheels possess the quality of equalizing their momentum and accumulating power proportioned to their weight and velocity, and are capable of use as momentum wheels; the term signifying those whose momentum is utilized in working machinery. *American Road Mach. Co. v. Pennock & Sharp Co.* (U. S.) 45 Fed. 252, 253.

MONEY.

See "Alabama Money"; "Bank Money"; "Brandon Money"; "Canada Money"; "Condemnation Money"; "Current Money"; "Freight Money"; "Lawful Money"; "Paper Money"; "Prize Money"; "Public Money"; "Ready Money"; "Surplus Money"; "Tennessee Money"; "Texas Money"; "Undepreciated Money."

Action for recovery of, see "Action for Recovery of Money."

All moneys, see "All."

Other money, see "Other."

Webster defines money: "(1) Coin; stamped metal; pieces of metal, usually gold, silver, or copper, stamped by public authority, and used as the medium of commerce. (2) Hence any currency usually and lawfully employed in buying and selling as the equivalent of money, as bank notes and the like." *Carter v. Cox*, 44 Miss. 155.

Money is a sign which represents the value of all commodities bearing the impress of the authority by which it was issued and made a standard of value. It may be in metal, in leather, or in paper. Metal is the most proper for a common measure. *Curcier v. Pennock* (Pa.) 14 Serg. & R. 51, 60.

The term "money" is used to designate the whole volume of the medium of exchange recognized by the custom of merchants and the laws of the country, just as land designates all real estate. *Taylor v. Robinson* (U. S.) 34 Fed. 678, 681; *Allibone v. Ames*, 68 N. W. 165, 167, 9 S. D. 74, 33 L. R. A. 585.

"Money," in its strict, technical sense, is coined metal, usually gold or silver, upon which the government stamp has been impressed to indicate its value; in its more popular sense, any currency token, bank notes, or other circulating medium in general use as the representative of value; a generic term, covering everything which by consent is made to represent property, and passes as such currently from hand to hand. The word designates the whole volume of the medium of exchange, regardless of its character or denomination. *State v. Downs*, 47 N. E. 670, 671, 148 Ind. 324; *Hopson v. Fountain*, 24 Tenn. (5 Humph.) 140; *Miller v. McKinney*, 73 Tenn. (5 Lea) 93, 96; *Graham v. State*, 24 Tenn. (5 Humph.) 40, 41; *State v. Hill*, 66 N. W. 541, 559, 47 Neb. 456; *United States v. Lucius Beebe & Sons* (U. S.) 122 Fed. 762, 767, 58 C. C. A. 562.

The word "money," in the provision of the Constitution requiring compensation for property taken for public purposes to be paid in money, refers to the amount to be paid, as well as the kind of payment. Money is the measure of value as well as the medium of

payment. *Symonds v. City of Cincinnati*, 14 Ohio, 147, 148-183, 45 Am. Dec. 529.

Money is not only a medium of exchange, but it is a standard of value. Nothing can be such a standard which has no intrinsic value, or which is subjected to frequent changes in values. From the earliest period in the history of civilized nations, we find pieces of gold and silver used as money. These metals are scattered over the world in small quantities. They are susceptible of division, capable of easy impression, and have more value in proportion to weight than size, and are less subject to loss by wear and abrasion, than any other material possessing these qualities. *Legal Tender Cases*, 4 Sup. Ct. 122, 137, 110 U. S. 421, 28 L. Ed. 204.

"Money," as used in Pen. Code, § 53, providing that every person who shall falsely represent or personate another, and shall receive any money or other property whatever in such assumed character, shall be deemed guilty of larceny, not only designated a class or genus of property, but included therein every kind or species of that class. *State v. White*, 41 Pac. 182, 183, 12 Wash. 417.

Money is in all things a chattel, and subject to the law which governs other chattels, except so far as it has the peculiar attribute of money in carrying its title by delivery from hand to hand, and that exception is only made on grounds of public policy for the protection of those who take it as money. *In re Ketchum* (U. S.) 1 Fed. 815, 829.

The term "money," in Rev. St. § 5095, which forbids any person holding a lucrative office from being interested in any public building contracts or work of any kind erected or built for the use of the public, or from receiving any percentage, drawback, premium, or profit or money whatever on any contract, must be construed to mean any money by way of percentage, drawback, premium, or profits upon any contract of others with the public. *Baker v. Crook County Com'rs*, 59 Pac. 797, 798, 9 Wyo. 51.

The term "money" or "moneys," as used in the chapter of the Code relating to taxation, shall be held to mean and include gold, silver, and other coin, bills of exchange, bank bills, or other bills or notes authorized to be circulated as money, whether in possession or on deposit, subject to the draft of the depositor, or the person having the beneficial interest therein, on demand. *Civ. Code Ala.* 1896, § 3906, subd. 3.

The word "money" or "moneys," when used in the revenue act, shall be construed to include gold, silver, or other coin, paper or other currency, used in barter and trade as money in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein is

entitled to withdraw in money on demand. Hurd's Rev. St. Ill. 1901, p. 1493, c. 120, § 292, subd. 8.

The term "money" or "moneys," whenever used in the revenue act, shall be held to mean and include gold and silver coin, and bank notes of solvent banks in actual possession, and every deposit which the person owning and holding in trust or having the beneficiary interest therein is entitled to withdraw in money, on demand, within the state or elsewhere, provided the same is subject to order. Ann. St. Ind. T. 1899, § 4900.

The term "money" or "moneys," whenever used in the act relating to taxation, shall be held to mean gold and silver coin, treasury notes, bank notes, and every deposit which any person owning the same or holding in trust, and residing in the state, is entitled to withdraw in money on demand. Gen. St. Minn. 1894, § 1511.

The term "money" or "moneys," wherever used in the chapter relating to the revenue, shall be held to mean gold, silver, or other coin, and paper or other currency, used in barter and trade as money. Rev. St. Mo. 1899, § 9123.

The word "money" includes all kinds of coin, and all kinds of paper issued by or under the authority of the United States, circulating as money, whether in possession, or deposited in some bank or elsewhere. Cobbe's Ann. St. Neb. 1903, § 10,403.

"Money or moneys" means gold and silver coin, treasury notes, bank notes, and every deposit which any person owning the same, or holding in trust, and residing in the state, is entitled to withdraw as money, or on demand. Rev. Codes N. D. 1899, § 1176.

As used in the title relating to taxation, the term "money" or "moneys" shall be held to mean and include any surplus or undivided profits held by societies for savings or banks having no capital stock, gold and silver coin, bank notes of solvent banks, in actual possession, and every deposit which the person owning, holding in trust, or having the beneficiary interest therein is entitled to withdraw in money on demand. Bates' Ann. St. Ohio 1904, § 2730.

The term "moneys" or "money" shall be held to mean and include gold, silver, and other coin, bank bills, and other bills or notes authorized to be circulated as money, whether in possession, or on deposit subject to the draft of the depositor or person having the beneficiary interest therein on demand. Civ. Code S. C. 1902, § 265.

Within the meaning of "money," as used in the chapter defining and punishing swindling and the fraudulent disposition of mortgaged property, are included, also, bank bills

or other circulating medium current as money. Pen. Code Tex. 1895, art. 945.

The term "money," as used in the chapter defining and punishing an embezzlement, includes, besides gold, silver, copper, or other coin, bank bills, government notes, or other circulating medium current as money. Pen. Code Tex. 1895, art. 941.

The term "money" or "moneys," whenever used in the title on Taxation, shall, besides money or moneys, include every deposit which any person owning the same, or holding in trust, and residing in this state, is entitled to withdraw in money on demand. Rev. St. Tex. 1895, art. 5064.

The term "money" or "moneys," whenever used in the chapter relating to the assessment and collection of taxes, shall be held to mean gold and silver coin, gold and silver certificates, treasury notes, United States notes, bank notes, and every deposit which any person owning the same, or holding in trust, and residing in this state, is entitled to withdraw in money. Ballinger's Ann. Codes & St. Wash. 1897, § 1658.

The word "money," as used in the chapter relating to the assessment of taxes, includes not only coin, but all notes, tokens, or papers which circulate or are used in ordinary transactions as money or currency, and deposits which, either in terms or effect, are payable in money on demand. Code W. Va. 1899, p. 199, c. 29, § 47.

The word "money," as used in the laws for the assessment and collection of taxes, shall be construed to mean not only gold, silver, and copper coin, but bullion and all notes used as currency. Code Va. 1887, § 489.

As cash.

A bequest of all moneys that the testator should die possessed of entitled the legatee only to the cash—using that term in its popular sense—which the testator was possessed of at the time of his death, or had on deposit in a bank. Beck v. McGillis (N. Y.) 9 Barb. 35, 60.

"Moneys," as used in a letter respecting the disposition of all the writer's moneys at his death, should be construed in the sense of cash. In re Price's Will, 32 Atl. 455, 456, 169 Pa. 294.

"Money," as used in a will disposing of testatrix's money, specifying it variously as money to her credit, money she might have by her, and money by her, does not include anything but what was literally money. The word "money" may, when so intended by the testator, include any kind of property, even land, but it can never have that effect when the text of the testament clearly shows that it was not so intended. In re Levy's Estate, 28 Atl. 1068, 1070, 161 Pa. 189.

In its ordinary and popular sense, "money" signifies cash, or its equivalent, used as a circulating medium. It does not include choses in action, or money loaned or deposited as an investment, or due on notes, bonds, and mortgages. It may properly include money deposited in a bank, to be checked out by the owner at his pleasure, and used and treated as cash—placed there for safe-keeping. *Mann v. Mann*, 14 Johns. 1, 7 Am. Dec. 416. As used in a bequest of what money testatrix might have on hand, and what money might be remaining at her decease, the word should be construed in its ordinary acceptance. *Hancock v. Lyon*, 29 Atl. 638, 67 N. H. 216.

The term "money, rights, or credits," in a statute authorizing the charging of a person as trustee who has in his hands money, rights, or credits of the principal debtor, means cash in the hands of the trustee, or debts due from him belonging to the principal debtor. *Sargeant v. Leland*, 2 Vt. 277, 280.

The words "money of which I may die possessed," in a will bequeathing such money, have been held to be limited to cash in the house, to money at bankers, and to ready money at call. *Smith v. Burch* (N. Y.) 28 Hun, 331, 332 (citing *Byrom v. Brandreth*, L. R. 16 Eq. 475; *Collins v. Collins*, L. R. 12 Eq. 455).

The word "money," as used in a will whereby the testator, after making specific bequests of personal property, gave all the rest of his personal property, consisting of money, not before or afterwards mentioned, to specified beneficiaries, means cash or ready money; and, so interpreted, the beneficiaries would be entitled to take nothing but the remainder of the cash, if any, which was on hand at the death of the testator after the payment of the debts and general legacies. *In re Carr's Estate*, 13 Pa. Co. Ct. R. 643, 645.

Comp. St. c. 83, art. 4, § 2, provides that the State Treasurer shall account for the paying over of all moneys received by him to his successor in office. Held, that the statutory duty can be complied with only by delivering the amount in actual cash, and the turning over of a certificate of deposit is not a compliance. "It is absurd to say that a promise to pay money is money." *State v. Hill*, 47 Neb. 456, 552, 66 N. W. 541.

As chattel.

See "Chattel."

Coin distinguished.

"Money" is a generic term. It is not the synonym of "coin." It includes coin, but is not confined to it. It includes whatever is lawfully and actually current in buying and selling, of the value and as the equivalent of

coin. By universal consent, under the sanction of all courts everywhere, or almost everywhere, bank notes lawfully issued, actually current at par, in lieu of coin, are money. The common term "paper money" is, in a legal sense, quite as accurate as the term "coin money." *Klauber v. Biggerstaff*, 3 N. W. 357, 359, 47 Wis. 551, 32 Am. Rep. 781.

Coin differs from money as the species differs from the genus. Coin is a particular species, always made of metal, and struck according to a certain process called "coining." Money is any matter which has currency as a medium in commerce. *Borle v. Trott*, 5 Phila. 366, 403.

As income.

"Money," as used in a will providing for the education of a beneficiary, but, if he should fail to carry out such intentions, the money left him for that purpose should pass from him entirely into the body of the estate, is equivalent to "income," and means only that. *Ellicott v. Ellicott*, 45 Atl. 183, 186, 90 Md. 321, 48 L. R. A. 58.

As credits or effect.

See "Credit"; "Effects."

As lawful money.

"Money," as used in an indictment for the larceny of money will be understood to mean lawful money. *Rains v. State*, 36 N. E. 532, 137 Ind. 83.

In the construction of statutes, the word "money" or "dollars" shall be construed to mean lawful money of the United States. *Rev. Code Del. 1893, c. 5, § 1, subd. 15.*

As legal tender.

"Money is that kind of currency which is a legal tender in payment of debts, or which is convertible at par into legal tender currency." *Thompson v. Woodruff*, 47 Tenn. (7 Cold.) 401, 414; *Anderson v. Ewing*, 13 Ky. (3 Litt.) *245, *247.

"Money," as used in the statute making the misapplication of public money an offense, means the legal tender metallic coins or legal tender currency of the United States. *Lewis v. State*, 12 S. W. 736, 28 Tex. App. 140. As to robbery, the term "money" means the same thing. It means that which is by the acts of Congress of the United States made a legal tender, whether coin or currency. *Thompson v. State*, 34 S. W. 629, 630, 35 Tex. Cr. R. 511; *Jackson v. State*, 29 S. W. 265, 266, 34 Tex. Cr. R. 90 (citing *Otero v. State*, 17 S. W. 1081, 30 Tex. App. 450); *Burries v. State*, 35 S. W. 164, 165, 36 Tex. Cr. R. 13.

"The term 'money' means, when used in connection with the crimes of theft and rob-

bery, and all other offenses prohibiting the unlawful acquisition of property, except swindling and embezzlement, the metallic coins or legal tender currency of the United States of America." *Menear v. State*, 17 S. W. 1082, 30 Tex. App. 475.

In authorizing the issuance of bonds for \$1,000,000, and in the use of the term "money," the Legislature must be supposed to have meant that money which constitutes the basis of the general business of the country, and was a legal tender for the payment of debts. Therefore there was no authority for the issuance of bonds payable in gold coin, and they were void for want of authority for their issuance. *Woodruff v. State*, 6 South. 235, 66 Miss. 298.

The word "money," in *Mansf. Dig. § 5775*, authorizing a redemption of land sold at a tax sale by the payment of an amount of money equal to the taxes, etc., means that which is legal tender for the payment of debts. *Murphy v. Smith*, 3 S. W. 891, 892, 49 Ark. 37.

Where a decree provides for the payment of money, that term imports a constitutional currency. *Shackleford v. Cunningham*, 41 Ala. 203, 205.

On a trial for robbery, where the indictment accused defendants of "taking \$60.50 in money which passed current as money of the United States of America, of the value of \$60.50," and the evidence was that they held the victim down, turned his pockets wrong side out, and took all his money, and that he had the money in bills in his watch pocket, the indictment and evidence were sufficient. Money is held to be legal tender money, under the acts of Congress, whether the same is coin or currency; and evidence that the property taken was bills, being money, could not be construed to be other than currency money of the United States of America. *Colter v. State*, 39 S. W. 576, 37 Tex. Cr. R. 284.

"Money," as used in the statutes pertaining to theft, means legal tender; the coin or legal tender currency of the United States. An indictment charged the larceny of \$20 in money. The evidence was that the money was "a \$20 bill," and "a \$20 bill, American money." The court said: "We do not think this evidence shows the bill was money, as that term was understood in our statutes pertaining to the crime of theft. If the property was not in money, as above defined, then the indictment should have described it; and, if that could not have been done, then that fact should have been stated in the indictment." *Otero v. State*, 17 S. W. 1081, 30 Tex. App. 450.

As money decreed.

"Money, costs, charges, and expenses," as used in 1 & 2 Vict. c. 110, § 18, enacting

that all decrees and orders of courts of equity, and all rules of courts of common law, whereby any sum of "money, or any costs, charges, or expenses," shall be payable to any person, shall have the effect of judgments in the superior court of common law, means money decreed or ordered to be paid, together with the costs, charges, and expenses, to be ascertained in the usual way by the officer of the court. *Jones v. Williams*, 8 Mees. & W. 349, 358.

As all personal estate.

In a will disposing of both real and personal estate, a provision that, if there was any "money" remaining after the testator's death, it should be equally divided, meant not only actual cash, but all the personal estate, consisting chiefly of money loaned. *Decker v. Decker*, 12 N. E. 750, 752, 121 Ill. 341.

"Money," as used by a testatrix whose personal property consisted chiefly of stock, after bequeathing a number of pecuniary and specific legacies, in bequeathing whatever remains of money to her children, refers to the general residuary of personal estate. *Dowson v. Gaskoin*, 2 Keen, 14, 18.

Testatrix bequeathed certain legacies to be paid out of the "money of my husband's estate now belonging to me," and then bequeathed the residue of such money to others. Testatrix's husband had died 10 months before, leaving all his property, real and personal, to his widow. The estate consisted of money in bank, notes due him, goods and chattels, and a farm; the personality being in the hands of the husband's executor. Held that, since the testatrix would have received her husband's personality as money the term "money," as used in her will, included the proceeds of all such personality, but did not include the real estate she was to receive from her husband's estate. *Sweet v. Burnett*, 20 N. Y. Supp. 24, 25, 65 Hun, 159.

The word "money," in a will, may be construed to mean cash, or may stand for the whole personal estate, and is to be received in the one or the other sense as will best effectuate the general intention of the testator, deduced from every part of the will. Where a testator bequeathed to his daughter household goods, a horse, and cow, and "also one-third of the remainder or balance of 'money' that may be left after paying all my just debts and funeral expenses," and his intention was manifestly to divide his personal estate equally between his two children, the word "money" will be construed to mean personality. *Smith v. Davis* (Pa.) 1 Grant, Cas. 158.

Property synonymous.

As property, see "Personal Property" "Property."

A will provided that "I give," etc., "all the estate, real or personal, of which I may

die seised or possessed, as follows:" and concluded by expressing the intention "that, after paying certain legacies, my mother shall receive the balance of my money for her benefit as long as she lives, and for her heirs, afterward." Held, that the word "money" was evidently used in its widest and popular sense, in which it is frequently employed as synonymous with "property and estate." *In re Miller's Estate*, 48 Cal. 165, 171, 22 Am. Rep. 422.

Money, although the representative of property, is not the synonym of that term, so that a direction in a will that money shall be used in the payment of debts is not equivalent to a direction that specifically devised personalty shall be so used. *Alexander v. Miller's Heirs*, 54 Tenn. (7 Heisk.) 65, 76.

Value imported.

"Money," in common language, means money of full and lawful value, and such is its use in an indictment charging the stealing of a certain number of dollars of money, so that the value of the money need not be alleged. *People v. Spencer*, 58 N. Y. Supp. 1127, 1129, 27 Misc. Rep. 491.

Money imports value, so that, in a prosecution for robbery of money, proof of value is not necessary. *State v. Hyde*, 61 Pac. 719, 724, 22 Wash. 551.

In construing an indictment for embezzlement, describing the embezzled property as a large sum of money, to wit, the sum of \$1,100, it was said that such allegation is not an averment of value, nor from which it can be said judicially that the thing embezzled had value, or, if it had value, what was its amount. Had it been averred that the money embezzled was lawful money of the gold coinage or the silver coinage or the legal tender notes of the government of the United States, the court could have taken judicial notice of its value, but as it was competent for the prosecution to prove, under the indictment, that it was money in either or all of those forms, or dollars of foreign coinage, or in bank notes, or in the shape of a mere credit, it was necessary to allege that it had value, and what value, as an ingredient of the offense. *Bork v. People (N. Y.)* 16 Hun, 476-479.

Bank bills or notes.

See also, "Bank Note."

The word "money" may be extended to bank notes, when they are known and approved of, and used in the market as cash. *Judah v. Harris (N. Y.)* 19 Johns. 144, 145.

"Money," in its most general significance, means a representative of value; a medium of commerce and exchange. In this general term are included lawful tender mon-

ey and current money, and the one or the other are intended by certain forms of expression, according to the times and currencies in use, and the same words used at different periods may convey different ideas as to the kind of money intended. During the Revolutionary War, when paper money was the only circulating medium of the states, current money meant paper money. After that was abolished and called in, and gold and silver became the currency, then 'current money' meant coin money, and not paper, but bank notes have been treated as money in Kentucky." *Jones v. Overstreet*, 20 Ky. (4 T. B. Mon.) 547, 550.

By the term "money" is generally understood that which is the lawful currency of the country—that which may be tendered and must be received in discharge of a subsisting debt—and a contract to pay in current bank notes is a contract to pay in money. *Morris v. Edwards*, 1 Ohio (1 Ham.) 189, 204.

"Money" is a generic term, and covers everything which by consent is made to represent property, and passes assets currently from hand to hand, whether it be the iron of Spartans, the cowry of the African, the gold and silver of the world, or the paper of modern Europe and America. Current bank paper has been invariably held, both in Europe and United States, to be a good legal tender in payment of debts, unless it be objected to upon the ground that it is not gold and silver; and this could never have been done, had it not been considered as money, as nothing but money can be tendered in payment of a debt. *Crutchfield v. Robins*, 24 Tenn. (5 Humph.) 15, 17, 42 Am. Dec. 417.

"Money," as used in a declaration against an innkeeper charging him with liability for a loss of money of a guest, stolen from the inn, includes bank notes, as "they answer all the purposes of money in the ordinary concerns of the community, and are treated as money in the payment of debts, the purchase of goods, and in everyday transactions between man and man. They are legal tender unless specially objected to at the time, and will pass by will under the general description of money." *Towson v. Havre de Grace Bank (Md.)* 6 Har. & J. 47, 53, 14 Am. Dec. 254.

The term "money" does not include a bank note. Such a note does not differ in its nature from any other promissory note payable to bearer. *Filgo v. Penny*, 6 N. C. 182, 183.

"Money," as used in statutes providing that an action by petition and summons can only be brought on notes or bonds for the direct payment of money, does not include bank notes. *Fleming v. Campbell*, 24 Ky. (1 J. J. Marsh.) 499 (citing *Loudon v. Kenney*, 4 Ky. [1 Bibb] 330).

Bank bills are not money. *Hevener v. Kerr*, 4 N. J. Law (1 South.) 58, 59.

Bank bills are not mere securities or documents for debts, but are treated as money in the ordinary course and transaction of business by the general consent of mankind. *Miller v. Race*, 1 Burrows, 457; *Ross v. Bank of Burlington (Vt.)* 1 Aikens, 43, 49, 15 Am. Dec. 664.

Same—Criminal law.

It is not accurate to call currency in the shape of bills or notes money, for in the true sense they are not money. *State v. Hoke*, 84 Ind. 137, 139 (citing *Boyd v. Olvey*, 82 Ind. 294; *Hamilton v. State*, 60 Ind. 193, 28 Am. Rep. 653).

The term "money" does not include bank notes. Hence an indictment under a statute making it an offense to play at games, etc., for money—the indictment charging that the defendant played at a game of faro for money—cannot be sustained by proof that bank notes were bet, nor would such an indictment be sustained by proof that property was bet. *Hale v. State*, 8 Tex. 171, 172.

"Money," as used in an indictment charging defendant with cheating another of his money at cards, does not include bank notes. *United States v. Wells* (U. S.) 28 Fed. Cas. 520, 521.

The term "money" does not include bank notes. They pass as cash, and constitute a part of the circulating medium, and for many purposes are to be considered as money; but, in the strict sense of the term, they are not included therein. *Dowdle v. Corpening*, 32 N. C. 58, 60.

As used in Acts 1806, c. 6, that provided for the punishment of the crime of feloniously taking money, goods, or chattels from a dwelling house, etc., in the daytime, "money" does not include a bank note, as a bank note was considered as having no extrinsic value, nor importing any property in possession of the person from whom it is taken, although the words used in the act might have a more comprehensive meaning in a testament in favor of intention, yet in a penal law it cannot be construed to embrace bank notes. *State v. Jim*, 7 N. C. 3, 5.

"The term 'money,' though it may have a popular import which in ordinary parlance means, or at least includes, bank notes, in its true technical import means lawful money of the United States, or, in other words, gold or silver coin, and, when used in judicial proceedings, is always to be taken in its technical sense; and thus an indictment for keeping a gaming table, at which a game of chance was charged to have been played for money, is not supported by proof that bank notes were played for. *Pryor v. Commonwealth*, 32 Ky. (2 Dana) 298.

"Money," as used in Crimes Act, § 18, providing that any person stealing any money, the property of another, shall be guilty of larceny, cannot be construed to include bank bills, for strictly bank bills are not money, though for many purposes they are treated as such. *Johnson v. State*, 11 Ohio St. 324, 325.

The term "money," in the statute defining robbery as taking from the person of another any money or personal property of any value whatsoever, with force and by violence, and with intent to steal or rob, does not include bank notes. *Turner v. State*, 1 Ohio St. 422, 426.

"Money," as used in an indictment for obtaining by false pretenses a package of money containing \$60 in bank bills, should not be construed as only applicable to coined metals, as gold, silver, or copper, but as applicable to bank bills or notes, which represent coin, or are a substitute for it, and pass current as a medium of exchange and commerce, which is the sense in which it is frequently and generally used, and therefore there was no repugnancy or uncertainty in speaking of a package of money containing \$60 in bank bills. *State v. Kube*, 20 Wis. 217, 222, 91 Am. Dec. 390.

Under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], providing that every officer of any association who embezzles, extorts, or willfully misapplies any moneys, etc., of the association shall be guilty of misdemeanor, etc., it is held that the term "money" includes the bills of national banking associations, as well as the coin and legal tender notes of the United States. This holding seems to be influenced by the fact that in other sections the terms "money" and "lawful money" are both used, and apparently not indiscriminately, but with the intention of limiting the meaning of the term "money" by the use of the term "lawful," so as to make the term "lawful money" include only legal tender, while the term "money" seems to have been intended to include all forms of legal circulating medium. *United States v. Johnson* (U. S.) 26 Fed. Cas. 621, 623.

Bonds, notes, and mortgages.

A bequest of all of testator's money remaining after the payment of legacies and debts is held to include bank stock and bonds, in view of a context favoring such construction. *Fulkeron v. Chitty*, 57 N. C. 244, 245.

A count for money loaned in an action of assumpsit should not be construed to allege the loan of a United States bond, and hence such a count is not sustained by evidence of the loan of such a bond. *Waterman v. Waterman*, 34 Mich. 490, 492.

In a bequest to the testator's wife of all the rest, residue, and remainder of the moneys

belonging to the testator's estate at the time of his decease, "money" should be construed in its ordinary acceptation, and to mean only cash. The word does not comprehend bonds, mortgages, and other choses in action; there being nothing in the will to show a different intention of the testator. *Mann v. Mann*, 14 Johns. 1, 12, 7 Am. Dec. 416.

The term "money" does not include bonds, mortgages, and notes, and hence a will devising testator's moneys does not include such property, unless he uses language showing an intention to use the word to describe such property. *Mann v. Mann's Ex'rs* (N. Y.) 1 Johns. Ch. 231, 236.

A testator, after reciting that he had sold his real estate, and paid to his heirs in cash the largest part of their portions, and that he was making his will dividing the residue, gave legacies to his wife and two of his heirs in full of their portions. He then bequeathed to his three other heirs all the money which should be left at his decease. At the date of his will almost all his property consisted of notes and money on hand. The amount of money then on hand could not be ascertained, but he commonly had not more than \$30. At his decease he had notes to the amount of over \$300 and \$31 in money. Held, that the word "money," as used in the will, should be construed to include money due on his notes at his decease. *Morton v. Perry*, 42 Mass. (1 Metc.) 446, 449.

As used in a will in which the testator bequeaths money, "money" includes cash, bank notes, money at the banker's, notes payable to bearer, etc., but does not include choses in action, promissory notes not payable to bearer, government stock, etc. *Dabney v. Cottrell's Adm'x* (Va.) 9 Grat. 572, 579.

In Rev. St. § 152, declaring that the State Treasurer shall have charge of all moneys paid into the state, the term does not include promissory notes. *State v. McFetridge*, 54 N. W. 1, 16, 84 Wis. 473, 20 L. R. A. 223.

Promissory notes are not the kind of notes which pass as money, for they are not public tokens. Bank notes are public tokens—as much so as weights and measures or the alnager's seal. In practice, they represent the coin of our country, and pass currently as money. *State v. Patillo*, 11 N. C. 348, 349.

A bequest of all of testator's money on deposit is held to include a deposit of United States bonds. *Gillen v. Kimball*, 34 Ohio St. 352, 363.

Where a defendant agreed to pay for the surrender of a lease \$850, and \$50 of said sum to be paid by a surrender to

plaintiff of his note for \$50, and the balance in money, a demand for payment of the money was substantially a demand for the note also; and a failure to pay authorized plaintiff to sue for the \$850, and recover that amount. *Cosand v. Bunker*, 50 N. W. 84, 85, 2 S. D. 294.

Negotiable paper is not such property, money, or effects as the statute contemplates, in describing what species of property may be made the subject of garnishment. This view seems to be based largely upon the provision of the statute that the property, money, or effects which may be reached by garnishment must be in the possession of or due from the person garnished to the defendant in the judgment or decree which forms the basis of the garnishment proceeding at the time the writ is served upon him, and that the maker of negotiable paper cannot be regarded as indebted to the original party before the maturity of the paper. *Hubbard v. Williams*, 1 Minn. 54, 55 (Gil. 37, 38), 55 Am. Dec. 66.

Checks.

A check is not money, but is only a token representing money; and where a party receives a check representing a sum of money, and immediately returns it to the person from whom he receives it, either the transaction does not represent a loan at all, or it represents a momentary loan, which is immediately repaid. *Griffen v. Train*, 81 N. Y. Supp. 977, 981, 40 Misc. Rep. 290.

The term "money," within the meaning of a statute providing that a party redeeming from an execution sale must deposit the amount required by law in money, does not include a check for money, though indorsed by the cashier of the bank as being good. *Lytle v. Etherly*, 18 Tenn. (10 Yerg.) 389.

On the trial of a person accused of betting at a gaming table, proof of the betting of checks, as representing money, was sufficient proof of the betting of money to warrant a conviction. *Walton v. State*, 14 Tex. 381.

"Money," as used in a statute relating to the embezzlement of money, means legal tender coin, and also paper issued by the government, or by banks by lawful authority, and intended to pass and circulate as money, so that a person who draws a check on money deposited in a bank, and fraudulently transfers such check, is as guilty of embezzlement as though he drew the money from the bank, and then wrongfully transferred the same. *Bartley v. State*, 73 N. W. 744, 752, 53 Neb. 310.

The word "money" is a very general term, and is often used to include checks or other like kinds of paper. *State v. Griswold*, 46 Atl. 829, 830, 73 Conn. 95.

In Rev. St. § 152, declaring that the State Treasurer shall have charge of all moneys paid into the state, the term "moneys" does not include checks. *State v. McFetridge*, 54 N. W. 1, 16, 84 Wis. 473, 20 L. R. A. 223.

Certificates of deposit.

An averment of obtaining money by false pretenses is not supported by proof of obtaining a certificate of deposit of a bank. *Commonwealth v. Howe*, 132 Mass. 250, 258.

The word "money," as used in statutes providing that a county treasurer should be liable for all moneys in his hands as such treasurer, does not mean merely coin and bank bills, but the statute must be construed in the light of commercial usage and common knowledge of business transactions. Such other construction would be extremely technical, and is uncalled for. "Money" is a generic term, and may mean not only legal tender coin and currency, but also any other circulating medium, or any instruments or tokens in general use in the commercial world as the representatives of value, and includes a certificate of deposit. *Montgomery County v. Cochran*, 121 Fed. 17, 21, 57 C. C. A. 261 (citing *State v. McFetridge*, 54 N. W. 1, 10, 998, 84 Wis. 473, 20 L. R. A. 223).

Claim for damages.

Within Hill's Ann. Laws, § 3587, providing for the payment of interest on money after it becomes due, a person is not entitled to interest on a claim for damages for failure to deliver building materials promised to be paid on a note, as the damages were not liquidated so as to bear interest until the judgment was rendered. *Poppleton v. Jones*, 69 Pac. 919, 922, 42 Or. 24.

Confederate money.

"Money" is a generic term covering anything that by consent is made to represent property, and pass as such in current business transactions, so that a payment of a debt in Confederate money which was accepted will be regarded as a full settlement. *Hendry v. Benlisa*, 20 South. 800, 802, 37 Fla. 609, 34 L. R. A. 283.

The word "money," in its most strict and technical sense, means coined metal, usually gold or silver, upon which the government stamp has been impressed to indicate its value; but in its more popular use it imports any currency tokens, bank notes, or other circulating medium in general use as the representative of value, and it will be used in the popular sense according to the business and medium in general use, so that a sale by a trustee for Confederate currency will not be held to be fraudulent as not being

for money. *Kennedy v. Briere*, 45 Tex. 305, 309.

The term "money," even during the Civil War, in the states of Rebellion did not include Confederate treasury notes; and therefore an order of sale made during the war, directing the commissioner to sell lands for money, did not authorize a sale for such notes. *McNeill v. Shaw*, 62 N. C. 91.

In holding that Confederate money received by the clerk of a court during the Civil War was a discharge of the judgment of the court, "this court, in the case of *Crutchfield v. Robbins*, 4 Humph. 15, said that 'money' is a generic term, and covers everything which by consent is made to represent property, and passes as such currently from hand to hand, whether it be the iron of the Spartans, the cowry of the African, the gold and silver of the world, or the paper of modern Europe and America." In answer to the contention that the Confederate notes were not money, though they passed current from hand to hand, because they are not convertible into gold and silver at par, it was said that neither were bank notes, nor were United States legal tender or national bank notes, which shortly after that displaced all other kinds of currency, convertible into bank notes at par. If the convertibility of the paper at par be the test, it would follow that payment in the notes of any of the old banks, when they constituted the chief currency of the country, or at a later day in national bank notes, when they were only worth 40 cents on the dollar, would be no satisfaction without express authority to receive such payment. *Burford v. Memphis Bulletin Co.*, 56 Tenn. (9 Heisk.) 691-694.

Debts and credits.

Money is not included in the term "credits," within Const. art. 7, § 2, providing that a deduction of debts from credits may be authorized; and hence the revenue act of 1893, as amended by Sess. Laws 1895, p. 508, is void, so far as it provides for the deductions of debts from money. *Pullman State Bank v. Manring*, 51 Pac. 464, 466, 18 Wash. 250.

A bequest of all of testator's money is held to include a credit due testator upon an ordinary current coin. *Dowson v. Gaskoin*, 2 Keen, 14, 16.

In a declaration in a case against a sheriff for not levying under a *fi. fa.*, and falsely returning *nulla bona* as to part of the goods, stating that the writ was indorsed to levy £60, besides officers' fees, poundage, etc.; that the defendant take in execution goods of the debtor of the value of the moneys so indorsed on the writ, the word "moneys" embraced the debt, officers' fees,

and sheriff's poundage—in short, all the items indorsed on the writ—and was not to be taken to mean debt only. *Slade v. Hawley*, 13 Mees. & W. 757, 764.

Act 1794 (Rev. c. 424) provides that, on the appearance and examination of a garnishee, the court may enter up judgment and award execution against him for all sums of money due to the defendant from him. Held, that the phrase "all sums of money" embraces every debt, whether due by bond or otherwise. *Skinner v. Moore*, 19 N. C. 138, 153, 30 Am. Dec. 155.

Where a testator gave to his son and two others all the money left at his decease, it was held, with reference to the condition of his property, that the term "money" included money due on promissory notes. *Morton v. Perry*, 42 Mass. (1 Metc.) 446, 449.

Deposits in bank.

"Money," as used in Pub. St. c. 11, § 4, providing that personal estate shall, for purposes of taxation, include goods, chattels, money, and effects, wherever they are, means money on hand, but includes money at the immediate command of the taxpayer, deposited in the usual way in the bank for safety and convenience. *Gray v. Street Com'r's of City of Boston*, 138 Mass. 414, 415.

"Moneys," as used in a will bequeathing the moneys of which the testator should die possessed, means cash, which at the time of his death the testator had in his possession or deposited in the bank, and nothing else, the term being used in its popular sense. *Beck v. McGillis* (N. Y.) 9 Barb. 35, 59 (citing *Mann v. Mann's Ex'rs* [N. Y.] 1 Johns. Ch. 231).

A will bequeathing all testator's moneys, etc., should be construed to include the balance standing to the testator's credit at his banker's, which did not bear interest, as well as money in his house, but it does not include that part of the balance at the banker's which bore interest. *Manning v. Purcell*, 31 Eng. Law. & Eq. 452, 457.

"Money," as used in a bequest of money, does not include funds in the savings bank; that being in the nature of an investment drawing interest, and not usually subject to the immediate order of the owner. The term "money" must be understood in its legal or popular sense to mean gold or silver, or the lawful currency of the country, or bank notes, or money deposited in bank for safe-keeping. *Beatty's Ex'r v. Lalor*, 15 N. J. Eq. (2 McCart.) 108, 109.

A will by which testator gave and devised to a certain church "all my moneys," after paying all just debts, should be construed as including deposits in a savings bank not specifically disposed of. *Jenkins v. Fowler*, 63 N. H. 244, 245.

Drinks or table fees.

The term "money," in a statute prohibiting the playing of pool if money is bet on the game, includes table fees or drinks. *Stone v. State*, 3 Tex. App. 675, 676.

Money in hands of beneficiary.

"No money or aid to be paid," within the meaning of Pub. Laws 1897, c. 320, § 14, relating to fraternal beneficiary organizations, and providing that the money or other aid to be paid shall not be liable to attachment by trustee or other process, and shall not be seized, taken, or appropriated, or applied by any legal or equitable process, nor operation by law, to pay any debt or liability of a certificate holder, or any beneficiary thereof, is limited to money or other aid while in the possession of the beneficiary organizations, and does not exempt such money from liability after it comes into the possession of the beneficiary. *Hathorn v. Robinson*, 51 Atl. 236, 237, 96 Me. 33.

Produce.

The term "money," in an indictment, charging the selling of foreign merchandise, without license, for money, does not include produce, and therefore the indictment is not sustained by proof that the merchandise was sold for produce. *Colson v. State* (Ind.) 7 Blackf. 590.

Real estate.

The word "money," as used in a will whereby the testator made a bequest of the remainder of her money, after making bequests of specific articles and pecuniary legacies, does not mean coin, stamped metal, or the lawful currency of the country, but means property or estate, and therefore it passes realty purchased by the testator after the making of the will. The estate at the time of the making of the will consisted of personality only, but it appeared from the will and the surrounding circumstances that the testator intended to dispose of the entire estate. In *re Jacobs' Estate*, 9 Pa. Co. Ct. R. 40, 48.

The word "money," as used in a gift of money in a will, may include a farm or specific real estate, "but certainly no such violent extension of the word beyond its normal and proper meaning can ever be justified unless the intention to so use it is clearly manifest on the face of the will, and put beyond all reasonable doubt." *Sweet v. Burnett*, 32 N. H. 628, 629, 136 N. Y. 204.

The word "moneys," as used in wills containing bequests of moneys, "has but seldom been held to apply to real estate." *Widener v. Beggs*, 12 Atl. 311, 312, 118 Pa. 374.

The word "money," used in making a devise in a will, will be construed to in-

elude both personal and real property, if it appears from the context and on the face of the instrument that such was the intention of the testator. *In re Miller's Estate*, 48 Cal. 165, 171, 22 Am. Rep. 422.

The satisfaction of an execution is a payment of the debt in money, although land is taken on the execution, and accepted in satisfaction at its value. *Randall v. Rich*, 11 Mass. 494, 498.

A devise of real estate to be converted into money and distributed among devisees is a devise of money and not a devise of land. *Nevitt v. Woodburn*, 51 N. E. 593, 595, 175 Ill. 376.

A bequest by a testator of all the money he might have in a certain fund or elsewhere did not pass a devise of lands. *Metz v. Metz*, 7 Pa. Dist. R. 194, 195.

Securities.

"Money," as used in a will directing payment of certain sums "out of money to my credit in the bank," will be held as synonymous with and embracing securities in the bank. *In re Torrance's Estate*, 37 N. Y. Supp. 583, 585, 15 Misc. Rep. 317.

A gift in a will of money, with nothing in the context to explain or define the sense in which it is used, includes cash, bank notes, and money in bank, but does not include choses in action or securities. The word, however, is often popularly used as synonymous with "personal estate," and has been construed to include, besides money, literally so called, not only debts and securities, but the whole personal estate, and often the proceeds of realty. *Dillard v. Dillard*, 34 S. E. 60, 62, 97 Va. 434 (citing *Dabney v. Cottrell's Adm'x* [Va.] 9 Grat. 572; *In re Miller's Estate*, 48 Cal. 165, 17 Am. Rep. 422).

A will provided that "all the money I shall have at the time of my death shall be equally divided between my four children and my adopted child R. in remembrance of her loving kindness to mother. I also leave some silver to R." Testatrix left \$2.50 in cash, and bonds and notes to the amount of \$2,300. Held, that the word "money," as used in the will, should be construed to include securities. *Hinckley v. Primm*, 41 Ill. App. 579, 581.

The residuary clause of a will giving the remainder of the money which the testator might have at his decease to certain persons should be construed to include all of the testator's personal estate, consisting of notes, bonds, mortgages, and other securities. "Money" is a term used in a specific, and also in a general and more comprehensive, sense. In its specific sense it means what is coined or stamped by public authority, and has its

determinate value fixed by governments. In its more comprehensive and general sense, it means wealth—the representative of commodities of all kinds, of lands, and of everything that can be transferred in commerce. *Paul v. Ball*, 31 Tex. 10, 16.

In a will disposing of both real and personal estate, a provision that, if there was any money remaining after the testator's death, it should be equally divided, meant not only actual cash, but all the personal estate, consisting chiefly of money loaned. *Decker v. Decker*, 12 N. E. 750, 752, 121 Ill. 341.

State bank notes, etc.

The term "money" does not include state scrip. *Wells v. Cole*, 27 Ark. 603, 605.

Paper medium issued by a state in pursuance of an act which does not pretend to give it the character of money, but only makes it a tender at the treasury, is not money, and therefore an instrument payable in paper medium is not payable in money. *Lange v. Kohne* (S. C.) 1 McCord, 115, 116.

While it has been held that the word "money" is a generic term, and embraces every description of coin or bank notes recognized by common consent as a representative of value in effecting exchanges of property or payment of debts, it cannot be held that a note payable in current bank notes of Tennessee is payable in the kind of money—that is, specie—which is necessary to constitute such note negotiable paper. *Whiteman v. Childress*, 25 Tenn. (6 Humph.) 303, 306.

The term "money," in a statute making all bonds, promissory notes, etc., drawn for any sum or sums of money certain, and payable to any person or order, or any person or bearer, etc., negotiable by indorsement, includes current Ohio bank notes. *Swetland v. Creigh*, 15 Ohio, 118-121.

The term "money," in a statute providing that a promissory note for the payment of a sum of money certain to the payee's order shall be negotiable by indorsement, includes current funds of the state. "Our law recognizes nothing as current funds of the state of Ohio but gold and silver coin, and bank notes issued by banks incorporated by the state, which are by law required to be of equal value with gold and silver coin of the same denomination." *White v. Richmond*, 16 Ohio, 5-7.

Stock.

A bequest of all of testator's money held to include bank stock. *Fulkerson v. Chitty*, 57 N. C. 244, 245.

A will by which testator gave and devised to a certain church "all my moneys,"

after paying all just debts, should be construed to include railroad stock not specifically disposed of. *Jenkins v. Fowler*, 63 N. H. 244, 245.

A bequest of money will not pass stock. *Hotham v. Sutton*, 15 Ves. 320, 327; *Ommanney v. Butcher*, 1 Turner & R. 260, 272; *Lowe v. Thomas*, 27 Eng. Law & Eq. 238, 239.

"Money," as used by a testator in bequeathing all his money in the Bank of England, includes stock in the funds, where the testator never had any cash in the bank. *Gallini v. Noble*, 3 Mer. 691, 692.

A will providing that in case testator's children should die before a division of the property, leaving no lawful issue, all the rest of testator's estate, including certain "money and securities," should go to his brothers, does not include shares in the capital stock of corporations. They are simply the title of a shareholder to his proportion of the corporate property and its income. Bonds, mortgages, notes, bills of exchange, and matters of like nature are securities for money. Shares of capital stock are never called "securities" unless when made so by being pledged as collateral. *Graydon's Ex'rs v. Graydon*, 23 N. J. Eq. (8 C. E. Green) 229, 231.

Surplus profits.

Under the expressed provisions of the Ohio tax laws the term "money," as used therein, means and includes any surplus or undivided profits held by societies for savings or banks having no capital stock, gold and silver coin, bank notes of solvent banks, in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw, in money on demand. *Chapman v. First Nat. Bank*, 47 N. E. 54, 56, 56 Ohio St. 310.

Tobacco.

In passing on a demurrer where a plaintiff in an action states two causes of action, one on a writing promising to pay a specified quantity of tobacco, and the other upon a writing promising to pay a certain number of dollars, the court said: "From the earliest period to this time [1828], tobacco has been considered in our judicial proceedings as current money, and actions of debt on bonds for the payment of it have been constantly brought in the debt and detinet, and without averring its value in the current coin of the state. This being the case, there is no doubt that money and tobacco debts may be sued for in the same action." *Crain v. Yates* (Md.) 2 Har. & G. 332-336.

Treasury notes or greenbacks.

"By the laws of the land the country is furnished with three kinds of money—

gold, silver and United States notes—as a medium of exchange. Money made by the coinage of gold or silver is a legal tender, as prescribed by law, in the discharge of obligations which are to be satisfied by the payment of money in general terms, and we have held that the notes of the United States issued by the authority of the laws of the national Legislature are a lawful and authorized currency, and in that sense a lawful money and a legal tender in the payment of private debts; but it does not follow that every kind or any kind of money which by law is a legal tender in the payment of debts may be tendered in satisfaction of every obligation capable of performance by the transfer and delivery of property in satisfaction of it. Gold and silver are commodities the value of which is estimated by the value of other things, in the same manner as that of the latter is estimated by the value of gold and silver. This quality or characteristic of the precious metals is not destroyed by their division into parcels bearing the impress of the mint and possessing a specific value ascertained and regulated by positive law." *Carpentier v. Atherton*, 25 Cal. 564, 569.

"Money" does not include treasury notes. *Foquet v. Hoadley*, 3 Conn. 534, 536.

In legal acceptance, "money" means current metallic coins; therefore an indictment for embezzling "money" is not sustained by proof of embezzling greenbacks or national currency notes. *Block v. State*, 44 Tex. 620, 622.

"The generic term 'money,' since the introduction and free use of bank notes and treasury notes as a circulating medium and standard of value, is understood to include such notes, as well as the authorized coin of the country." *Noble v. State*, 59 Ala. 73, 80.

"Money" as used in an indictment charging the betting of money, does not include United States treasury notes, such notes not being money in the legal acceptance. *Williams v. State*, 20 Miss. (12 Smedes & M.) 58, 63.

"Money, being the common measure of all things, has not, like other things, any particular function. It takes the place of all other things, but is represented only by standards created by law. But gold in bars is no more money than are pigs of iron, lead, or copper. Like them, it may be bought and sold by weight. But until it is coined, and the value of the coin is ascertained and declared by law, it is no more a medium of exchange or currency than any other metal would be. Thus a contract to pay a sum of "money" is satisfied by the offer of any money which has been made a legal tender in payment of all debts, whether it be gold, silver, or paper. *Wilson v. Morgan*, 27 N. Y. Super. Ct. (4 Rob.) 58, 72.

Money is any matter, whether metal, paper, beads, shells, etc., which has currency as a medium in commerce, and includes treasury notes. *Borie v. Trott* (Pa.) 5 Phila. 366, 403.

Where, in an action to recover damages for the failure to deliver cotton which had been contracted and paid for, the value of cotton in United States currency, commonly called "greenbacks," was shown, "it was error for the court to instruct that before plaintiff can recover he must prove the value of the cotton in specie, and if there is no evidence of the specie value of cotton, or of the specie value of United States treasury notes, called 'greenbacks,' then the jury can find no verdict for the plaintiff," since greenbacks, having been made legal tender for the payment of debts, were properly to be considered money for the estimate of value. *Carter v. Cox*, 44 Miss. 148, 155, 156.

Treasury notes of the United States are moneys, within the obligation of the superintendent of a mint to safely keep the "moneys" of the United States. *United States v. Smythe* (U. S.) 120 Fed. 30, 33.

Warrants.

"Money," as used in Pen. Code, art. 103, providing for the punishment of any county officer who shall fraudulently take or misapply any money belonging to the county, means legal-tender metallic coins, or legal-tender currency of the United States, and does not include bank bills, though they pass as current, nor does it include United States warrants. *Lewis v. State*, 12 S. W. 736, 28 Tex. App. 140.

"Money," as used in Const. § 14, declaring that no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money, means just compensation, paid in the measure of value or measure of compensation, which excludes not only benefits received from the improvement, but also payment in any other kind of security or commodity, such as city warrants, etc. *Redman v. Philadelphia, M. & M. R. Co.*, 33 N. J. Eq. (4 Stew.) 165, 169 (cited and approved *Martin v. Tyler*, 60 N. W. 392, 399, 4 N. D. 278, 25 L. R. A. 838).

MONEY AT INTEREST.

"In ordinary parlance, 'money at interest' has reference more to money loaned than to interest-bearing notes and accounts received for property sold." *Wasson v. First Nat. Bank*, 8 N. E. 97, 99, 107 Ind. 206.

"Money at interest," as used in Pub. St. c. 11, § 4, authorizing the taxation of money at interest, includes railroad bonds. *Hale v. Hampshire County Com'rs*, 137 Mass. 111, 115.

The expression "money at interest," as used in the revenue act, by which it is provided that money at interest, secured by mortgage or otherwise, shall be subject to taxation, includes all money at interest, whether secured or not, and the words "secured by mortgage or otherwise" in the statute add nothing to the force of the sentence. It is evident that money at interest was intended to be a separate subject of taxation, as contradistinguished from other debts due to the party. It is therefore the money at interest that is taxed, whether it be secured by mortgage or not secured, and the tax is not levied on the mortgage as such, but on the money at interest. *People v. Whartenby*, 38 Cal. 461, 465.

MONEY BILL.

A "money bill" is a bill imposing a direct tax on the people, and an inquiry into the lists of valuation of town property, and settling the same, cannot so properly be said to be a "money bill." In re Opinion of Justices, 126 Mass. 547, 549.

The exclusive privilege of the House of Representatives under Const. c. 1, § 3, art. 7, to originate "money bills," is limited to bills that transfer money or property from the people to the state, and does not include bills that appropriate money from the treasury of the commonwealth to particular uses of the government, or bestow it upon individuals or corporations. In re Opinion of Justices, 126 Mass. 557, 590.

A bill for raising revenue was technically called a "money bill" at common law. It is a bill levying a tax on all or some of the persons, property, or business of the country for a public purpose, and the assessment or listing and valuation of the polls or property preliminary thereto, and all laws regulating the same are merely measures to secure what may be deemed a just or expedient basis for the levying of a tax or the raising of a revenue. *Northern Counties Inv. Trust v. Sears*, 41 Pac. 931, 935, 30 Or. 388, 35 L. R. A. 188.

MONEY CHANGERS.

"Money changers," as used in a city charter authorizing the city to license, tax, and regulate auctioneers, merchants, and retailers, grocers, taverns, ordinaries, hawkers, peddlers, brokers, pawnbrokers, and money changers, means brokers who deal in money or exchanges, and includes a banker. "The buying and selling of uncurrent funds, and the exchanging of one kind of money for another, are equally the practice of the money changer and the banker. The term 'banker' includes all the business of a money changer." While one is a banker he is also

a money changer. Hence the city is authorized to require a banker to take out a license under the provision of the charter which applies to money changers. *Hinckley v. City of Belleville*, 43 Ill. 183, 184.

MONEY DECREE.

A decree of court awarding preliminary alimony is a "money decree," and bears interest under the statute. *Hurd's Rev. St. 1897*, p. 973, c. 24, tit. "Interest," § 3; *Harding v. Harding*, 54 N. E. 604, 180 Ill. 592.

MONEY DEMAND.

A money demand is any demand arising out of contract, express or implied, which from its nature enabled the plaintiff to make affidavit that the amount sued for is actually due. *Mills v. Long*, 58 Ala. 458, 460.

A statutory penalty where the amount is fixed or can readily be ascertained is a "money demand," within Code 1896, § 524, subd. 2, providing that any money demand may be enforced by attachment. The term "money demand" is much more comprehensive than "debt," and includes all rightful claims, whether founded upon contract, tort, or penalties, given by statute, and may be enforced by attachment when the amount is fixed or can be certainly ascertained. *Dittman Boot & Shoe Co. v. Mixon*, 24 South. 847, 848, 120 Ala. 206.

A money demand on contract is any action arising out of contract where the relief demanded is a recovery of money. *Roberts v. Nodwift*, 8 Ind. 339, 341; *Brock v. Parker*, 5 Ind. 538; *Horner's Rev. St. Ind. 1901*, § 1285.

MONEY DEPOSITED IN COURT.

See "Deposit in Court."

MONEY DUE.

See "Due."

MONEY EXPENDED.

See "Expended."

MONEY HAD AND RECEIVED.

Action for, as equitable action, see "Equitable Action."

MONEY IN HAND.

See "In Hand."

MONEY JUDGMENT.

A money judgment is a legal demand or a record debt upon which suit may be

brought. In *re Kelsey*, 43 Pac. 106, 108, 12 Utah, 393.

"Money judgment," within the meaning of Supreme Court Rule 29, requiring supersedeas bonds, where the judgment is for the recovery of money not otherwise secured, to be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on appeal, is one which adjudges a defendant, either as an individual or in a representative capacity, absolutely liable to pay a certain sum to the plaintiff, and awards execution therefor, and which may be fully satisfied by the defendant by paying into court the amount adjudged, with interest and costs; and the fact that the judgment does not involve the personal liability of defendant is immaterial. *Fuller v. Aylesworth* (U. S.) 75 Fed. 694, 701, 21 C. C. A. 505.

"Money judgment," as used in Code Civ. Proc. § 685, providing that, in all cases other than for the recovery of a money judgment, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, etc., includes a decree allowing a certain sum to a commissioner in partition for services and expenses, and hence it cannot be enforced by execution after five years. *Cortez v. Superior Court*, 24 Pac. 1011, 86 Cal. 274.

MONEY LENT.

"Money lent" means a delivery of money to another, to be returned or repaid, and differs from the lending of any other property in that it is not ordinarily expected that the identical money will be returned, and also that ordinarily, in the case of a loan of money, some compensation is provided for in the way of interest or otherwise, while the lending of other property for a compensation is termed a "hiring" or "letting," and is, so used in Rev. St. § 1001, providing that contracts for the repayment of money knowingly lent to any person gaming or betting shall be void. *Kinney v. Hynds*, 49 Pac. 403, 404, 7 Wyo. 22.

MONEY OF ANOTHER.

See "Another."

MONEY ON HAND.

See "On Hand."

MONEY ON MORTGAGES.

Lands held by a testator as mortgagee pass to the wife under a bequest of all "moneys on mortgages." The words would sufficiently pass not only the money on mortgages, but the securities also; that is, the legal estate on which the money is secured. *Guest v. Bennett*, 6 Exch. 892, 895.

MONEY ORDER.

A money order is an order for a specified sum of money, not less than 1 cent or greater than \$50, made out of the money order office, on a blank form prescribed by law, by the post-office regulations, payable at some other money-order office. *United States v. Long* (U. S.) 30 Fed. 678, 679.

MONEY SCRIVENER.

A money scrivener in England was a person, usually an attorney or solicitor, whose business it was to look up investments, see to perfecting the securities, and generally collect the interest, and they were often intrusted with the possession of the securities and the receipt of the principal loan. *Williams v. Walker* (N. Y.) 2 Sandf. Ch. 325, 328.

MONEYED CAPITAL.

Other moneyed capital, see "Other."

The term "moneyed capital," as used in Rev. St. § 5219, prohibiting the taxation of national bank shares at a greater rate than that assessed on other moneyed capital in the hands of individuals, embraces capital employed in national banks, and capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money; but it does not include moneyed capital in the hands of the corporation, even if its business be such as to make its shares moneyed capital when in the hands of individuals, or if it invests its capital in sureties payable as money. *Mercantile Nat. Bank v. City of New York*, 7 Sup. Ct. 825, 826, 121 U. S. 138, 30 L. Ed. 895; *Palmer v. McMahon*, 10 Sup. Ct. 324, 327, 133 U. S. 660, 33 L. Ed. 772; *Talbot v. Silver Bow County Com'rs*, 11 Sup. Ct. 594, 597, 139 U. S. 438, 35 L. Ed. 210; *Bressler v. Wayne County*, 49 N. W. 787, 788, 32 Neb. 834, 13 L. R. A. 614; *First Nat. Bank v. Chehalis County*, 32 Pac. 1051, 1054, 6 Wash. 64.

The words "moneyed capital," as used in Rev. St. U. S. § 5219, refer only to capital which comes into competition with the business of national banks; hence exemptions from taxation, however large, such as deposits in savings banks, or moneys belonging to charitable institutions which are exempted for reasons of public policy, and not as an unfriendly discrimination against investments in national bank shares, are not forbidden by the federal statutes. *First Nat. Bank v. Chapman*, 19 Sup. Ct. 407, 410, 173 U. S. 205, 43 L. Ed. 669 (cited in *Primm v. Fort*, 57 S. W. 86, 90, 23 Tex. Civ. App. 605); *Commercial Nat. Bank v. Chambers*, 61 Pac. 560, 565, 21 Utah, 324, 56 L. R. A. 346.

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The term "moneyed capital," as used in Rev. St. U. S. § 5219, has a more limited meaning than the term "personal property," and applies only to such capital as is readily solvable into money. *Mercantile Nat. Bank v. City of New York* (U. S.) 28 Fed. 776, 785.

"Moneyed capital," within Rev. St. U. S. § 5219, means "either money itself, or negotiable securities readily convertible into money, and having a quotable market value, as distinguished from ordinary property." *First Nat. Bank v. City of Richmond* (U. S.) 39 Fed. 309, 310.

The term "moneyed capital," as used in Rev. St. U. S. § 5219, means capital employed in a business in which the stock in trade from which profits are expected to accrue is money, including in that term absolute money, legal substitutes for money, and commercial representatives of money. *First Nat. Bank v. Turner*, 57 N. E. 110, 112, 154 Ind. 456.

The term "moneyed capital," as used in Rev. St. U. S. § 5219, is to be construed as including not only bonds, stocks, and money loaned, but "all credits and demands of every character in favor of the taxpayer." *Wasson v. First Nat. Bank*, 8 N. E. 97, 100, 107 Ind. 206.

The term "moneyed capital," as used in Rev. St. U. S. § 5219, means and describes ready money or capital invested in private banking, and does not comprise capital invested in manufacturing corporations, insurance companies, or the like, since it would not be appropriate to call such shares "moneyed capital in the hands of individual citizens," and, if it had been intended to include capital thus invested, it would have been easy to have done so by the use of more comprehensive language. *First Nat. Bank v. Waters* (U. S.) 7 Fed. 152, 156.

Wherever money is employed in the carrying on of a business the object of which is the making of profit by its use as money, it is moneyed capital. When such capital is invested in loans or securities of a permanent or temporary character, if it is so invested with a view to sale and reinvestments for the purpose of making money by the operation, it is moneyed capital. The securities themselves do not necessarily come within the definition. In other words, moneyed capital is the tool or instrument, bonds and other security are the material, in and with which it operates. *National Bank v. City of Baltimore* (U. S.) 100 Fed. 24, 29, 40 C. C. A. 254.

"Moneyed capital," as used in Act June 30, 1885, § 1, providing that all moneyed capital in the hands of individual citizens of the state shall be taxed for state purposes, means not money merely, but includes

"money employed as such in trade, and moneyed capital in the hands of an individual citizen is money thus employed by him or for his benefit." *Commonwealth v. Lehigh Val. R. Co.*, 18 Atl. 406, 409, 129 Pa. 429.

"Moneyed capital," as used in Pub. St. Mass. c. 13, § 8, providing that all bank shares shall be assessed at their cash value, and at the same rate and no greater than other moneyed capital in the hands of citizens is by law assessed, does not include the interest of individuals in insurance and trust companies, for such interest is not moneyed capital. The investments made by those institutions themselves constituting their assets, are not moneyed capital in the hands of individual citizens of the state. *National Bank v. City of Boston*, 8 Sup. Ct. 772, 773, 125 U. S. 60, 31 L. Ed. 689.

Bank notes.

"Moneyed capital," as used in Acts June 7, 1879, of June 10, 1881, and of June 30, 1885, providing that all mortgages and money owing by solvent debtors, owned or possessed by any person or persons whatsoever, and all other moneyed capital in the hands of individual citizens of the state, shall be liable to taxation for state purposes, does not include bank notes. Such notes, though in form promissory notes, do not bear interest, and are not in their ordinary use investments or "moneyed capital" in the sense of interest-bearing property, which was meant to be taxed. *Appeal of Hunter (Pa.)* 10 Atl. 429, 433.

Shares of stock.

The term "moneyed capital," as used in Rev. St. § 5219, is to be construed as including national bank stock. *First Nat. Bank v. Herbert (U. S.)* 44 Fed. 158, 159.

"Moneyed capital," as used in Rev. St. § 5219, of course includes shares in national banks. The use of the word "other" required that, if bank shares were not moneyed capital, the word "other" in this connection would be without significance, but "moneyed capital" does not mean all capital the value of which is measured in terms of money. In this sense all kinds of real and personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interests of the owner are expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation. But the property of the corporation which constitutes its invested capital may consist of real and personal property which, in the hands of individuals, no

one would think of calling "moneyed capital." But the word refers only to such moneyed capital as comes in competition with the business of national banks, and an exemption of the stocks and bonds of insurance, wharf, and gas companies, or other noncompeting capital or credits, is authorized, such property not being "moneyed capital" within the meaning of the act. The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money, where the banks are banks of issue in receiving deposits payable on demand, in discounting commercial paper, making loans, buying and selling bills of exchange, and dealing in municipal and other securities. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it, in the eye of this statute, "moneyed capital." Capital in the hands of individuals thus employed is what is intended to be described in the act of Congress. *First Nat. Bank v. Chehalis County*, 17 Sup. Ct. 629, 635, 166 U. S. 440, 41 L. Ed. 1069.

"Moneyed capital," as used in Rev. St. U. S. § 5219, includes shares in national banks, but "moneyed capital" does not mean all capital the value of which is measured in terms by money. In this sense all kinds of real and personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. The term "moneyed capital" includes shares of stock, or other interests owned by individuals, in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loans, discounts, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals, employed in a similar way, invested in loans or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment or reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as "personal property." *Bressler v. Wayne County*, 49 N. W. 787, 32 Neb. 834, 13 L. R. A. 614.

"Moneyed capital" includes shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money. The moneyed capital thus employed is invested for that purpose in securities by way

of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and re-invested. It includes money in the hands of individuals, employed in a similar way, invested in loans or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. *Washington Nat. Bank v. King County*, 38 Pac. 219, 220, 9 Wash. 607.

Shares of stock in railroad companies, insurance companies, etc., although, in a fair sense, they are "moneyed capital" in the hands of individuals, are not within the purview of section 5219 of the federal statutes, declaring that the taxes to be levied on national bank stock under state laws shall not be assessed at a greater rate than upon other moneyed capital in the hands of individuals of such state. *Mechanics' Nat. Bank v. Baker*, 46 Atl. 586, 587, 65 N. J. Law, 113.

MONEYED CORPORATION.

"Moneyed, business, or commercial corporations," within the bankruptcy act, are all corporations of a private nature organized for pecuniary profits. "Instead of undertaking to enumerate the names or descriptions of the various kinds of such corporations, language was employed broad enough to include them, and which would exclude corporations of a public, civil, or municipal character." Railways fall within the designation of "business or commercial corporations." *Winter v. Iowa M. & N. P. Co. (U. S.)* 30 Fed. Cas. 329.

"Moneyed corporation," as used in chapter 18, tit. 3, of the act in relation to corporations, means all corporations which deal in money and in the business of loaning money, and is not limited to banks. *Mutual Ins. Co. of Buffalo v. Erie County Sup'rs*, 4 N. Y. (4 Comst.) 442, 444.

Corporations created by the General Assembly whose charters contemplate the receiving or holding money on deposit, or the letting, loaning, or managing money deposited, other than banks of discount, shall be deemed "moneyed corporations" within the meaning of the chapter relating to private corporations. V. S. 1894, 3674.

Banking association.

Banking associations organized under the general law are "moneyed corporations" within the meaning of the insolvent law. *Gillet v. Moody*, 3 N. Y. (3 Comst.) 479, 487.

The term "moneyed corporations," in a statute in reference to assignments for creditors, but excepting moneyed corporations from the operation thereof, includes banking associations; but if the act authorizing their

creation provides that they are not subject to the regulations to prevent the insolvency of moneyed corporations, they are not entitled to the benefit of the exception. *Robinson v. Bank of Attica*, 21 N. Y. 406-409.

Every corporation organized under the act authorizing the business of banking is a "moneyed corporation," within the meaning of a statute relating to moneyed corporations. *Talmage v. Pell*, 7 N. Y. (3 Seld.) 328, 347.

Insurance company.

An insurance company is a moneyed corporation, and as such may make a general assignment for the benefit of its creditors on becoming insolvent. *Hill v. Reed (N. Y.)* 16 Barb. 280, 287.

Railroad.

A railroad is a "moneyed business or commercial corporation" within the bankruptcy act. In re *California Pac. R. Co. (U. S.)* 4 Fed. Cas. 1060, 1062; *Winter v. Iowa, M. & N. P. R. Co. (U. S.)* 30 Fed. Cas. 329.

Trust company.

The term "moneyed corporations," as used in Code Civ. Proc. N. Y. § 394, which prescribes the limitation governing actions against directors and stockholders of moneyed corporations, if defined in accordance with the new corporation law of 1892, is broad enough to include a mortgage trust company of another state, authorized to issue and sell its bonds, secured by mortgages, if it does business within the state of New York. *Hobbs v. National Bank of Commerce of Kansas City (U. S.)* 101 Fed. 75, 76, 41 C. A. 205.

MONEYED MAN.

The term "moneyed man" is commonly used to designate a person having large possessions. *Appeal of Jacobs*, 21 Atl. 318, 319, 140 Pa. 268, 11 L. R. A. 767, 23 Am. St. Rep. 230.

MONEYS ADVANCED.

The expression "moneys advanced," in Act Aug. 25, 1864, authorizing school directors to borrow money to reimburse the Halifax Bounty Association moneys advanced to free said township from the draft, etc., must be understood in a business or commercial sense, and that is defined by Webster to be: "Giving beforehand, furnishing of something on contract, before an equivalent is received, as money or goods towards a capital or stock, or on loan; a furnishing of money or goods for others in expectation of reimbursement." *Tyson v. School Directors of Halifax Tp.*, 51 Pa. (1 P. F. Smith) 9, 21.

MONOMANIA.

See, also, "Paranoia."

As delusion, see "Delusion."

Mania distinguished, see "Mania."

"Monomania" is a perversion of the understanding in regard to a single object or a small number of objects, with the predominance of mental excitement, as distinguished from "mania," which means a condition in which the perversion of the understanding embraces all kinds of objects, and is accompanied with general mental excitement. In *re Gannon's Will*, 21 N. Y. Supp. 960, 962, 2 Misc. Rep. 329. See, also, *Appeal of Dunham*, 27 Conn. 192, 206; *State v. John*, 30 N. C. 330, 337, 49 Am. Dec. 396; *Schuff v. Ransom*, 79 Ind. 458, 464; *Freed v. Brown*, 55 Ind. 310, 317; *People v. Lake* (N. Y.) 2 Parker, Cr. R. 215, 218; *Hall v. Unger* (U. S.) 11 Fed. Cas. 261, 263.

The term "monomania" is used to designate that species of insanity which is of the partial intellectual order. It is mania on one subject. In the simplest form of this species of mania, the understanding appears to be tolerably sound on all subjects but those connected with the hallucination. *Hopps v. People*, 31 Ill. 385, 390, 83 Am. Dec. 231.

"Monomania consists in a mental or moral perversion, or both, in regard to some particular subject or class of subjects, while in regard to others the person seems to have no such morbid affection. The degrees of monomania are various. In many cases the person is entirely capable of transacting any matters of business out of the range of his peculiar infirmity, and as to those matters out of that range he may be entirely sound, while as to matters within the range of the infirmity he may be quite unsound." In *re Black's Estate* (Cal.) 1 Myr. Prob. 24, 27.

The term "monomania" is applied to a derangement of mental faculties which is confined to some particular idea or object of desire or aversion. In cases of this kind which may be adduced as a ground for relief or defense in any judicial controversy, it should appear that the morbid image in the mind of the patient has been connected by him with and has perverted his judgment in relation to those of his acts which are drawn in question. *Owing's Case* (Md.) 1 Bland, 370, 388.

Monomania is a form of insanity in which the subject may be sane on every topic but one, but is insane on some particular topic. This condition is brought about by the impairment or disease of the mental faculties, which may more or less affect the mind generally. Monomania may operate as an excuse for a criminal act when the delusion is such that the person under its influ-

ence has a real and firm belief of some act not true in itself, but which, if it were true, would excuse his act, as where the belief is that the party killed had an immediate design upon the slayer's life. *Merritt v. State*, 45 S. W. 21, 22, 39 Tex. Cr. R. 701.

MONOMANIAC.

A monomaniac is a person who is insane upon one or more subjects, whether it relate to one or more persons or things, and is apparently sane upon all others. *Colhoun v. Jones* (N. Y.) 2 Redf. Sur. 34, 37.

A person who is rational on all subjects except one, and with respect to that subject exhibits the ordinary deportment and sagacity of a weakened mind, is a monomaniac. *Thompson v. Thompson* (N. Y.) 21 Barb. 107, 128.

"A monomaniac is a person who is deranged in a single faculty of his mind, or in regard to a particular subject only, and it is a fact that persons possessed of monomania may, and often do, on all subjects foreign to the subject of mania, act rationally and with ordinary prudence." *Young v. Miller*, 44 N. E. 757, 758, 145 Ind. 652.

MONOPOLY.

As an exclusive franchise or privilege.

A "monopoly" is defined as an exclusive right granted to a few of something which was before of common right. *Leeper v. State*, 53 S. W. 962, 964, 103 Tenn. 500, 48 L. R. A. 167; *City of Memphis v. Memphis Water Co.*, 52 Tenn. (5 Heisk.) 495, 529; *United States v. Trans-Missouri Freight Ass'n* (U. S.) 53 Fed. 440, 452; *Bartholomew v. City of Austin* (U. S.) 58 Fed. 359, 364, 29 C. C. A. 568; *Patterson v. Wollmann*, 5 N. D. 608, 615, 616, 67 N. W. 1040, 33 L. R. A. 536.

A "monopoly" is defined to be an institution or allowance from the sovereign power of the state, by grant, commission, or otherwise, to any person or corporation, for the sole buying, selling, making, working, or using of anything whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade. *State v. Haworth*, 23 N. E. 946, 958, 122 Ind. 462, 7 L. R. A. 240 (citing *Black Law Dict.*); *Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co.* 4 Sup. Ct. 652, 660, 111 U. S. 746, 28 L. Ed. 535; *United States v. E. C. Knight Co.*, 15 Sup. Ct. 249, 252, 156 U. S. 1, 39 L. Ed. 325; *In re Greene* (U. S.) 52 Fed. 104, 115; *Bartholomew v. City of Austin* (U. S.) 85 Fed. 359, 364, 29 C. C. A. 568; *Thompson v. Haight*, 23 Fed. Cas. 1040, 1042; *Darcantel v. People's Slaughterhouse & Refrigerating*

Co., 11 South. 239, 242, 44 La. Ann. 632; Davenport v. Kleinschmidt, 13 Pac. 249, 254, 6 Mont. 502; Wright v. State, 41 Atl. 795, 798, 88 Md. 436; Marshall & Bruce Co. v. City of Nashville, 71 S. W. 815, 818, 109 Tenn. 495 (citing Fishburn v. City of Chicago, 171 Ill. 338, 49 N. E. 532, 39 L. R. A. 482, 63 Am. St. Rep. 236).

A monopoly is a special privilege conferred on one or more persons, to the absolute exclusion of the others. *Barbee v. Jacksonville & A. Plank Road Co.*, 6 Fla. 262, 268.

"The popular meaning of 'monopoly,' at the present day, seems to be the sole power (or a power largely in excess of that possessed by others) of dealing in some particular commodity or at some particular place or market, or of carrying on some particular business." *Davenport v. Kleinschmidt*, 13 Pac. 249, 254, 6 Mont. 502.

"A monopoly is that which has been granted without consideration, as a monopoly of trade, or of the manufacture of any particular article, to the exclusion of all competition. It is withdrawing that which is a common right from the community, and vesting it in one or more individuals, to the exclusion of all others. Such monopolies are justly odious, as they operate not only injuriously to trade, but against the general prosperity of society." *Charles River Bridge v. Warren Bridge*, 36 U. S. (13 Pet.) 420, 567, 9 L. Ed. 773, 938.

Section 19 of article 2 of the Constitution declares that "perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed." Of this provision the court said: "The monopolies which in England became so odious as to excite general opposition and infuse a detestation which has been transmitted to the free states of America were in the nature of the exclusive privileges of trade, granted to favorites or purchasers from the Crown, for the enrichment of individuals, at the cost of the public. They were supported by no consideration of public good. They enabled a few to oppress the community by undue charges for goods or services. The memory and historical traditions of abuses resulting from this practice has left the impression that they are dangerous to liberty, and it is this kind of monopoly against which the constitutional provision is directed. * * * It is to be regretted that the states which have set up the inhibition have not, with it, given us some more satisfactory definition of a 'monopoly' than can be derived from its literal meaning, the 'sole power to sell,' or than can be gathered from the oppressive measures of the Tudors and the Stuarts. Evidently, powers to sell, to be exercised by some and not by all, cannot be wholly prohibited, because that would exclude the power to sell under license. * * * We are left to con-

clude that the monopolies meant were such as in England had been found detrimental and offensive." *Ex parte Levy*, 43 Ark. 42, 53, 51 Am. Rep. 550.

"All trades, as well mechanical as others, which prevent idleness, the bane of the commonwealth, and exercise men and youth and labor for the maintenance of themselves and their families, and for the increase of their substance to serve the Queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them (playing cards) is against the common law and the benefit and liberty of the subject. The sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects, for the end of all these monopolies is for the private gain of the patentees, and, although provisions and cautions are added to moderate them, yet it is mere folly to think that there is any measure in mischief and wickedness, and therefore there are three inseparable to every monopoly against the commonwealth: First, that the price of the same commodity will be raised, for he who has the sole selling of any commodity may as well make the price as he pleases. The second incident to a monopoly is that after the monopoly is granted the commodity is not so good and merchantable as it was before, for the patentee, having the sole trade, regards only his private benefit, and not the commonwealth. Third, it tends to the impoverishment of divers artificers and others who before, by the labor of their hands in their art or trade, had maintained themselves and their families, who will now of necessity be constrained to live in idleness and beggary." *The Case of Monopolies*, 11 Coke, 84, 86.

An exclusive profit granted by the state either to an individual or a corporation is a monopoly in the general sense of the word. *Camblos v. Philadelphia & R. Co.* (U. S.) 4 Fed. Cas. 1089, 1101.

A "monopoly" need not be a perpetuity, nor is a perpetuity necessarily a monopoly; but both, existing either jointly or severally, are within the constitutional prohibition (article 1, § 31) declaring that perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed. *Thrift v. Town Com'rs of Elizabeth City*, 30 S. E. 349, 351, 122 N. C. 31, 44 L. R. A. 427.

Same—Bridge or ferry franchise.

A charter granting the right to erect a bridge across a river and charge a toll for the use thereof, the grantees to pay an annuity to a certain college, does not constitute a monopoly for the accommodation afforded to the public by the bridge, and the annuity paid to the college constitutes a valuable con-

sideration granted by the charter, and the odious features of the monopoly do not therefore attach to the charter. *Charles River Bridge v. Warren Bridge*, 36 U. S. (11 Pet.) 420, 467, 9 L. Ed. 773, 938.

There are classes of exclusive privileges which do not amount to "monopolies" within the meaning of the common law. Courts of last resort have generally refrained from propounding an authoritative affirmative definition of the "monopoly" so odious to the common law and to the genius of a free government. It would try the power of expression of most judges, if not of human speech, to frame such a definition, outside of which a grant or contract must wholly and clearly rest to escape the stroke of nullity. It has therefore generally been deemed wise and safe to use rather the process of exclusion, and determine what is not a monopoly, so far as the case in hand requires. The city of Laredo, Tex., owning a ferry franchise over the Rio Grande river, granted to it at an early day by the Spanish government, contracted, by ordinance, with a bridge company to permit the erection of the north end of a bridge in certain of its streets, and agreed not to exercise its ferry franchise for a period of 25 years, in return for which it was to receive \$5,000 per year for the same period. Held, that this ordinance did not create a "monopoly" within the meaning of the Texas Constitution, which declares that perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed. *City of Laredo v. International Bridge & Tramway Co.* (U. S.) 66 Fed. 246, 248, 14 C. C. A. 1.

Same—Fair privilege.

The constitutional prohibition against the creation of monopolies is not violated by an act incorporating an agricultural society, and providing that no person shall sell any liquor, tobacco, etc., within a half mile of the society's grounds during fair week, except such persons as may be conducting regularly established business within the prohibited territory. *State v. Stovall*, 8 S. E. 900, 901, 103 N. C. 416.

Same—Gas franchise.

Where an amendment to a gas company's charter provided that the right to lay gas pipes in and through the streets and public grounds of the city should be exclusive as against all other persons and corporations except such as might thereafter be invested by the General Assembly of the state, with power to use such streets for the same purpose, such amendment, so far as it was a restriction upon the free manufacture and sale of gas, was a monopoly, and unconstitutional and void. *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19, 38.

Same—Patent.

A patent for a useful invention is not, under the laws of the United States, a "monopoly" in the old sense of the common law. *Attorney General v. Rumford Chemical Works* (U. S.) 32 Fed. 608, 617. See, also, *Seymour v. Osborne*, 60 U. S. (11 Wall.) 516, 533, 15 L. Ed. 557; *Allen v. Hunter* (U. S.) 1 Fed. Cas. 476, 477.

The monopoly given by a patent is not a "monopoly" in the sense in which the word first came into the English language, where, without anything at all except the mere whim of the sovereign power, some extraordinary privileges were given to an individual. The man who holds a patent monopoly has earned the right to the monopoly, because he need not have invented the novelty unless he chose, and having invented it he might have kept it to himself if he chose, and his fellow citizens and the community at large would be without the benefit of his discovery; therefore there is nothing obnoxious to law or good morals in the fact that a patent secures to the holder of it a monopoly for a limited period of time. *International Tooth Crown Co. v. Hanks Dental Ass'n* (U. S.) 111 Fed. 916, 917.

Same—State printing.

A monopoly is an exclusive privilege not enjoyed by others, and an act giving to a printing company the privilege, which the company may accept or reject at its option, of doing all the printing required by the state, and requiring all officers of the state to have their printing done by such company, is invalid as creating a monopoly. *Guthrie Daily Leader v. Cameron*, 41 Pac. 635, 639, 3 Okl. 677.

Same—State schoolbooks.

Laws 1899, c. 205, providing for uniform text-books in public schools, making their use therein compulsory, and creating a commission to select the same, to award to the lowest bidder the exclusive privilege for specified periods of furnishing such books, and to regulate their distribution so as to guaranty that the books shall be furnished at the lowest price obtainable by free competition and according to the contract, is not unconstitutional as granting a monopoly. *Leeper v. State*, 53 S. W. 962, 964, 103 Tenn. 500, 48 L. R. A. 167.

Same—Water franchise.

It is held that the grant of an exclusive privilege to erect waterworks, or of such privilege to a private corporation for a term of years, is not a grant of monopoly. *City of Memphis v. Memphis Water Co.*, 52 Tenn. (5 Heisk.) 495, 529.

"Monopoly" signifies the sole power of dealing in a particular thing or doing a particular thing, either generally or in a par-

ticular place. Monopoly is usually, though not necessarily, harmful or injurious to the public interests. As that term is generally used, injury to the public is implied, and competition is therefore regarded as favorable to the public interests; but there is a competition which tends to monopoly by driving out all but the strongest competitor, when prices are again increased so as not only to yield a profit on the original investment, but to recoup the losses incurred in breaking down competitors, or, where competitors are of equal strength and tenacity of purpose, it may result in the destruction of the public service by the collapse of all of them. But a contract between a corporation owning a water supply and pipes to conduct it to the city, and a corporation owning a system of distributing pipes in the city, under which water is to be supplied to the city, is not void as a monopoly. *San Diego Water Co. v. San Diego Flume Co.*, 41 Pac. 495, 497, 108 Cal. 549, 29 L. R. A. 839.

An ordinance granting to a water company the privilege, not in terms exclusive, of constructing and operating a system of waterworks in a city, for supplying the corporation and its citizens with water, on certain terms and conditions, for a period of 25 years, is not a grant of an obnoxious, exclusive privilege, or the creation of a monopoly, inhibited by public policy or the Constitution of Texas, which provides that "perpetuities and monopolies are contrary to the genius of free government, and should never be allowed." *Bartholomew v. City of Austin* (U. S.) 85 Fed. 359, 364, 29 C. C. A. 568.

As a combination.

A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to, or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control. *United States v. Trans-Missouri Freight Ass'n* (U. S.) 58 Fed. 58, 82, 7 C. C. A. 15, 24 L. R. A. 73.

"Combinations in the nature of modern trusts" are those which aim at a union of energy, capital, and interest to stifle competition and enhance the price of articles of prime necessity and staples of commerce. In such cases there is absent the element of exchange of one valuable thing or right for another. The lease of a building and equipment used in the manufacture of bone tartar for a period of 10 years at \$12,000 per year, the annual rental value of which land and building was between \$2,000 and \$2,500 per year, but the profits derived by the lessor from the business conducted on the premises were from \$10,000 to \$12,000 per year, and which lease contained a covenant that during its continuance the lessor will not engage in the manufacture of bone tartar, and which lease was made with the intention that it

should be assigned to another, and made for the purpose of removing the lessor's competition from the market, is not void as having a tendency to create a monopoly or trust. *United States Chemical Co. v. Provident Chemical Co.* (U. S.) 64 Fed. 946, 950.

Combinations among dealers in provisions or other articles of prime necessity are deemed in law contrary to public policy, and contracts to effect or carry out such combinations are held void. Combinations of this character are commonly called "monopolies," but they are not the technical monopolies known to the common law. The doctrine that they are illegal properly had its origin in the laws against forestalling, regrating, and engrossing offenses, which at a very early date in England were made punishable by statutes which have since been repealed. They were properly offenses at common law, though their precise nature as defined in that system seems to be obscure. *Queen Ins. Co. v. State*, 24 S. W. 397, 403, 86 Tex. 250, 22 L. R. A. 483.

A "monopoly," within Act Cong. July 2, 1890, punishing combinations to monopolize business, is a combination, in form of trust or otherwise, or a conspiracy, in restriction of trade or commerce among the several states. *In re Corning* (U. S.) 51 Fed. 205, 212.

A monopoly exists where all or so nearly all of an article of trade or commerce within a community or district is brought within the hands of one man or set of men as to practically bring the handling or production of the commodity, or thing within such single control, to the exclusion of competition or free traffic therein. Anything less than this is not monopoly. *Herriman v. Menzies*, 46 Pac. 730, 731, 115 Cal. 16, 35 L. R. A. 318, 56 Am. St. Rep. 81.

An exclusive privilege or right is indispensable to the existence of a monopoly; so it is held that a contract by a gas company to issue its stock in exchange for the stock of another company merely to prevent ruinous competition is not a combination with the other company for the creation of a monopoly, inasmuch as no exclusive privilege or right, as against individuals or corporations, to manufacture or sell and distribute gas, is acquired. *Rafferty v. Buffalo City Gas Co.*, 56 N. Y. Supp. 288, 290, 37 App. Div. 618.

The purchase of stock of sugar refineries for the purpose of acquiring control over the business of refining sugar for sale in the United States does not involve a monopoly or combination in restraint of trade among the states, within the prohibition of the anti-trust act of July 2, 1890. *United States v. E. C. Knight Co.*, 15 Sup. Ct. 249, 252, 156 U. S. 1, 39 L. Ed. 325.

It is held that an agreement between several competing railway companies, and the formation of an association thereunder, for

the purpose of maintaining just and reasonable rates, preventing unjust discriminations by furnishing adequate and equal facilities for the interchange of traffic between the lines, etc., is not a monopoly. *United States v. Trans-Missouri Freight Ass'n* (U. S.) 53 Fed. 440, 452.

MONTANA.

As Indian country, see "Indian Country."

MONTH.

See "Calendar Month"; "School Month."

At common law the word "month," when used without qualification, meant a lunar month, or twenty-eight days. *Hale v. Finch*, 1 Wash. T. 517, 518; *Commonwealth v. Stanley*, 12 Pa. Co. Ct. R. 543; *Glenn v. Smith*, 17 Md. 260, 265; *Churchill v. Merchants' Bank*, 38 Mass. (19 Pick.) 532, 535; *Guaranty Trust & Safe Deposit Co. v. Green Core Springs & M. R. Co.*, 11 Sup. Ct. 512, 515, 139 U. S. 137, 35 L. Ed. 116; *Loring v. Halling* (N. Y.) 15 Johns. 119, 120 (citing *Rex v. Peckham*, Carth. 406; *Same v. Addely*, Doug. 462; *Castle v. Burdett*, 3 Term R. 623; *Catesby's Case*, 6 Coke, 62); *Lacon v. Hooper*, 6 Term R. 224; *Migotti v. Colvill*, 4 C. P. Div. 233, 235; *Crook v. McTavish*, 1 Bing. 307; *Regina v. Chawton*, 1 Adol. & El. (N. S.) 247, 251; *Tullet v. Linfield*, 3 Burrows, 1455. See, also, *Hart v. Middleton*, 2 Car. & K. 9, 10; *Marsh v. Higgins*, 9 C. B. 552, 564; *Webb v. Fairmaner*, 3 Mees. & W. 473, 478; *Warburton v. Sandys*, 14 Sim. 622, 626; *Franco v. Alvares*, 3 Atk. 342, 347; *Hart v. Middleton*, 2 Car. & K. 9, 10. Which rule was abolished by statute in England in 1850 (13 & 14 Vict. c. 21). *McGinn v. State*, 65 N. W. 46, 47, 48 Neb. 427, 30 L. R. A. 450, 50 Am. St. Rep. 617. In the United States the common-law rule was followed in some of the earlier cases. *Loring v. Halling* (N. Y.) 15 Johns. 119, 120; *Leffingwell v. White* (N. Y.) 1 Johns. Cas. 99, 100, 1 Am. Dec. 97; *Stackhouse v. Halsey* (N. Y.) 3 Johns. Ch. 74; *People v. City of New York* (N. Y.) 10 Wend. 393, 396; *Rives v. Guthrie*, 46 N. C. 84, 87, 90; *Redmond v. Glover* (Ga.) Dud. 107; *Ellis' Case*, 8 N. J. Law (3 Halst.) 232; *Thomas v. Shoemaker* (Pa.) 6 Watts & S. 179, 182; *State v. Jacobs* (Del.) 2 Har. 548, 549. But the holdings now seem to be uniform that the word, in whatever connection it is used, signifies a calendar month, unless a contrary intent is indicated, and in many states this rule has been fixed by statute. *Ellis' Case*, 8 N. J. Law (3 Halst.) 232; *Loring v. Halling* (N. Y.) 15 Johns. 119, 120; *Stackhouse v. Halsey* (N. Y.) 3 Johns. Ch. 74; *Redmond v. Glover* (Ga.) Dud. 107; *Glore v. Hare*, 4 Neb. 132; *Brown v. Williams*, 34 Neb. 378, 51 N. W. 851; *McGinn v. State*, 65 N. W. 46, 47, 48 Neb. 427, 30 L. R. A. 450, 50 Am.

St. Rep. 617; *Guaranty Trust & Safe Deposit Co. v. Greencove Springs & M. R. Co.*, 11 Sup. Ct. 512, 515, 139 U. S. 137, 35 L. Ed. 116; *Gasquet v. Crescent City Brewing Co.* (U. S.) 49 Fed. 496; *Union Bank of Georgetown v. Forrest* (U. S.) 24 Fed. Cas. 559, 561; *Sheets v. Selden's Lessee*, 69 U. S. (2 Wall.) 177, 189, 17 L. Ed. 822; *Brudenell v. Vaux* (U. S.) 2 Dall. 302, 4 Fed. Cas. 469, 1 L. Ed. 390; *Commonwealth v. Chambre* (Pa.) 4 Dall. 143, 144, 1 L. Ed. 776; *Bartol v. Calvert*, 21 Ala. 42, 46; *Riddle v. Hill's Adm'r*, 51 Ala. 224, 232; *Maxwell v. Jacksonville Loan & Improvement Co.* (Fla.) 34 South. 255, 264; *Gross v. Fowler*, 21 Cal. 392, 395; *Sprague v. Norway*, 31 Cal. 173, 176; *Savings & Loan Soc. v. Thompson*, 32 Cal. 347, 351; *Scoville v. Anderson*, 63 Pac. 1013, 1015, 131 Cal. 590, 594; *Daly v. Concordia Fire Ins. Co.*, 65 Pac. 416, 16 Colo. App. 349; *Strong v. Birchard*, 5 Conn. 357, 361; *Guaranty Trust & Safe Deposit Co. v. Buddington*, 9 South. 246, 247, 27 Fla. 215, 12 L. R. A. 770, 772; *Bacon v. State*, 22 Fla. 46, 47; *City of Holton v. Bimrod*, 55 Pac. 505, 506, 8 Kan. App. 265; *Pyle v. Maulding*, 30 Ky. (7 J. J. Marsh.) 202, 207; *Hardin v. Major*, 7 Ky. (4 Bibb) 104, 105; *Hopkins v. Chambers*, 23 Ky. (7 T. B. Mon.) 257, 262; *Baltimore & D. P. R. Co. v. Pumphrey*, 21 Atl. 559, 562, 74 Md. 86; *Glenn v. Smith*, 17 Md. 260, 282; *Churchill v. Merchants' Bank*, 38 Mass. (19 Pick.) 532, 535; *Hunt v. Holden*, 2 Mass. 168, 170; *Avery v. Pixley*, 4 Mass. 460, 461; *Mitchell v. Woodson*, 37 Miss. 567, 573; *People v. City of New York* (N. Y.) 10 Wend. 393, 398; *Parsons v. Chamberlin* (N. Y.) 4 Wend. 512, 513; *Hosley v. Black*, 28 N. Y. 438, 444; *Snyder v. Warren* (N. Y.) 2 Cow. 518, 14 Am. Dec. 519; *Satterwhite v. Burwell*, 51 N. C. 92; *State v. Upchurch*, 72 N. C. 146, 148; *Muse v. London Assur. Co.*, 108 N. C. 240, 244, 13 S. E. 94; *McMurchey v. Robinson*, 10 Ohio, 496, 497; *Bertwell v. Haines*, 63 Pac. 702, 10 Okl. 469; *Thomas v. Shoemaker* (Pa.) 6 Watts & S. 179, 182; *Shapley v. Garey* (Pa.) 6 Serg. & R. 539, 540; *Moore v. Houston* (Pa.) 3 Serg. & R. 169, 184; *Williamson v. Farrow* (S. C.) 1 Bailey, 611, 615, 21 Am. Dec. 492; *Alston v. Alston* (S. C.) 2 Tread. Const. 604, 608; *Cook v. Shute*, 3 Tenn. (Cooke) 67, 75; *Bank of Tennessee v. Officer*, 62 Tenn. (3 Baxt.) 173, 174; *Kimball v. Lamson*, 2 Vt. 138, 142; *Brewer v. Harris* (Va.) 5 Grat. 235, 298; *Daley v. Anderson*, 48 Pac. 839, 840, 7 Wyo. 1, 75 Am. St. Rep. 870; *Civ. Code Mont.* 1895, § 4662, subd. 4; *Id.*, § 3463, subd. 4; *Pen. Code Mont.* 1895, § 7, subd. 13; *Pol. Code Mont.* 1895, § 16, subd. 4; *Rev. St. Okl.* 1903, § 2805; *Pen. Code Ariz.* 1901, par. 7, subd. 13; *Pol. Code Cal.* 1903, § 17, subd. 4; *Civ. Code Cal.* 1903, § 14, subd. 4; *Id.*, § 17, subd. 4; *Pen. Code Cal.* 1903, § 7, subd. 13; *Rev. Code Del.* 1893, c. 5, § 1, subd. 8; *Gen. St. Minn.* 1894, § 255, subd. 9; *Rev. Codes N. D.* 1899, § 5132; *Civ. Code S. D.* 1903, § 2466; *Rev. Laws Mass.* 1902, p. 83.

c. 8, § 5, subd. 11; Pen. Code Ga. 1895, § 2; Rev. St. Me. 1883, p. 59, c. 1, § 6, subd. 10; Rev. St. Wis. 1898, § 4971; Ky. St. 1903, § 452; Rev. St. Utah 1898, § 2498; Ballinger's Ann. Codes & St. Wash. 1897, § 4789; Pub. St. R. I. 1882, p. 77, c. 24, § 11; Code W. Va. 1899, p. 132, c. 13, § 14; Pub. St. N. H. 1901, p. 63, c. 2, § 8; Comp. Laws Mich. 1897, § 50, subd. 10; Gen. St. Kan. 1901, § 7342, subd. 11; Mills' Ann. St. Colo. 1891, § 4185, cl. 6; Horner's Rev. St. Ind. 1901, § 240, subd. 4; Sand. & H. Ark. Dig. 1893, § 7219; Code Iowa 1897, § 48, subd. 11; Rev. St. Wyo. 1899, § 2724; Civ. Code Ala. 1896, § 8; Gen. St. Conn. 1902, § 1; Hurd's Rev. St. Ill. 1901, p. 1719, c. 131, § 1, subd. 10; Code Va. 1887, § 5; V. S. 1894, 12; Rev. St. Tex. 1895, art. 3270; Code Miss. 1892, § 1509; Rev. St. Mo. 1899, § 4160; Gen. St. N. J. 1895, p. 3195, § 34; Code N. C. 1883, § 3765, subd. 3; Shannon's Code Tenn. 1896, § 64; Laws N. Y. 1892, p. 1490, c. 677, § 26.

The term "month," whether employed in statutes or contracts, and not appearing to have been used in a different sense, denotes a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one. If there be no corresponding day of the succeeding month, it terminates with the last day thereof. *McGinn v. State*, 65 N. W. 46, 47, 46 Neb. 427, 30 L. R. A. 450, 50 Am. St. Rep. 617. See, also, *English v. Ozburn*, 59 Ga. 392, 394; *Marcoux v. Society of Beneficence St. John Baptist*, 39 Atl. 1027, 1029, 91 Me. 250. But when used in a criminal statute, it is held the words "one month" mean 30 days. *McKinney v. State*, 66 S. W. 769, 771, 43 Tex. Cr. R. 387; Code N. C. 1883, § 3765, subd. 12.

A number of months after or before a certain day shall be computed by counting such number of calendar months from such day, exclusive of the calendar month in which such day occurs, and shall include the day of the month in the last month so counted having the same numerical order in days of the month as the day from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of the month so counted. Laws N. Y. 1892, p. 1490, c. 677, § 26.

For the purpose of calculating interest, a month shall be considered the twelfth part of a year, and as consisting of 30 days, and interest for any number of days less than a month shall be estimated by the proportion which said number of days shall bear to 30. Ann. St. Ind. T. 1899, § 3048.

When a month is referred to, it will be understood to be of the current year, unless from the connection it is apparent that another is intended. *Tillson v. Bowley*,

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"Month," as contained in the proviso of the eighth section of the general railway law, is used to express the same time as the words "thirty days" in the body of the section. *Heaton v. Cincinnati & Ft. W. Ry. Co.*, 16 Ind. 275, 276, 280, 79 Am. Dec. 430.

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the purpose of maintaining just and reasonable rates, preventing unjust discriminations by furnishing adequate and equal facilities for the interchange of traffic between the lines, etc., is not a monopoly. *United States v. Trans-Missouri Freight Ass'n* (U. S.) 53 Fed. 440, 452.

MONTANA.

As Indian country, see "Indian Country."

MONTH.

See "Calendar Month"; "School Month."

At common law the word "month," when used without qualification, meant a lunar month, or twenty-eight days. *Hale v. Finch*, 1 Wash. T. 517, 518; *Commonwealth v. Stanley*, 12 Pa. Co. Ct. R. 543; *Glenn v. Smith*, 17 Md. 260, 265; *Churchill v. Merchants' Bank*, 36 Mass. (19 Pick.) 532, 535; *Guaranty Trust & Safe Deposit Co. v. Green Core Springs & M. R. Co.*, 11 Sup. Ct. 512, 515, 139 U. S. 137, 35 L. Ed. 116; *Loring v. Halling* (N. Y.) 15 Johns. 119, 120 (citing *Rex v. Peckham*, Carth. 406; *Same v. Addely*, Doug. 462; *Castle v. Burdett*, 3 Term R. 623; *Catesby's Case*, 6 Coke, 62); *Lacon v. Hooper*, 6 Term R. 224; *Migotti v. Colvill*, 4 C. P. Div. 233, 235; *Crook v. McTavish*, 1 Bing. 307; *Regina v. Chawton*, 1 Adol. & El. (N. S.) 247, 251; *Tullet v. Linfield*, 3 Burrows, 1455. See, also, *Hart v. Middleton*, 2 Car. & K. 9, 10; *Marsh v. Higgins*, 9 C. B. 552, 564; *Webb v. Fairmaner*, 3 Mees. & W. 473, 478; *Warburton v. Sandys*, 14 Sim. 622, 626; *Franco v. Alvares*, 3 Atk. 342, 347; *Hart v. Middleton*, 2 Car. & K. 9, 10. Which rule was abolished by statute in England in 1850 (13 & 14 Vict. c. 21). *McGinn v. State*, 65 N. W. 46, 47, 48 Neb. 427, 30 L. R. A. 450, 50 Am. St. Rep. 617. In the United States the common-law rule was followed in some of the earlier cases. *Loring v. Halling* (N. Y.) 15 Johns. 119, 120; *Leffingwell v. White* (N. Y.) 1 Johns. Cas. 99, 100, 1 Am. Dec. 97; *Stackhouse v. Halsey* (N. Y.) 3 Johns. Ch. 74; *People v. City of New York* (N. Y.) 10 Wend. 393, 396; *Rives v. Guthrie*, 46 N. C. 84, 87, 90; *Redmond v. Glover* (Ga.) Dud. 107; *Ellis' Case*, 8 N. J. Law (3 Halst.) 232; *Thomas v. Shoemaker* (Pa.) 6 Watts & S. 179, 182; *State v. Jacobs* (Del.) 2 Har. 548, 549. But the holdings now seem to be uniform that the word, in whatever connection it is used, signifies a calendar month, unless a contrary intent is indicated, and in many states this rule has been fixed by statute. *Ellis' Case*, 8 N. J. Law (3 Halst.) 232; *Loring v. Halling* (N. Y.) 15 Johns. 119, 120; *Stackhouse v. Halsey* (N. Y.) 3 Johns. Ch. 74; *Redmond v. Glover* (Ga.) Dud. 107; *Glore v. Hare*, 4 Neb. 132; *Brown v. Williams*, 34 Neb. 376, 51 N. W. 851; *McGinn v. State*, 65 N. W. 46, 47, 48 Neb. 427, 30 L. R. A. 450, 50 Am.

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c. 8, § 5, subd. 11; Pen. Code Ga. 1895, § 2; Rev. St. Me. 1883, p. 59, c. 1, § 6, subd. 10; Rev. St. Wis. 1898, § 4971; Ky. St. 1903, § 452; Rev. St. Utah 1898, § 2498; Ballinger's Ann. Codes & St. Wash. 1897, § 4789; Pub. St. R. I. 1882, p. 77, c. 24, § 11; Code W. Va. 1899, p. 132, c. 13, § 14; Pub. St. N. H. 1901, p. 63, c. 2, § 8; Comp. Laws Mich. 1897, § 50, subd. 10; Gen. St. Kan. 1901, § 7342, subd. 11; Mills' Ann. St. Colo. 1891, § 4185, cl. 6; Horner's Rev. St. Ind. 1901, § 240, subd. 4; Sand. & H. Ark. Dig. 1893, § 7219; Code Iowa 1897, § 48, subd. 11; Rev. St. Wyo. 1899, § 2724; Civ. Code Ala. 1896, § 8; Gen. St. Conn. 1902, § 1; Hurd's Rev. St. Ill. 1901, p. 1719, c. 131, § 1, subd. 10; Code Va. 1887, § 5; V. S. 1894, 12; Rev. St. Tex. 1895, art. 3270; Code Miss. 1892, § 1509; Rev. St. Mo. 1899, § 4160; Gen. St. N. J. 1895, p. 3195, § 34; Code N. C. 1883, § 3765, subd. 3; Shannon's Code Tenn. 1896, § 64; Laws N. Y. 1892, p. 1490, c. 677, § 26.

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See "Permanent Monuments"; "Suitable Monument."

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A deed described a lot conveyed as "beginning at a stake on the northeast corner

of Egypt and Race streets, and thence along the northeast side of said Egypt street 91.8 to a stake in the middle of a 10-foot alley; thence along the middle of said alley north 183.2 to a stake on the southwest side of Penn street, and along said side of said street north to the stake on the south corner of Penn and Race streets aforesaid, and along the southeast side of Race street 174.4 feet to the place of beginning." The trial court held, chiefly because such deed referred to monuments, to wit, stakes, as well as giving the exact distances, that the streets bordering such lot were excluded from the grant. The Supreme Court, in discussing this proposition, say: "But what sort of a monument is a stake? It is so unsubstantial that in country surveys it indicates a corner which the surveyor never visited, and which exists only on paper. Artificial boundaries which are meant to be fixed monuments are made with more care than merely sticking a stake, which the next wind may blow over, which one of a thousand accidents may destroy, and which must rapidly decay, if not otherwise obliterated. So frail a witness is scarcely worthy to be called a monument, or to control the construction of a deed in so important a particular as that under consideration"—and held that the streets to the center were included in the grant. *Cox v. Freedley, 33 Pa. (9 Casey) 124, 130, 75 Am. Dec. 584.*

MOONSHINE BUSINESS.

The term "moonshine business" refers to the unlawful manufacture or sale of spirituous liquors, like the common-law offense of owling, applied to the unlawful exportation of wool. It derives its name from the fact that it is carried on principally at night, or at least in secret; and its use by the county solicitor, in an argument to the jury on the trial of a prosecution for the illegal sale of intoxicating liquors, was prejudicial, where it was also stated that C.'s murder was caused by it, and it must be broken up. *State v. Tuten, 42 S. E. 443, 131 N. C. 701.*

MOOR.

"To moor" means to tie or fasten a vessel to the shore or to a buoy or some other stationary object. *Walsh v. New York Floating Dry Dock Co. (N. Y.) 8 Daly, 387, 389.*

"To moor" means to fix or secure as a vessel in a particular place by casting anchor, or by fastening with cables or chains; and hence an allegation in an answer that the structure was moored to a bulkhead implies that it is not a permanent structure, and hence the structure was liable to wharfage. *Flandreau v. Elsworth, 29 N. Y. Supp. 694, 696, 9 Misc. Rep. 340.*

MOORAGE.

Moorage is a sum due by law or usage for mooring or fastening of ships to trees or posts at the shore or to a wharf. Wharfage is a toll or duty for the pitching or lodging of goods upon a wharf. Those two kinds of shore duties, as thus designated in the English books, which are evidently distinct in their nature—the one as a charge for the accommodation of ships, and the other as a toll for the use of a landing place for goods—are, in our country generally, and certainly in the port of Baltimore, spoken of under the one common denomination of “wharfage,” the wharfage due from a vessel, and the wharfage payable on merchandise. And this, perhaps, has arisen from the fact of no duty being demanded of ships which have been moored to the shore where there was no wharf. *Wharf Case* (Md.) 3 Bland, 361, 373.

MOORED IN SAFETY.

The phrase “moored at anchor 24 hours in safety,” in a marine policy for a voyage, and until a vessel shall have arrived at her port of destination, and have been moored at anchor 24 hours in safety, operates as a prolonging of the time for which the insurers have engaged to be liable, without varying the nature of the perils insured against. A vessel coming to anchor and remaining there 24 hours before her destruction by being driven on shore is not within the protection of the policy, though the storm existed during the 24 hours. *Bill v. Mason*, 6 Mass. 313, 315.

A vessel insured under a policy covering the voyage, and until she reached port and was “moored in safety 24 hours,” on reaching port was too heavily laden to reach the wharf from which she had started; and while sufficient of her cargo was being taken out by lighters to enable her to reach the wharf, and while she was still in charge of the pilot who was taking her to the wharf, she was burned in the harbor. She had been in the harbor a week, but, owing to absence of lighters and stormy weather, had not been able to unload sufficient of her cargo to enable her to reach the wharf. It was held that she was still properly pursuing her course to the place of her ultimate destination, and that the voyage had not been completed, and she had not been moored in safety, at the time of the fire, within the meaning of such policy. *Meigs v. Mutual Marine Ins. Co.*, 56 Mass. (2 Cush.) 439, 453.

Within the meaning of a policy insuring a vessel “to her discharging port, and until she had moored at anchor twenty-four hours in safety,” a vessel which has arrived at the port of destination, and anchored at the usual place for unloading—it being necessary to unload with lighters—and has re-

mained at such anchorage more than 24 hours, is moored in safety, within the meaning of the policy, and the risk thereupon terminates. *Bramhall v. Sun Mut. Ins. Co.*, 104 Mass. 510, 516, 6 Am. Rep. 261.

MOOT CASE.

A moot case is one which seeks to determine an abstract question which does not arise upon existing facts or rights. *Adams v. Union R. Co.*, 42 Atl. 515, 517, 21 R. I. 134, 44 L. R. A. 273, 79 Am. St. Rep. 801.

MORAL

“Moral character of his act,” as used in an instruction reciting that if one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, such self-destruction will not of itself prevent recovery upon the policies, means a capacity to understand what he was doing, and the consequences thereof to himself, his character, his family, and others, and to comprehend the wrongfulness of the act as a sane man would. *Ritter v. Mutual Life Ins. Co. (U. S.)* 69 Fed. 505, 506.

MORAL AND MENTAL IMPROVEMENT.

A medical society organized for mental improvement is not within Laws 1803, c. 408, § 1, exempting from taxation the property of associations organized for the “moral and mental improvement” of men and women. *People v. Neff*, 34 App. Div. 83, 86, 53 N. Y. Supp. 1077.

MORAL AND NATURAL LIBERTY.

“Moral and natural liberty” is defined by Burlanaquil as “the right which nature gives to all mankind of disposing of their persons and property in the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and that they do not in any way abuse it to the prejudice of any other man.” *Snyder v. Warford*, 11 Mo. 513, 515, 49 Am. Dec. 94.

MORAL CERTAINTY.

See “Absolute Moral Certainty.”

Moral certainty is that degree of certainty which convinces and directs the understanding, and satisfies the reason and judgment, of those who act conscientiously upon it. *State v. Orr*, 64 Mo. 339, 344, *James v. State*, 45 Miss. 572, 574.

Moral certainty is a state of impression produced by facts in which a reasonable

forehand for the convenience of the public. Ordinarily, and for a like reason, too, the monthly trips are so arranged as to make the periods intervening between them approximately equal. *Pacific Mail S. S. Co. v. United States (U. S.) 18 Ct. Cl. 30, 38.*

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of Egypt and Race streets, and thence along the northeast side of said Egypt street 91.8 to a stake in the middle of a 10-foot alley; thence along the middle of said alley north 183.2 to a stake on the southwest side of Penn street, and along said side of said street north to the stake on the south corner of Penn and Race streets aforesaid, and along the southeast side of Race street 174.1 feet to the place of beginning." The trial court held, chiefly because such deed referred to monuments, to wit, stakes, as well as giving the exact distances, that the streets bordering such lot were excluded from the grant. The Supreme Court, in discussing this proposition, say: "But what sort of a monument is a stake? It is so unsubstantial that in country surveys it indicates a corner which the surveyor never visited, and which exists only on paper. Artificial boundaries which are meant to be fixed monuments are made with more care than merely sticking a stake, which the next wind may blow over, which one of a thousand accidents may destroy, and which must rapidly decay, if not otherwise obliterated. So frail a witness is scarcely worthy to be called a monument, or to control the construction of a deed in so important a particular as that under consideration"—and held that the streets to the center were included in the grant. *Cox v. Freedley, 33 Pa. (9 Casey) 124, 130, 75 Am. Dec. 584.*

MOONSHINE BUSINESS.

The term "moonshine business" refers to the unlawful manufacture or sale of spirituous liquors, like the common-law offense of owling, applied to the unlawful exportation of wool. It derives its name from the fact that it is carried on principally at night, or at least in secret; and its use by the county solicitor, in an argument to the jury on the trial of a prosecution for the illegal sale of intoxicating liquors, was prejudicial, where it was also stated that C.'s murder was caused by it, and it must be broken up. *State v. Tuten, 42 S. E. 443, 131 N. C. 701.*

MOOR.

"To moor" means to tie or fasten a vessel to the shore or to a buoy or some other stationary object. *Walsh v. New York Floating Dry Dock Co. (N. Y.) 8 Daly, 387, 389.*

"To moor" means to fix or secure as a vessel in a particular place by casting anchor, or by fastening with cables or chains; and hence an allegation in an answer that the structure was moored to a bulkhead implies that it is not a permanent structure, and hence the structure was liable to wharfage. *Flandreau v. Elsworth, 29 N. Y. Supp. 694, 696, 9 Misc. Rep. 340.*

MOORAGE.

Moorage is a sum due by law or usage for mooring or fastening of ships to trees or posts at the shore or to a wharf. Wharfage is a toll or duty for the pitching or lodging of goods upon a wharf. Those two kinds of shore duties, as thus designated in the English books, which are evidently distinct in their nature—the one as a charge for the accommodation of ships, and the other as a toll for the use of a landing place for goods—are, in our country generally, and certainly in the port of Baltimore, spoken of under the one common denomination of “wharfage,” the wharfage due from a vessel, and the wharfage payable on merchandise. And this, perhaps, has arisen from the fact of no duty being demanded of ships which have been moored to the shore where there was no wharf. *Wharf Case* (Md.) 3 Bland, 361, 373.

MOORED IN SAFETY.

The phrase “moored at anchor 24 hours in safety,” in a marine policy for a voyage, and until a vessel shall have arrived at her port of destination, and have been moored at anchor 24 hours in safety, operates as a prolonging of the time for which the insurers have engaged to be liable, without varying the nature of the perils insured against. A vessel coming to anchor and remaining there 24 hours before her destruction by being driven on shore is not within the protection of the policy, though the storm existed during the 24 hours. *Bill v. Mason*, 6 Mass. 313, 315.

A vessel insured under a policy covering the voyage, and until she reached port and was “moored in safety 24 hours,” on reaching port was too heavily laden to reach the wharf from which she had started; and while sufficient of her cargo was being taken out by lighters to enable her to reach the wharf, and while she was still in charge of the pilot who was taking her to the wharf, she was burned in the harbor. She had been in the harbor a week, but, owing to absence of lighters and stormy weather, had not been able to unload sufficient of her cargo to enable her to reach the wharf. It was held that she was still properly pursuing her course to the place of her ultimate destination, and that the voyage had not been completed, and she had not been moored in safety, at the time of the fire, within the meaning of such policy. *Meigs v. Mutual Marine Ins. Co.*, 56 Mass. (2 Cush.) 439, 453.

Within the meaning of a policy insuring a vessel “to her discharging port, and until she had moored at anchor twenty-four hours in safety,” a vessel which has arrived at the port of destination, and anchored at the usual place for unloading—it being necessary to unload with lighters—and has re-

mained at such anchorage more than 24 hours, is moored in safety, within the meaning of the policy, and the risk thereupon terminates. *Bramhall v. Sun Mut. Ins. Co.*, 104 Mass. 510, 516, 6 Am. Rep. 201.

MOOT CASE.

A moot case is one which seeks to determine an abstract question which does not arise upon existing facts or rights. *Adams v. Union R. Co.*, 42 Atl. 515, 517, 21 R. I. 134, 44 L. R. A. 273, 79 Am. St. Rep. 801.

MORAL

“Moral character of his act,” as used in an instruction reciting that if one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, such self-destruction will not of itself prevent recovery upon the policies, means a capacity to understand what he was doing, and the consequences thereof to himself, his character, his family, and others, and to comprehend the wrongfulness of the act as a sane man would. *Ritter v. Mutual Life Ins. Co. (U. S.)* 69 Fed. 505, 506.

MORAL AND MENTAL IMPROVEMENT.

A medical society organized for mental improvement is not within Laws 1893, c. 498, § 1, exempting from taxation the property of associations organized for the “moral and mental improvement” of men and women. *People v. Neff*, 34 App. Div. 83, 86, 53 N. Y. Supp. 1077.

MORAL AND NATURAL LIBERTY.

“Moral and natural liberty” is defined by Burlanaqui as “the right which nature gives to all mankind of disposing of their persons and property in the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and that they do not in any way abuse it to the prejudice of any other man.” *Snyder v. Warford*, 11 Mo. 513, 515, 49 Am. Dec. 94.

MORAL CERTAINTY.

See “Absolute Moral Certainty.”

Moral certainty is that degree of certainty which convinces and directs the understanding, and satisfies the reason and judgment, of those who act conscientiously upon it. *State v. Orr*, 64 Mo. 339, 344, *James v. State*, 45 Miss. 572, 574.

Moral certainty is a state of impression produced by facts in which a reasonable

mind feels a sort of coercion or necessity to act in accordance with it; the conclusion presented being one which cannot, morally speaking, be avoided consistently with adherence to truth. *Bradley v. State*, 31 Ind. 492, 505; *Garfield v. State*, 74 Ind. 60, 63; *Patzwald v. United States*, 54 Pac. 458, 460, 7 Okl. 232.

A moral certainty is that high decree of probability, though less than absolute assurance, that induces prudent and conscientious men to act unhesitatingly in matters of the gravest importance. *Ross v. Montana Union Ry. Co.* (U. S.) 45 Fed. 424, 425.

Moral certainty is that degree of proof which produces conviction in an unprejudiced mind. *Freese v. Hibernia Savings & Loan Soc.*, 73 Pac. 172, 173, 139 Cal. 392.

Moral certainty requires that the circumstances, taken together, should be of a conclusive nature and tendency; leading, on the whole, to a satisfactory conclusion that the accused, and no one else, committed the offense charged. *Commonwealth v. Goodwin*, 80 Mass. (14 Gray) 55, 57.

Moral certainty is descriptive of the kind of certainty which is attainable by means of moral evidence, and it is that degree of assurance which induces a man of sound mind to act without doubt upon the conclusion to which it leads. *In re Langlois' Estate*, 14 N. Y. Supp. 146, 147, 2 Con. Sur. 481, 484, 26 Abb. N. C. 226.

Moral certainty is certainty that produces a conviction of the truth charged, on which the mind reposes with satisfaction, and does not require absolute or mathematical certainty. *McKleroy v. State*, 77 Ala. 95, 97.

Moral certainty is a certainty that convinces and directs the understanding, and satisfies the reason and judgment of the truth of the charge. *Maxey v. State*, 52 S. W. 2, 3, 66 Ark. 523.

Moral certainty is that degree of certainty which is supported by reason or probability, founded on the experience of the ordinary course of things, and consequently must be reasonable, within itself. *Pharr v. State*, 10 Tex. App. 485, 489.

"Moral certainty" may be said to bear the same relation to matters relating to human conduct that absolute certainty does to mathematical subjects, and has been accepted by some as meaning experience and action of any and every man of sound mind; and, from this point of view, the test of its force is a practical one. It is not only what men in general would unhesitatingly believe to be true, but what they would be willing and ready to act on; and "to be convinced to a moral certainty by the evidence of the truth of a fact sought to be proved" means

that the juror would venture to act on such conviction in matters of the highest concern and importance to his own interests. *Territory v. McAndrews*, 3 Mont. 158, 165.

The phrase "moral certainty" has been introduced into our jurisprudence from the publicists and metaphysicians, and signifies only a very high degree of probability. It was observed by Pufendorf that, when we declare a thing to be morally certain because it has been confirmed by creditable witnesses, this moral certitude is nothing else but a strong presumption grounded on probable reasons, and which very seldom fails and deceives us. *Commonwealth v. Costley*, 118 Mass. 1, 23.

The phrase "moral certainty" is an artificial form of words, having no precise and definite meaning. As explained in the Century Dictionary, it signifies a probability sufficiently strong to justify action upon it. It is defined in Webster as "a very high degree of probability, although not demonstrable as a certainty." It has also been used as indicating a conclusion of the mind established beyond a reasonable doubt. *State v. Gallivan*, 53 Atl. 731, 733, 75 Conn. 326, 96 Am. St. Rep. 203 (citing *Commonwealth v. Costley*, 118 Mass. 1, 24).

If the definition of "moral certainty" is to be given at all, "to be thoroughly impressive it should be carried one step further. * * * Is the juror so convinced by the evidence of the truth of the fact sought to be proved that he himself would venture to act upon such conviction in matters of the highest concern and importance to his own interests? If this be so, he may declare himself morally certain." *State v. Gleim*, 17 Mont. 17, 31, 41 Pac. 998, 1002, 31 L. R. A. 294, 52 Am. St. Rep. 655 (quoting *Territory v. McAndrews*, 3 Mont. 158).

The word "moral," as used in a definition of "reasonable doubt," that the evidence must establish the truth of the fact to a reasonable and moral certainty, means nothing more than intellectual or mental, and is therefore the same as "reasonable." *People v. Dewey*, 6 Pac. 103, 106, 2 Idaho (Hasb.) 83.

The phrases "beyond a reasonable doubt" and "to a moral certainty" are the legal equivalents of each other. *Jones v. State*, 14 South. 772, 773, 100 Ala. 88; *Bailey v. State*, 32 South. 57, 58, 133 Ala. 155; *Woodruff v. State*, 12 South. 653, 658, 31 Fla. 320; *Bone v. State*, 30 S. E. 845, 847, 102 Ga. 387; *Fidelity Mut. Life Ass'n v. Mettler*, 22 Sup. Ct. 662, 666, 185 U. S. 308, 46 L. Ed. 922; *Taylor v. Pegram*, 37 N. E. 837, 839, 151 Ill. 106; *Carlton v. People*, 37 N. E. 244, 247, 150 Ill. 181, 41 Am. St. Rep. 346.

MORAL CHARACTER.

See "Good Moral Character."

MORAL CONSIDERATION.

The terms "moral obligation" and "moral consideration" are not convertible terms, even if there is any such thing as a moral consideration. Natural love and affection are a good consideration for an executed contract or gift, and in this state a moral obligation is a good consideration for an express promise, but natural love and affection are not a moral obligation in such sense as will support even an express promise to make a gift. In *re Kern's Estate*, 33 Atl. 129, 171 Pa. 55.

MORAL HAZARD.

"Moral hazard," in insurance, is but another name for a pecuniary interest in the insured to permit the property to burn. Statistics, experience, and observation all teach that the moral hazard is least when the pecuniary interest of the insured in the protection of the property against fire is greatest, and that the moral hazard is greatest when the insured may gain most by the burning of the property. *Syndicate Ins. Co. v. Bohn* (U. S.) 65 Fed. 165, 170, 12 C. C. A. 531, 27 L. R. A. 614.

MORAL INSANITY.

Moral insanity which is a defense to a charge of crime means, in most of the states, an incapacity to distinguish between right and wrong—an unconsciousness on the part of the person that the act he is doing, or is about to do, is a wrong and forbidden act, and one that he ought not to do. In a very few of the states where moral insanity is recognized as a defense, it means an incapacity of resistance, as where there was an entire destruction of the freedom of the will, although the person perceived the moral or immoral character of the act. *State v. Leehman*, 49 N. W. 3, 5, 2 S. D. 171.

"The law does not recognize moral insanity as an independent state; hence, however perverted the affections, moral feelings, or sentiments may be, a medical jurist must always look for some indications of disturbed reason. Moral insanity is not admitted as a bar to responsibility for civil or criminal acts, except in so far as it may be accompanied by intellectual disturbance." *Tayl. Med. Jur.* p. 780. "Irresistible impulse is not moral insanity, supposing moral insanity to consist of insanity of the moral system co-existing with mental sanity. Moral insanity, as thus defined, has no support either in psychology or law." *Leache v. State*, 3 S. W. 539, 542, 22 Tex. App. 279 (quoting 1 Whart. Cr. Law, § 574).

"Moral insanity is a disorder of the feelings and propensities. Legal insanity is a disorder of the intellect. Dr. Prichard de-

scribes moral insanity as consisting in a morbid perversion of the feelings, affections, and active powers, without any illusion or erroneous conviction impressed upon the understanding. Moral insanity may or may not impair the intellect or intellectual faculties. Moral insanity not proceeding from or accompanied with insane illusion—the legal test of insanity—is insufficient to set aside a will." In *re Forman's Will* (N. Y.) 54 Barb. 274, 291.

MORAL LAW.

Moral law is the eternal and indestructible sense of justice and of right written by God on the living tablets of the human heart, and revealed in his Holy Word. *Moore v. Strickling*, 33 S. E. 274, 277, 46 W. Va. 515, 50 L. R. A. 279 (citing Dill. Laws Eng. & Am.).

MORAL MARRIAGE.

Before the act authorizing the emancipation of slaves, the law did not recognize the power of men and women slaves to enter into a valid contract of marriage. So much was this the case that, even when these people cohabited as man and wife, it was in the power of the master, of his own will, to disrupt this union. New marriage relations could be established either by his command, or at either the will of the slave husband or the slave wife. There was no law for marriage of these people, and, as a consequence, there arose what we are pleased to call "moral marriage"—the sexes living in concubinage. *Lloyd v. Rawl*, 41 S. E. 312, 317, 63 S. C. 219.

MORAL NECESSITY.

Moral necessity arises where there is a duty incumbent on a rational being, to perform, which he ought at the time to perform. It presupposes a power of volition and action under circumstances in which he ought to act, but in which he is not absolutely compelled to act by overwhelming superior force. Physical necessity cannot correctly be said to exist in cases where an agent is called on to exercise judgment and discretion—to act or not to act. Take the case of a master of a ship in a storm of eminent peril, where a jettison seems required, or masts are to be cut away to save the ship from foundering at sea. The master is called on to act, but even in such an extremity he has a choice, and, when he acts, he acts—properly speaking—on his judgment, under a moral rather than a physical necessity. But in ordinary cases, where a master orders repairs or supplies for the ship, it would be an entire defection from the true use of language to call it a case of physical necessity. So far as the master is concern-

ed, it is his duty to procure suitable repairs and supplies in order to enable him to save the ship and prosecute the voyage; and this sense of duty, when it becomes imperative by its urgency on his conscience and judgment, constitutes what is most appropriately called a "moral necessity." No one can correctly say in such a case that the master is under a physical necessity to make the repairs or to procure the supplies. The *Fortitude* (U. S.) 9 Fed. Cas. 479. If a vessel is stranded, and the actual and immediate prospective danger menace a probable loss, the master is justified in selling, regardless of the condition of the vessel. The necessity for the sale must be determined by the circumstances as they must have appeared at the time of the sale, and not by any subsequent event. The sale of a ship in such circumstances, if justified by necessity, is valid. This necessity is neither a legal nor a physical necessity, but a moral necessity. The *Yarkand* (U. S.) 117 Fed. 336, 341.

MORAL OBJECT.

Acts 1857, § 145, providing for the punishment of any person making a disturbance of an "assembly for the promotion of any moral or benevolent object," cannot be construed to include a meeting for culture and improvement in sacred church music. The object of such a meeting is musical education, and not moral training—acquisition of skill, not the dispensation of charities. *State v. Gager*, 28 Conn. 232, 236.

MORAL OBLIGATION.

Moral consideration distinguished, see "Moral Consideration."

A moral obligation is an imperative duty, which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance from legal liability. *Goulding v. Davidson* (N. Y.) 25 How. Prac. 483, 484.

"Moral obligation" means no more than a legal liability suspended or barred in some technical way short of a substantial satisfaction. *Tebbetts v. Dowd* (N. Y.) 23 Wend. 379, 382.

Any obligation which cannot be enforced is simply a moral, not a legal, obligation. *Herriott v. Potter*, 89 N. W. 91, 92, 115 Iowa, 648.

A "moral obligation," in law, is defined as one which cannot be enforced by action, but which is binding on the party who incurs it, in conscience and according to natural justice, and is otherwise defined as a duty which would be enforceable by law, were it not for some positive rule which, with a view to general benefit, exempts the party in that

particular instance from legal liability. *Bailey v. City of Philadelphia*, 31 Atl. 925, 926, 167 Pa. 569, 46 Am. St. Rep. 691.

The moral obligation assumed by debtors in making a settlement with their creditors, having the purpose suggested to secure payment in full of a prior indebtedness, may be regarded as being so connected with and relating to a prior legal obligation as to bring it within the characteristics of moral obligations which are held sufficient to furnish a legal consideration for subsequent promises and agreements. It has been that a mere obligation of morals or conscience, entirely disconnected with, and having no origin in, any legal or equitable obligation, would not be sufficient to operate even as a consideration for a promise or agreement. That, however, is not this case. *Goulding v. Davidson*, 26 N. Y. 604, 610; *Ehle v. Judson*, 24 Wend. 97. There seems to be no question but that, in the case of a discharge of a debtor from his legal obligations by proceedings which are involuntary as against his creditors, a moral obligation to pay his debts in full survives. *Taylor v. Hotchkiss*, 80 N. Y. Supp. 1042, 1048, 81 App. Div. 470.

Civ. Code 1895, § 3658, defines a good consideration to be such as is founded on natural duty and affection, or on a strong moral obligation. The strong moral obligation here referred to seems to be one supported either by some antecedent legal obligation, though unenforceable at the time, or by some present equitable duty. The section, however, does not relate to the moral obligation which inheres in every promise. *Austell v. Humphries*, 99 Ga. 416, 27 S. E. 736. For a moral obligation to constitute a sufficient consideration to support an express promise, it must be founded on an antecedent consideration, though respectable authority can be adduced on the other side. *Hargroves v. Freeman*, 12 Ga. 342; *Davis & Co. v. Morgan*, 43 S. E. 732, 733, 117 Ga. 504, 61 L. R. A. 148, 97 Am. St. Rep. 171.

MORAL TURPITUDE.

"Moral turpitude" is defined as an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *State v. Mason*, 43 Pac. 651, 652, 29 Or. 18, 54 Am. St. Rep. 772; *Blackburn v. Clark* (Ky.) 41 S. W. 430, 431; *Baxter v. Mohr*, 76 N. Y. Supp. 982, 37 Misc. Rep. 833.

"Turpitude" is defined by Webster to be inherent baseness or vileness of principle or acting; shameful wickedness. What constitutes moral turpitude, or what will be held such, is not entirely clear. A contract to promote public wrong, short of crime, may or may not involve it. If parties intend such

wrong, as where they conspire against the public interests by agreeing to violate the law or some rule of public policy, the act doubtless involves moral turpitude. When no wrong is contemplated, but is unintentionally committed, through error of judgment, it is otherwise. *Pullman's Palace Car Co. v. Central Transp. Co.* (U. S.) 65 Fed. 158, 161.

Moral turpitude is anything done contrary to justice, honesty, principle, or good morals. The crime of extortion involves a moral turpitude, so as to justify the disbarment of an attorney who has practiced extortion. *In re Disbarment of Coffey*, 56 Pac. 448, 449, 123 Cal. 522.

Everything done contrary to justice, honesty, modesty, or good morals is done with turpitude, so that embezzlement involves moral turpitude, justifying the disbarment of an attorney. *In re Kirby*, 73 N. W. 92, 94, 10 S. D. 322, 39 L. R. A. 856.

It imputes a crime involving moral turpitude to charge a woman with an attempt to procure an abortion on her daughter. *Filber v. Dautermann*, 26 Wis. 518, 520.

To charge another with being a dirty, drunken cur, lying drunk around the house more than half the time, and to have poisoned all the cats and dogs in the neighborhood, and to have scalded defendant's cat and kicked his dog, and to have persecuted a poor woman and robbed her of her rights, are not words charging a crime involving moral turpitude. *Baxter v. Mohr*, 76 N. Y. Supp. 982, 37 Misc. Rep. 833.

MORALITY.

Morality is defined by Paley to be "that science which teaches men their duty, and the reason of it." Paley, *Mor. Ph.* bk. 1, c. 1. Morality is the rule which teaches us to live soberly and honestly. It hath four chief virtues—justice, prudence, temperance, and fortitude. Bishop Horne's Works, vol. 6, "Charge to Clergy of Norwich." To make a contract against morals void as being against public policy, it must be against sound morals, and not merely against the morals of the times. *Lyon v. Mitchell*, 36 N. Y. 235, 238, 93 Am. Dec. 502.

As used in Const. art. 1, § 7, reciting that religion, morality, and knowledge being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction. "Morality" should be construed in its generic or unlimited sense. The meaning is, that true morality shall be promoted by encouraging schools and means of instruction. The word "knowledge" comprehends in it-

self all that is comprehended in the words "religion and morality," and which can be the subject of human instruction. True religion includes morality. All that is comprehended in the word "religion," or the words "religion and morality," and that can be the subject of human instructions, must be included under the general term "knowledge." Nothing is enjoined, therefore, but the encouragement of means of instruction in general knowledge—the knowledge of truth. The fair interpretation seems to be that true religion and morality are aided and promoted by the increase and diffusion of knowledge on the theory that knowledge is the handmaid of virtue, and that all three—religion, morality, and knowledge—are essential to good government. But there is no direction as to what system of morals shall be taught. *Board of Education of City of Cincinnati v. Minor*, 23 Ohio St. 211, 241, 13 Am. Rep. 233.

MORE.

See "No more."

In an action for injuries caused by being run over by a street car, plaintiff requested the court to charge that if the jury find from the evidence that plaintiff was intoxicated, that is a matter of no consequence, unless the jury find that his intoxication contributed to the injury. The court said: "That is so. The intoxication is of no consequence, unless it made him more careless." Held, that the word "more," as so used in the court's statement, could not have been construed by the jury as an intention to instruct that plaintiff might have been somewhat careless, and still recover, where they had been already instructed that any negligence by plaintiff contributing to the injury, would defeat a recovery. *Morris v. Eighth Ave. R. Co.*, 22 N. Y. Supp. 666, 667, 68 Hun, 39.

"More," as used in a demise of lands for the term of one year, with the privilege of four more years from a fixed date, modifies the contract in only one particular; and that is, it gives the lessee the option of extending the term for four years additional, instead of three. *Mershon v. Williams*, 42 Atl. 778, 779, 62 N. J. Law, 779.

In an action brought under a statute which provides that every toll gatherer who demands and receives from any person more than he is authorized to collect shall forfeit \$10 to the party aggrieved, it was claimed that a toll gatherer on a plankroad collected from plaintiff a toll which he had no right to collect for the reason that the law authorizing the collection of any toll on such road had been repealed. The court said: "If he was not authorized to collect anything, and did collect something, it would not be

construing the word 'more' according to the context and the approved usage of the language to say that he collected more than he was authorized to collect." *Culbertson v. Kinevan*, 14 Pac. 864, 366, 73 Cal. 68.

More favorable judgment.

Prac. Act 1877, § 522, providing that in all civil actions tried before a justice of the peace in which an appeal shall be taken to the district court, and the party shall not recover a more favorable judgment in the district court than before the justice of the peace, such appellant shall pay all costs accruing after the appeal, does not mean a judgment a few dollars or cents larger or smaller than the judgment recovered in the justice court, but one substantially more favorable, which is to be determined by the court in view of the circumstances of each particular case. *Baxter v. Scoland*, 3 Pac. 638, 640, 2 Wash. T. 86.

More interior port.

1 Stat. 648, c. 22, enacting that if any ship or vessel which shall have arrived within the limits of any district of the United States from any foreign port or place shall depart or attempt to depart from the same, unless to proceed on her way to some "more interior port" to which she may be bound, the master shall be subject to forfeiture, etc., means "those districts which are, in a strict sense, deeper within the interior of the country than the one to which the vessel has arrived, and from which she must go before she can reach the interior port." *United States v. Bearse* (U. S.) 24 Fed. Cas. 1052, 1053.

More than eight miles.

The words "more than eight miles," in the statute providing that a railroad may demand and receive for the transportation of passengers a rate not exceeding three cents per mile for a distance of "more than eight miles," are—since it is provided in such statute that the unit of measurement is one mile, and fractions of a mile are not to be considered—equivalent to nine miles, proceeding by units of one mile; that is, the limit of three cents per mile applies first to nine miles, then to ten, then to eleven, and so on, and for any distance less than nine miles the said limit does not apply. *Cleveland, C., O. & St. L. Ry. Co. v. Wells*, 62 N. E. 332, 65 Ohio St. 313, 58 L. R. A. 651.

More than fifteen days.

A statute providing that a justice should not adjourn a cause for more than 15 days from the return day of the summons means that, if there is one adjournment, it should not be for more than 15 days, and, if there be more than one adjournment, the whole time of such adjournment should not exceed

15 days. *Pedreck v. Shaw*, 2 N. J. Law (1 Penning.) 57, 59.

More than ninety days.

The term "more than 90 days," in Pamph. Acts 1853-54, p. 92, § 10, providing that a lien acquired by any execution issuing from certain courts shall not be lost if alias executions issue to the sheriff at intervals of not more than 90 days, requires a time greater than the time between the 14th of April, when the original execution is issued, and the issuance of the alias on the 14th of the following July. The phrase is to be read as meaning more days than 90 days. *Lang v. Phillips*, 27 Ala. 311, 314.

More than five years.

An allegation in a complaint which alleged that a debtor had been absent from the state for "more than five years" (the defense being that the action was barred by the statute of limitations) cannot be treated as definitely describing a longer period than five years and one day. *Bauserman v. Blunt*, 13 Sup. Ct. 466, 472, 147 U. S. 647, 37 L. Ed. 316.

More than three strands.

Tariff Act Oct. 1, 1890, par. 458, relating to the duties on gloves with "more than three single strands or cords," refers to the actual number of single strands or cords upon the glove, and not to any commercial designation thereof. Such words include ladies' kid gloves embroidered with more than three single strands or cords, although such gloves may be commercially known as three-row embroidered gloves. *Werthelmer v. United States* (U. S.) 68 Fed. 186.

MORE OR LESS.

See, also, "About."

The plain and most obvious meaning of the expression "more or less" is that the parties were to run the risk of gain or loss, as there might happen to be an excess or deficiency in the estimated quantity. *Harrison v. Talbot*, 32 Ky. (2 Dana) 258, 261.

The words "more or less," or other equivalent words used in contracts or conveyances, should be construed to qualify the representation of quantity in such a manner that, if made in good faith, neither party should be entitled to any relief on account of deficiency or surplus. *Jones v. Plater* (Md.) 2 Gill, 125, 128, 41 Am. Dec. 408.

A levy was made upon "100 bales of cotton, more or less." A forthcoming bond was given for "100 bales of cotton." Held, that though the words "more or less," standing alone, as used in the levy, were indefinite, yet, in view of the statement in the bond, such words would be disregarded, and the

levy declared not invalid. *Bolling v. Vandiver*, 8 South. 290, 291, 91 Ala. 375.

MORE OR LESS (Personalty).

The words "more or less," as used in contracts relating to personalty, and as applied to quantity, are to be construed as qualifying a representation or statement of an absolute and definite amount, so that neither party to a contract can avoid it or set it aside by reason of any deficiency or surplus occasioned by no fraud or want of good faith, if there is a reasonable approximation to the quantity specifically stipulated in the contract. *City of Chicago v. Galpin*, 55 N. E. 731, 733, 183 Ill. 390; *Hackett v. State*, 37 Pac. 156, 158, 103 Cal. 144; *Cabot v. Winsor*, 83 Mass. (1 Allen) 546, 550; *Hardy v. United States* (U. S.) 9 Ct. Cl. 244, 251.

The words "more or less," when used in a contract for the delivery of a certain quantity of personal property, more or less, will be construed to authorize a limited deviation from the quantity named. Where parties enter into executory arrangements for the sale of chattels, to be obtained subsequently by the seller, and designedly leave the exact quantity unfixed, and see fit to remit its ascertainment to the future act of the seller under and subject to a stipulation that it is to be so much "more or less," their practical construction of it ought to have great weight. *Rea v. Holland*, 12 N. W. 167, 48 Mich. 218.

The words "more or less," as used in a contract for the purchase of 400 tons of iron, more or less, should not be construed to make the contract ambiguous. The words "400 tons," in the contract, are to be taken not as mere words of expectation, but as words of contract, limiting and defining the quantity to be sold. To construe the contract as ambiguous would be to erase, in effect, from the contract, the words "400 tons." The words "more or less" would ordinarily cover a small excess or deficiency proportioned to the amount named, so that the parties would not be subjected to the inconvenience of a small excess in complying, or a small deficiency in not complying, with the contract, by leaving the excess in the hands of the vendor, in the one event, or refusing to take the amount offered by reason of the deficiency, in the other. The term "more" would not compel a party to take an indefinite quantity, nor would the term "less" force him to take the quantity bearing no proportion to that stipulated. *Shickle v. Chouteau, Harrison & Valle Iron Co.*, 10 Mo. App. 241, 245 (citing *Patterson v. Judd*, 27 Mo. 563, 567).

In an agreement to manufacture, furnish, or deliver certain property not then in existence, or to be taken from a larger quantity, the addition of the words "more or less" will be given a narrow construction, and held to apply only to such accidental and imma-

terial variations in quantity as would naturally occur in connection with such a transaction. *Norrington v. Wright*, 115 U. S. 186, 6 Sup. Ct. 12, 15, 29 L. Ed. 366; *Pine River Log & Imp. Co. v. United States*, 22 Sup. Ct. 920, 924, 186 U. S. 279, 46 L. Ed. 1164.

Immaterial deviation.

Under an agreement for the sale of 500 bundles of gunny bags, "more or less," it was held that the vendor must deliver a number reasonably approximating to the number specified, and that a shortage of 5 per cent. in quantity was within a reasonable limit of variation. *Cabot v. Winsor*, 83 Mass. (1 Allen) 546, 550.

Where the words "more or less" are used in a bill of lading reciting a shipment of, and agreeing to deliver, 2,282 bushels of corn, more or less, they indicate an intention on the part of the carrier not to be bound in strictness by the number of bushels mentioned, and the contract is complied with by delivering 2,217 bushels, if no more is shipped. *Kelly v. Bowker*, 77 Mass. (11 Gray) 428, 429, 71 Am. Dec. 725.

Material deviation.

The words "more or less," in a bill of lading reciting the receipt of 400 piles, more or less, signed by the carrier as per charter party, was construed to operate to prevent the carrier from being liable for a shortage of 90 piles, although the bill of lading had been transferred for value. *The Dixie* (U. S.) 46 Fed. 403.

The words "more or less," qualifying the statement of quantity in a contract for the sale of personalty, may cover a variation that is unimportant in amount, but will not cover a deficiency of 7,000 feet in a contract for the sale of 23,000 feet of lumber. *Creighton v. Comstock*, 27 Ohio St. 548, 551.

The seller agreed to deliver to the buyer two rafts of pine logs, containing each from 350,000 to 400,000 feet, more or less. The seller brought to the place specified for the delivery a raft containing 419,226 feet, and refused to deliver all of them by the contract. It was held that the words "more or less" did not cover so great an excess as 19,226 feet, and that the contract would be complied with by delivery of a raft containing any quantity of logs between 350,000 and 400,000 feet. *Patterson v. Judd*, 27 Mo. 563, 567.

Where a contract provided for the delivery of a specific lot of cattle, containing 262 head, more or less, it was held that a tender of 178 head was not a sufficient performance of the contract; the deficiency in number being too great. *Tilden v. Rosenthal*, 41 Ill. 385, 89 Am. Dec. 388 (cited in *Bloomington v. Hewitt*, 58 N. Y. Supp. 9, 10, 40 App. Div. 208).

"More or less," as used in a contract of sale whereby the plaintiff agreed to purchase about 300 quarters, more or less, of foreign rye, shipped on board a certain vessel, did not contemplate so large an excess as 50 over 300 quarters, and plaintiffs were not liable for such excess. *Cross v. Eglin*, 2 Barn. & Adol. 106.

Quantity identified by independent circumstances, or determined by option of buyer or seller.

Where a contract is made to sell or furnish certain goods identified by a reference to independent circumstances, such as an entire lot deposited in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of "about" or "more or less," or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. In such cases the governing rule is somewhat analogous to that which is applied in the description of lands, where natural boundaries and monuments control courses and distances and estimates of quantity. But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words "about," "more or less," and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight. If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significance, then the contract is to be governed by such added stipulations or conditions. As if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variation from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith. So, where a manufacturer contracts to deliver, at a certain price, all the articles he shall make at his factory for the space of two years, "say a thousand to twelve hundred gallons of naphtha per month," the designation of quantity is qualified not only by the intermediate word "say," but by the fair discretion or ability of the manufacturer, always provided he acts in good faith. *Brawley v. United States*, 96 U. S. 168, 24 L. Ed.

622. See, also, *Day v. Cross*, 59 Tex. 595, 604.

The use of "more or less" in a contract for the sale of all cattle bearing a certain brand, containing 10,000 head, more or less, will operate to cause the contract to be construed as only a contract for the sale of all the cattle bearing such brands, and does not require the seller to deliver any specific number of cattle. *Day v. Cross*, 59 Tex. 595, 604.

The words "more or less," in a government contract to furnish 1,600,000 pounds of oats to a military station, more or less, or such other quantity, more or less, as may be required from time to time for the wants of a military station between certain dates, in such quantities and at such times as the receiving officer may require, was construed not to require the contractor to deliver, or the United States to receive, in addition to the 1,600,000 pounds, all the oats needed between the dates mentioned, but only such other quantities, more or less, in addition to the specified quantity named, as might be needed from time to time for the wants of the station, and as he might be required to deliver. *Merriam v. United States*, 2 Sup. Ct. 536, 539, 107 U. S. 437, 27 L. Ed. 530.

The New York City docks department advertised for proposals for furnishing certain iron materials. The notice specified the period of the contract, and stated that the materials must be delivered as called for by the requisitions of the treasurer, and that any bidder must be engaged in, as well as prepared for, the business. The contract which was given to plaintiff stated the quantity of material, more or less, and it was agreed that the delivery thereof should be in such quantities as should be directed by the treasurer; also that the materials should be furnished according to the specifications and the requirements of the treasurer; and payments were to be made on the engineer's certificate that the quantities had been delivered as per requisition, and in accordance with the specifications. In the specifications each statement of quantity was followed by the words "more or less." Held, that the words "more or less" were used to indicate an estimate, merely, and that the agreement was not for any definite or fixed quantity of material, but that plaintiff was to deliver, and the city only bound to accept, what was needed by the department, and called for by its official requisition. Hence an action to recover damages because of failure to take the quantities stated in the specifications was not maintainable. *Callmeyer v. City of New York*, 83 N. Y. 116, 120.

Where an agreement was entered into between the United States and a contractor whereby the latter undertook to deliver at the post on Port Pembina 880 cords of wood,

more or less, as should be determined to be necessary by the post commander for the regular supply, in accordance with army regulations, of the troops and employes of the garrison of said post for the fiscal year beginning July 1, 1871, and the post commander, as soon as the contract came to his knowledge, and within four days after it was signed, notified the contractor that about 40 cords of wood would be required thereon, and forbade his hauling any more to the government yard, held, that the United States was not liable to the contractor for any amount exceeding the 40 cords delivered. *Brawley v. United States*, 96 U. S. 168, 24 L. Ed. 622.

Where a contract between a government Indian agent and a private party provided that the former shall deliver to the latter all the hides of beef cattle killed for the Indians, the number of the hides to be about 4,000, more or less, it was held that the expression as to the number of hides did not create a duty to deliver even approximately the number specified, but only the hides from those which were actually killed. *Lobenstein v. United States*, 91 U. S. 324, 329, 23 L. Ed. 410.

"More or less," as used in a contract to furnish 600 cords, more or less, of stone sufficient for the construction of a specified building, are words of estimate, merely; the contract being for sufficient stone to construct the building. *Thurber v. Ryan*, 12 Kan. 453, 458.

MORE OR LESS (Realty).

The words "more or less," as used in a deed declaring that the land conveyed contained a specified number of acres, more or less, did not mean as estimated, as supposed, but should be construed to mean about the specified number of acres, and are designed to cover only such small errors of surveying as usually occur in surveys. *Crislip v. Cain*, 19 W. Va. 438, 442, 485.

A description in a deed of a quantity of land to be conveyed as "fifteen acres, more or less," was not conclusive as to the exact quantity of land to be conveyed, but was a sufficient description if the tract of land in question contained approximately 15 acres. *Hodges v. Kowling*, 18 Atl. 979, 58 Conn. 12, 7 L. R. A. 87.

"The words 'more or less,' in a deed in connection with a description of land, are used to designate approximately the quantity of land within the given boundary. In the absence of contracts, the quantity is always regarded as a part of the description, and, where it appears by words of qualification as more or less, with a statement of the quantity of acres in the deed, is mere matter of description, and not of the essence of the

contract. The buyer takes the risk of the quantity if there be no intermixture of fraud. This is the general rule where the land is sold in lump and for a gross sum, and there is no fraud or concealment or misrepresentation that amounts to fraud. An abatement of any portion of the purchase price on account of a deficit in the number of acres in all cases where the quantity is merely a part of the description rests upon the ground of fraud. There may be cases where the deficit in quantity is so great as to authorize an inference of bad faith and fraud on the part of the seller." *Tyler v. Anderson*, 6 N. E. 600, 601, 106 Ind. 185.

"More or less," as used in a deed describing the lots conveyed as containing together in breadth in front on the street 75 feet, and in the rear 75, on another street 75 feet, and on the easterly side 75 feet, more or less, applies to the depth of the lots on the second street mentioned, as well as on the easterly line of the premises; thereby indicating that both parties to the conveyance were ignorant of the actual depth of either of the three lots conveyed. *Morris Canal Co. v. Emmett* (N. Y.) 9 Paige, 168, 170, 37 Am. Dec. 388.

"More or less," as used in an agreement to sell a certain farm in a certain county for a gross sum, containing a certain number of acres, more or less, should be construed to import that quantity did not enter into the essence of the contract; and hence, in the absence of fraud, neither party can claim relief either for a deficiency or a surplus. *Tyson v. Hardesty*, 29 Md. 305, 309.

The words "more or less," following a description of land in a deed, indicates that the statement of the quantity of acres in a deed is mere matter of description, not of the essence of the contract, and the buyer takes the risk of the quantity if there be no intermixture of fraud in the case. *Jenkins v. Bolgiano*, 53 Md. 407, 420; *Hall v. Mayhew*, 15 Md. 551, 568; *Slothower v. Gordon*, 23 Md. 1, 9; *McArthur v. Morris*, 84 N. C. 405, 407; *Moore v. Harmon*, 41 N. E. 599, 600, 142 Ind. 555; *Libby v. Dickey*, 27 Atl. 253, 255, 85 Me. 362; *Young v. Craig*, 5 Ky. (2 Bibb) 270, 272; *Blaney v. Rice*, 37 Mass. (20 Pick.) 62, 64, 32 Am. Dec. 204.

The words "more or less" and "about" are words of safety and precaution, and, when used in a deed, are intended to cover some slight or unimportant inaccuracy, and, while enabling an adjustment to the imperative demands of fixed monuments, do not weaken or destroy the indications of distance and quality when no other guides are furnished. *Oakes v. De Lancey*, 133 N. Y. 227, 30 N. E. 974, 975, 28 Am. St. Rep. 628.

"Where the words 'more or less' are annexed to a contract for the sale of a speci-

fied number of acres of land, the parties are entitled to compensation for a deficiency or excess in that quantity beyond what may be reasonably imputed to small errors from variations of instruments or otherwise; but where the contract is to sell a tract of land, so many acres as it may contain, more or less, fully understood to be so, the purchaser takes the tract at the risk of loss by deficiency in the number of acres contemplated, and no compensation can be had." *Jolliffe v. Hite* (Va.) 1 Call, 301, 329, 1 Am. Dec. 519; *Russell v. Keeran*, 8 Leigh, 9, 14.

"More or less," as used in a deed of land, the quantity of which is ascertained and described as so much, more or less, are considered as having been annexed to the number of acres stated in the agreement from motives of caution, and not from any disregard to the actual quantity. *Caldwell v. Moore*, 33 Ky. (3 Dana) 340, 345.

"More or less," as used in a description of real estate which furnishes a starting point, and gives the boundary line by admeasurement, but describes the property as so many acres, more or less, cannot be construed to render the description void for uncertainty, but may be treated as surplusage. *Dale v. Travelers' Ins. Co.*, 89 Ind. 473, 475.

A grant described the premises by name, and recited that the said premises contained three-fourths of a square league of land, "a little more or less." Held, that the words a "little more or less" should be rejected as surplusage, as without meaning in the system of location and survey which obtains in the United States, and that the grantee's title for the quantity clearly expressed was valid. *United States v. Cameron* (Ariz.) 21 Pac. 177, 178.

"More or less," as used in a receipt reciting that the signer had sold to certain persons, and received payment in full for, the hemlock, bark, timber, and wood on one acre, more or less, did not have the effect to enlarge the quantity before described. *Smith v. Rock*, 9 Atl. 551, 552, 59 Vt. 232.

Where there is no natural boundary or descriptive call for the termination of lines of a tract of land, and the quantity of land called for in the grant is one league, a little more or less, the survey must include only a league, and the words "a little more or less" must be rejected. *United States v. Fossat*, 61 U. S. (20 How.) 413, 15 L. Ed. 944.

The words "more or less" or equivalent terms may be used in a conveyance to show that the land is conveyed at an estimated instead of an actual quantity. *Pickman v. Trinity Church*, 123 Mass. 1, 5, 25 Am. Rep. 1.

"More or less," as used in a sale of land by auction, in which the auctioneer repre-

sented the land as being 300 acres, "more or less," but which he stated to be uncertain, and that he would sell the land at so much per acre—the land to be measured—made the amount thus specified a mere estimate of the quantity; and hence a purchaser was required to pay the specified price per acre for the entire amount, though there was an excess of 45 acres. *Ashcom v. Smith* (Pa.) 2 Pen. & W. 211, 218, 21 Am. Dec. 437.

More or less as used in a deed conveying 67 acres "more or less" does not limit or extend the grant and excludes a construction that the quantity named in the conveyance should be conclusive on the parties. It is generally used in the absence of definite knowledge of the boundaries and extent of the land to be conveyed. *Pierce v. Faunce*, 37 Me. 63, 67.

The words "more or less," as used in a deed of certain described lands, stated to contain so many acres, more or less, are not to be construed as to unsettle the amount of purchase money, and to leave the matter open to surveys, but are to be understood as indicating an agreement of each party to risk a variation in the quantity assumed. *Sullivan v. Ferguson*, 40 Mo. 79, 89 (citing *Boxley v. Stevens*, 31 Mo. 201).

An agreement for the sale of 340 acres of land, be the same more or less, at \$20 an acre, which did not accurately describe the lands, or provide any gross sum as the price to be paid therefor, was construed as authorizing a survey by the parties for the ascertaining of the quantity of land for which \$20 an acre was to be paid. The court said that it does not absolutely follow that a survey is to be made, and the land paid for by the acre, in all cases where the agreement mentions that the tract contains so many acres, more or less, at a certain price by the acre. Because, taking the whole agreement together, it may appear that the parties intended to consider the tract as containing a certain number of acres. Low priced lands are often sold with reference to the official survey, where the intent is to abide by the survey, although it may be mentioned in the articles of agreement that the vendor is to pay at the rate of so much per acre. But where the land is of the value of \$20 an acre, each acre is of importance to both buyer and seller; and, where it is said in such case that the buyer is to pay so much per acre, there will be great reason to conclude that the sale was intended to be by the acre, unless other parts of the instrument pretty clearly indicate the contrary. *Bailey v. Snyder* (Pa.) 13 Serg. & R. 160, 161.

The words "more or less," used to describe a lot of land, mean merely that the lot conveyed may be in size more or less than the dimension given, but they cannot be

so extended as to include a separate and distinct lot. *McCune v. Hull*, 24 Mo. 570, 574.

Where a testator devised a certain tract of land, stating that it contained 219 acres, more or less, the devisee was entitled to recover the entire tract devised, though it contained less than the stipulated number of acres. *Benson's Lessee v. Musseter* (Md.) 7 Har. & J. 208, 212.

Mistake or fraud.

The use of the words "more or less" in a conveyance of land as containing so many acres, more or less, does not authorize the purchaser to receive all the land within the designated boundaries when it appears that the wrong boundaries were described by reason of a mistaken surveyor's report. *Shipp v. Swann*, 5 Ky. (2 Bibb) 82.

Where 84 acres of land is conveyed by a deed reciting that the tract contains 121 acres, more or less, the vendee is entitled to relief, notwithstanding the use of the words "more or less," though the discrepancy is the result of a gross mistake. In the case of *Harrison v. Talbot*, 32 Ky. (2 Dana) 258, Chief Justice Robertson, after a somewhat careful review of the decided cases involving the principles of this case, says: "When it is evident that there has been a gross mistake as to quantity, and the complaining party has not been guilty of any fraud or culpable negligence, nor has otherwise impaired the equity resulting from the mistake, he may be entitled to relief from the technical or legal effect of his contract, whether it be executed or only executory." In the case of *Quesnel v. Woodlief* (Va.) 2 Hen. & M. 173, note, the tract of land sold was estimated as containing 800 acres, but was found afterwards to comprise but a little over 608 acres, so that, in the language of the court, both parties were mistaken in the quantity and number of acres contracted for, and the mistake ought to be rectified in a court of equity, and the appellant allowed a deduction from the price agreed by him to be given for said land, for the deficiency in quantity; that deficiency being too great for a purchaser to lose under an agreement for a reputed quantity, notwithstanding the words "more or less," inserted in the deed, which should be restricted to a reasonable allowance for small errors in survey, and variations in instruments. Again, in *Campbell's Ex'rs v. Wilmore*, 29 Ky. (6 J. J. Marsh.) 209, where a tract of land was sold and conveyed as containing 124 acres, more or less, and it was subsequently ascertained to contain 132 acres, a judgment was ordered for the additional 8 acres at the price per acre at which the land had been sold. Mr. Justice Washington observed in the case of *Thomas v. Perry* (U. S.) 23 Fed. Cas. 964, "that, when the land sold is said to contain about so many acres, both the grantor and

grantee considered these words as a representation of the quantity which the grantor expects to sell, and the grantee to purchase. The words 'more or less' are intended to cover a reasonable excess or deficit. If the difference between the real and the represented quantity be very great, both parties act obviously under a mistake which it would be the duty of a court of equity to correct. So in *Putnam v. Hill*, 2 Russ. 520, and *Hill v. Buckley*, 17 Ves. 395, this rule is recognized." *Sollinger v. Jewett*, 25 Ind. 479, 481, 87 Am. Dec. 372.

The general rule is that where land is sold by metes and bounds, and estimated to contain a specified quantity, more or less, and a gross sum is paid for the entire tract, the vendee will not be entitled to abatement, should the number of acres fall short of the estimated quantity; but this rule is not applicable where there is any fraud or concealment on the part of the vendor, and this though the deficit in quantity may be so great as to authorize the inference that the seller acted in bad faith, but the abatement, if any, must proceed on the ground of his fraudulent conduct. *Langsdale v. Girtton*, 51 Ind. 99, 102, *Cravens v. Kiser*, 4 Ind. 512, 513.

A man who sells land as containing a certain quantity, more or less, when he knows from an inspection of the title deeds in his possession or otherwise that it contains a much less quantity, is bound in equity to make the deficiency good to the purchaser. *Nelson v. Matthews* (Va.) 2 Hen. & M. 164, 3 Am. Dec. 620; *Duval v. Ross* (Va.) 2 Munf. 290; *Pringle v. Samuel*, 11 Ky. (1 Litt.) 43, 44, 13 Am. Dec. 214. According to this rule, a sale of land at judicial sale as containing 20 acres, though it only contained 13 acres, which fact was not known to the purchaser, though known to one of the parties beneficially interested in the sale, who concealed such fact, was set aside. *Veeder v. Fonda* (N. Y.) 3 Paige, 94, 99.

"More or less," as used in an obligation for the conveyance of land, in which it was agreed to convey a certain amount of land, more or less, means that the parties are to run the risk of gain or loss, as there may be an excess or deficiency in the estimated quantity, but this does not bar an inquiry into a fraud committed by the seller in falsely representing the number of acres sold. *McCoun v. Delaney*, 6 Ky. (3 Bibb) 46, 47, 6 Am. Dec. 635.

Reasonable excess or deficiency covered.

"More or less," as used in conveyances where land is sold by the entire tract or lot, and described as containing a certain number of acres, more or less, will so qualify the description as to cover any deficiency not

so gross as to justify the suspicion of willful deception or mistake, amounting to fraud. *Wylly v. Gazan*, 69 Ga. 506, 516.

"More or less," as used in a contract to convey a certain number of acres of land, more or less, cannot extend so far as to prevent the vendee's relief when there is a deficiency of a large number of acres, and of considerable value. *Gentry v. Hamilton*, 38 N. C. 376, 379.

"More or less," as used in a sale of land of a certain number of acres, more or less, must be restrained to cover a reasonable deficiency or excess. These words must be considered as to the subject-matter to which they are applied. *Eichelberger's Lessee v. Barnitz* (Pa.) 1 Yeates, 307, 309; *Duval v. Ross* (Va.) 2 Munf. 290, 295; *Nelson v. Mathews* (Va.) 2 Hen. & M. 164, 175, 3 Am. Dec. 620; *Belknap v. Sealey*, 14 N. Y. (4 Kern.) 143, 152, 67 Am. Dec. 120; *Hosleston v. Dickinson*, 1 N. W. 550, 557, 51 Iowa, 244; *Douthitt v. Hipp*, 23 S. O. 205, 209; *Smith v. Fly*, 24 Tex. 345, 350, 76 Am. Dec. 109.

"More or less," as used in a conveyance of land, is intended to cover any slight excess or deficiency with regard to the quantity conveyed. If, however, the variance between the quantity expressed and that conveyed be considerable, the party sustaining the loss should be allowed for it; and this rule should prevail, also, when the discrepancy is from mistake only, without fraud or deception. *Couse v. Boyles*, 4 N. J. Eq. (3 H. W. Green) 212, 216, 38 Am. Dec. 514.

"More or less," as used in a title bond covenanting to make a deed of a certain tract of land containing a certain number of acres, more or less, means, where there is only an inconsiderable deficiency as to the quantity of land, that the vendor shall not be submitted to a deduction from the amount of the purchase money if the tract of land contained less than the specified number of acres, or the purchaser pay more than the sum stipulated if the tract contained a greater number of acres. *Phipps v. Tarpley*, 24 Miss. (2 Cushm.) 597, 599.

"More or less," as used in a deed of land described as containing so many acres, more or less, operates to allow a small variation in the number of acres without rendering either party liable for a difference in price. In *Day v. Flew, Owen*, 133, 9 Vin. 343, pl. 10, it was held that by *sine plus sine minus*, shall be intended of a reasonable quantity "more or less" by a quarter of an acre, or two or three, at most. *Sugden* says (page 200): "This expression applies to a small quantity." In *Quesnel v. Woodlief*, 2 Hen. & M. 173, note, it was decided that "more or less" must be restricted to a reasonable or usual allowance for small errors in sur-

veys, and for variations in instruments. (Cited in *Allison v. Allison*, 9 Tenn. [1 Yerg.] 16, 21).

"We think the decisions of this court recognize that even in the case where land is sold in gross, and the quantity stated in the conveyance is qualified by the words 'more or less,' the purchaser will be relieved in equity if the deficiency be great. The disparity being gross between the quantity believed by both parties to exist and that which is found actually to exist, and both having been mutually mistaken, and the quantity being a material element of inducement in the sale, it is but equitable to let the purchaser retain his bargain, and to relieve him from payment for that which he does not get." *Wheeler v. Boyd*, 6 S. W. 614, 617, 69 Tex. 293.

The addition of the words "more or less" to the statement of the number of acres conveyed by a deed converts what would otherwise be a sale by the acre to a sale in gross, but has been defined to merely cover a reasonable excess or deficiency only; that is, such as may be caused by a difference in surveys or variations in instruments or similar causes. Such deviations ought not usually to exceed 5 per cent. of the whole tract as described, and will not be so held unless there is a special agreement or certain understanding between the parties that those words, so used, are intended to cover any excess or deficiency, however great. When the difference between the actual and estimated quantity of land is so great as to warrant the conclusion that the contract would not have been entered into, had the truth been known, the injured party is entitled to relief in equity on the ground of gross mistake. Twenty per cent. has been held to justify interference in equity, and where the excess was about 85 per cent. the contract should be canceled at the suit of the grantor, but the grantee could not be compelled to retain the land and pay for the excess. *Pratt v. Bowman*, 17 S. E. 210, 212, 37 W. Va. 715.

It is well settled that a vendee of land, when it is sold in gross, or with the description "more or less" or "about," does not thereby, *ipso facto*, take all risk of quantity in the tract. The use of the words "more or less" or "about," or similar words, in designating quantity, although they show a sale in gross, and not by the acre, covers only a reasonable excess or deficiency. *Bigham v. Madison*, 52 S. W. 1074, 1075, 103 Tenn. 358, 47 L. R. A. 267 (citing *Belknap v. Sealey*, 14 N. Y. 143, 67 Am. Dec. 120; *Harrel v. Hill*, 19 Ark. 102, 68 Am. Dec. 212; *Drake v. Eubanks*, 32 S. W. 492, 61 Ark. 120; *Stebbins v. Eddy*, 22 Fed. Cas. 1192; *Couse v. Boyles*, 4 N. J. Eq. 212, 38 Am. Dec. 514; *Pratt v. Bowman*, 17 S. E. 210, 37 W. Va. 715;

Wheeler v. Boyd, 6 S. W. 614, 69 Tex. 293; Newton v. Tolles, 19 Atl. 1092, 66 N. H. 136, 9 L. R. A. 50, 49 Am. St. Rep. 593).

The words "more or less," used in connection with a description of land conveyed by deed, cover only a reasonable excess or deficiency. Kreiter v. Bomberger, 82 Pa. 59, 63, 22 Am. Rep. 750.

Risk as to quantity indicated.

"More or less," as used in a deed conveying certain acres, be there more or less, was employed for the purpose of showing that the parties therein risked the quantity. Willford v. Bentley, 28 Ky. (5 J. J. Marsh.) 181; Young v. Craig, 5 Ky. (2 Bibb) 270, 272; Moore v. Harmon, 41 N. E. 599, 600, 142 Ind. 555; Libby v. Dickey, 27 Atl. 253, 255, 85 Me. 362.

"More or less," as used in a contract to purchase for a certain sum a tract of land containing a certain number of acres, be the same more or less, so far qualify the representation of quantity as to preclude either party from any just claim to relief on account of a deficiency or surplus. Smallwood v. Hatton, 4 Md. Ch. 95, 98; Stebbins v. Eddy (U. S.) 22 Fed. Cas. 1192, 1194; Hurt v. Stull, 3 Md. Ch. 24, 27.

"More or less," as used in a contract for the sale and purchase of land for an entire sum, the land being described as a certain number of acres, more or less, and its boundaries being described as of a certain length, more or less, will so control a statement of the quantity of land, or of the length of one of the boundary lines, that neither party will be entitled to relief on account of the deficiency or surplus, unless in case of so great a difference as will universally raise the presumption of fraud or gross mistake in the very essence of the contract. Noble v. Googins, 99 Mass. 231, 235.

"More or less," as used in a deed of conveyance conveying a certain number of acres of land, more or less, is indefinite and general. The purchaser by such description cannot get relief on that feature only unless the disparity is so great between the generally declared number of acres and the actual number as to be evidence of intentional fraud. Watson v. Sutro, 24 Pac. 172, 178, 86 Cal. 500.

"The general rule, as laid down by Chancellor Kent, is that where it appears by definite boundaries, or by words of qualification, as 'more or less,' that the statement of the quantity of acres in the deed is a mere matter of description, and not of the essence of the contract, the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case." Weart v. Rose, 16 N. J. Eq. (1 C. E. Green) 290, 297 (citing Mann v. Pearson [N. Y.] 2 Johns. 37; Marvin

v. Bennett [N. Y.] 26 Wend. 169; Stebbins v. Eddy [U. S.] 22 Fed. Cas. 1192, 1194; Powell v. Clark, 5 Mass. 355, 4 Am. Dec. 67).

"More or less," as used in a deed conveying a certain quantity of land, more or less, do not import a special agreement that the purchaser takes the risk of the quantity, nor are they equivalent to a stipulation that a mistake, if one is subsequently discovered, shall not be a ground for equitable relief. Paine v. Upton, 87 N. Y. 327, 334, 335, 41 Am. Rep. 371.

The words "more or less," as used in a deed conveying certain described property as containing a certain number of acres, more or less, operate to relieve either party thereto of the necessity of paying additional compensation in case the quantity falls short or overruns in a small amount, in the absence of evidence of fraud. Melick v. Dayton, 34 N. J. Eq. (7 Stew.) 245, 249.

"More or less," as used in a deed describing land by its boundaries and situation, and as containing by survey a certain number of acres, be the same more or less, in its plain and most obvious meaning, meant that the parties were to run the risk of gain or loss as there might happen to be an excess or deficiency in the estimated quantity. This, it is to be believed, is the sense in which such an expression is uniformly understood by both the learned and unlearned. This idea is not repelled by the expression of the quantity of acres. On the contrary, it rather derives strength from the manner in which the quantity is mentioned, for it plainly indicates that the matter of quantity was used as matter of description only, and that it was the intention of the parties not to be confined to a concise and specified quantity. Young v. Craig, 5 Ky. (2 Bibb) 270, 272.

"More or less," as used in the description in a deed, indicates an intention that any small variation either above or below the number of acres mentioned shall be no cause for complaint by either party. For any small deficiency the purchaser will be held to have assumed the risk, and for any small excess the vendor will have no relief. In order to maintain an action on the ground of variance between the number of acres actually contained in the tract and that stated in the description, there must be evidence of fraud or mistake. Watson v. Cline (Tex.) 42 S. W. 1037, 1038.

The words "more or less," in a deed which recites that the tract is estimated to contain 180 acres of land, more or less, are, in the absence of fraud and mistake, to be taken as prima facie evidence that the parties to the deed intended to risk a gain or loss in the estimated quantity. Rich v. Ferguson, 45 Tex. 396, 398.

"When the contract is to sell a tract of land of so many acres as it may contain, more or less—fully understood to be so—the purchaser takes the tract at the risk of gain or loss by deficiency or excess. *Caldwell v. Oralg* (Va.) 21 Grat. 132; 2 Lom. Dig. 63; 2 Minor, Inst. 794; *Grantland v. Wight* (Va.) 2 Munf. 179; *Weaver v. Carter* (Va.) 10 Leigh, 37. Where the contract is for the sale of a tract or parcel of land without reference to its quantity, whatever the deficiency, no allowance is made to either party, even where the deficiency is great. In the case of *Tucker v. Cocke* (Va.) 2 Rand. 51, the deficiency was 100 acres. In *Russell v. Keeran* (Va.) 8 Leigh, 9, the deficiency amounted to 100 acres in a tract of 400 or 500 acres." *Allen's Ex'r v. Shriver's Adm'r*, 81 Va. 174, 183.

Sale in gross or by acre indicated.

The use of the words "more or less" in a conveyance of a tract of land as containing so many acres, more or less, indicates a sale in gross, and not by the acre. *Hull v. Cunningham's Ex'r* (Va.) 1 Munf. 330, 335; *Franco-Texan Land Co. v. Simpson*, 20 S. W. 953, 954, 1 Tex. Civ. App. 600 (citing *Belamy v. McCarthy*, 12 S. W. 849, 75 Tex. 293); *Pollock v. Wilson*, 33 Ky. (3 Dana) 25; *Faure v. Martin*, 7 N. Y. (3 Seld.) 210, 217, 57 Am. Dec. 515.

If a vendor agrees in writing to convey, or by deed does convey, to his vendee, for a specified price, a tract of land described by metes and bounds, and as containing a specified number of acres, more or less, it is a sale in gross, and not by the acre; and there is no ambiguity in the written contract or deed on this point, though the price named be an exact multiple of the number of acres named. The question whether such a sale is a sale by the acre, or a sale in gross, is a question of law, to be determined by the court on an inspection of the written contract or deed, and parol evidence is not admissible to show that the parties intended a sale by the acre. *Depue v. Sergeant*, 21 W. Va. 326, 332.

The statement in a deed of a consideration in gross, and the recital that the land conveyed contained 98 acres, more or less, may, unexplained, justify the inference that the sale was in bulk, and not by the acre; but this is an inference of a fact collateral to the purpose of the conveyance, and it is well settled that the consideration clause is open for explanation for any purpose except to defeat the conveyance. Such inference is rebutted where it is shown that the agreement was to buy the land at the rate of \$44 per acre, and that at the time the conveyance was made it was agreed that the quantity of the land should be subsequently ascertained, and the adjustment of the purchase money should be made upon

that basis. *Murdock v. Gilchrist*, 52 N. Y. 242, 247.

The description of land in a contract to convey as containing so many acres, more or less, when the land is described by metes and bounds or otherwise, operates to make it a contract for the sale of the land in gross, and not a contract of sale by the acre, and excludes any implied warranty of the quantity. The contract, not being ambiguous, cannot be explained, modified, or altered by parol evidence; but if the vendor, to induce the vendee to purchase, falsely represents to him that the land contains a specified number of acres, or that number more or less, and the vendee, relying on the truth of such representation, is thereby induced to purchase the same as containing about that number of acres, such representation may amount to an implied warranty of the number of acres, and the vendor may be compelled to account to the vendee for a deficiency in the number of acres. *Anderson v. Snyder*, 21 W. Va. 632, 647.

A contract to convey land described the land by metes and bounds, and stated that it contained 54.15 acres of land, more or less, which was agreed to be sold for the sum of \$35 per acre. The description of the land in the deed made in pursuance to the contract was also followed by the words "containing 54.15 acres of land, more or less." There was in fact 48.47 acres in the piece. Held, that it appeared from the contract and the deed, considered together, that the sale was by the acre, and not by the piece, so that, despite the use of the words "more or less," the buyer was entitled to abatement. *Wilson v. Randall*, 67 N. Y. 338, 341.

Quantity described by metes and bounds or monuments.

Where a person purchases land by metes and bounds, represented to contain a number of acres, more or less, he is entitled to recover all the lands within the prescribed limits, whatever the number of acres may be. It must be apparent from the words more or less that the metes and bounds are to govern, and not the number of acres. *Kennedy v. Boykin*, 14 S. E. 809, 818, 35 S. C. 61, 28 Am. St. Rep. 838 (citing *Peay v. Briggs* [S. C.] 2 Mill, Const. 93, 12 Am. Dec. 656).

Where a lot of land is conveyed by boundaries, and it is stated in the conveyance that the contract contained a certain number of acres, more or less, the whole tract will pass, although it contains more than the specified number of acres. *Mann v. Pearson* (N. Y.) 2 Johns. 37, 44.

A tract of land conveyed by deed was described by metes and bounds, and as "containing twenty acres, more or less." Held,

that the words "more or less" were merely words of description, expressing the quantity, and did not amount to a covenant as to the quantity; they being controlled by the definite calls in the deed. *Austrian v. Dean*, 23 Minn. 62, 64.

Land was described in a deed by its subdivisions in the government survey, including fractional parts of three several sections, and fully described by its metes and bounds. After the description by numbers was added the words "making, in all, 527 acres, more or less." Held, that the words "more or less" should be construed to have been inserted for the purpose of making more manifest an intention to describe, and not to warrant. *Rogers v. Peebles*, 72 Ala. 529, 530.

"More or less," as used in a will describing a tract of land as the southeast quarter of a section containing 40 acres, more or less, should not be construed to modify the description of the land as the southeast quarter, where it appeared that the testator did not own such tract, so as to mean the southeast quarter of the northeast quarter of that section. *Bishop v. Morgan*, 82 Ill. 351, 353, 25 Am. Rep. 327.

"More or less," as used in a deed describing land to be within certain lines, and to contain a certain number of acres, more or less, should be construed as merely descriptive, and not a covenant. In other words, the number of acres mentioned in the deed did not control or limit the description. *Armstrong v. Brownfield*, 4 Pac. 185, 188, 32 Kan. 116.

Where a person purchases land by metes and bounds, represented to contain a certain number of acres, more or less, he is entitled to receive the lands within the prescribed limits, whatever the number of acres may be. "It must be apparent from the words 'more or less' that the metes and bounds are to govern, and not the number of acres. The question was settled in the case of *Vaughan v. Mitchell*, determined in this court, I think, about the year 1803. In that case about 50 acres of the land were taken off by an older grant. Still the defendant had nearly double the number of acres that his deed called for. Yet the court held that he was entitled to all the land embraced within the lines of the plat referred to, and allowed a deduction from his bond for the deficiency." *Peay v. Briggs* (S. C.) 2 Mill, Const. 98, 100, 12 Am. Dec. 656.

Where a conveyance of land describes the same by metes and bounds, and states that it contains a certain quantity, more or less, the purchaser takes all within the prescribed bounds, although more than the estimated quantity; and there is no abatement, should the quantity fall short. *Ketchum v. Stout*, 20 Ohio, 453, 463.

The use of the words "more or less" in a deed describing a lot by its number, and with reference to a map, and providing that it contains 200 acres, more or less, does not operate to prevent the deed from passing the entire lot, though it contains more acres than specified. *Jackson v. Defendorf* (N. Y.) 1 Caines, 493.

When the words "more or less" are annexed to the quantity of land, it is against principle that the vendor should be responsible to assure any given number of acres unless he practiced fraud upon the purchaser. The decisions are that these words are intended only to protect the seller against a small deficiency where there is an approximation to the quantity of acres mentioned. Where both parties to a conveyance of land described as lying on two water courses, and which designates all the coterminous proprietors, and provides that the tract contains 860 acres, more or less, and neither the buyer nor seller knows exactly the size of the tract, equity will not relieve against the conveyance, by reason of a deficiency in the number of acres, in the absence of any showing of fraud. *Beall v. Berkhalter*, 26 Ga. 564, 567.

Where the description contained in a grant and the circumstances of the case justified the belief that the intention was to grant all the land included within the boundaries named, then the words "a little more or less" must be construed as operative to pass to the grantee such fractional part of the league as may be found in excess of the quantity named in the grant. *United States v. Estudillo* (U. S.) 25 Fed. Cas. 1022, 1023.

The use of the words "more or less" in a conveyance of 200 acres, more or less, implies that the boundaries are fixed, and may contain more or less. The boundaries, being recognized by both parties, must be taken as those intended by the deed. Thus the fact that the tract contains 213 acres is not so great a discrepancy as to carry with it irresistible evidence of an essential mistake, sufficient to authorize relief to the vendor. *Glen v. Glen* (Pa.) 4 Serg. & R. 487, 492.

The phrase "more or less," when added to a specification of quantity in a conveyance, means that it is a mere estimate, and, by necessary inference, subordinates the quantity to fixed calls or monuments. *Borkenhagen v. Vianden*, 52 N. W. 260, 261, 82 Wis. 206.

Where testatrix, in her will, defined the boundary of city lots devised, to the inch, the use of the words "more or less" could not have been meant to cover a distance within 10 feet. *Krechter v. Grofe*, 66 S. W. 358, 361, 166 Mo. 385.

Under a conveyance of a tract of land bounded by adjoining owners, and described

as a tract containing so many acres, "more or less," at a certain price per acre, when there is no stipulation for admeasurement, or any bad faith proved, redress cannot, after the transaction is closed, be given to either party for a surplus or deficiency subsequently appearing. *Galbraith v. Galbraith* (Pa.) 6 Watts, 112, 117.

The words "more or less," in a conveyance of a tract of land by metes and bounds for a gross consideration, must be understood as a part of the description of the land, and, though not decisive, of themselves, to show that there was no stipulation by the vendor as to the quantity of the land, may, when taken in connection with the rest of the deed, become very expressive of its true meaning. In the absence of fraud in such a case, the vendee is not entitled to have a reduction of the price by reason of a deficiency in the estimated quantity. *Dozler v. Duffee*, 1 Ala. 320, 325.

The words "more or less," used in a deed of conveyance, or in a petition to sell land, or decree, should be construed with reference to the particular circumstances under and in relation to which they are used. An administrator's deed, following the description of the petition to sell land to pay debts and the decree of sale, described it as all that lot situate on a certain corner of two streets, having a front on one of 108 feet, more or less, and running back on the other street 126 feet, more or less, "constituting the only realty of said estate. Held that though the intestate died seised of a lot 160 by 126, situated on said corner, it did not all pass by the deed. *Bromberg v. Yukers*, 19 South. 49, 51, 108 Ala. 577.

The words "more or less," as contained in a deed to certain land, described as "bounded and containing, as within fence, as follows, to wit" (then following courses and distances), are merely words of description, to prevent the parties from being prejudiced by inaccuracies, and do not have the effect to extend the grantees' boundary beyond the line fixed by a visible monument or a map referred to in the deed. *Brady v. Hennion*, 21 N. Y. Super. Ct. (8 Bosw.) 528, 537.

Immaterial deviation.

"More or less," as used in a contract whereby one party sold to another a certain amount of land, describing it particularly, and adding, "supposed to be one hundred acres more or less," are construed to mean that there might be such deviation from the supposed quantity as would be reasonable under the circumstances of the negotiation, and this would not exceed 10 or 15 per cent. *Fannin v. Bellomy*, 68 Ky. (5 Bush) 663, 665.

Where land is sold at executor's sale under a judgment describing the land as a

certain lot, containing 45x90 feet, more or less, the purchaser cannot complain where the lot lacks, by actual measurement, 8 or 9 front feet. *Wyllly v. Gazan*, 69 Ga. 506, 516.

"One hundred and thirty-eight feet, more or less," as used in a contract for the conveyance of land, with which both parties were familiar, stating that it has a frontage along low water mark of 138 feet, more or less, should be construed as merely an approximate estimate, arrived at by scaling a plat or map of the land, and, though the frontage proved to be only 123 feet, the vendee was not allowed a deduction. *Appeal of McCullough*, 18 Atl. 1080, 1083, 132 Pa. 43.

Where a grantee agreed to pay a gross sum for a wharf measuring 260 feet on C. street, more or less, he was not entitled to a reduction, though the wharf measured only 170 feet. *Noble v. Googins*, 99 Mass. 231, 233.

Where a deed described a part of the lot as running back from a street 77 feet, more or less, and bounded in the rear on land of the grantor, and thereafter a plan of the land was put on record, in which the part granted was laid down as 88 feet in depth, the grantee took according to the plan. *Blaney v. Rice*, 37 Mass. (20 Pick.) 62, 64, 32 Am. Dec. 204.

Same—6 in 431 acres.

Where the estimated quantity as stated in a deed was 425 acres, more or less, and it was subsequently found there were 431 acres, the surplus was not so great as not to be within the reasonable limits of a risking bargain of this kind. *Young v. Craig*, 5 Ky. (2 Bibb) 270, 272.

Same—8 in 552 acres.

A deficiency of 8 acres in a tract of 552 acres is no more than a purchaser who buys for more or less may reasonably expect. *Nelson v. Matthews* (Va.) 2 Hen. & M. 164, 175, 3 Am. Dec. 620.

Same—3½ in 100 acres.

Where a party purchased land for a gross sum, and the deed described it as 100 acres, more or less, the fact that it only contained 96½ acres entitled the vendee to no relief. *Smallwood v. Hatton*, 4 Md. Ch. 95, 98.

Same—40 in 900 acres.

A master sold a tract of land as a whole, and as known by a certain name, representing it as containing 900 acres, more or less. Held, that no abatement should be allowed for a deficiency of 40 acres, it not being a gross deficiency. *Douthit v. Hipp*, 23 S. C. 205, 209.

Same—28 in 274 acres.

Where land purchased for a gross sum was described in the contract of sale by metes and bounds, and also as containing 274 acres, more or less, a deficiency of 28 acres in the quantity is not ground for an abatement in the purchase price; there being no fraud or misrepresentation, and the purchase having been made of the land in gross, and not by the acre. *Graham v. Larmer*, 87 Va. 222, 224, 12 S. E. 389.

Same—2 in 39 acres.

A purchaser of a tract of land as containing 39 acres, more or less, when in fact it only contains 37 acres, cannot recover compensation for the deficiency in the quantity of the land. *Clark v. Carpenter*, 19 N. J. Eq. (4 C. E. Green) 328.

Same—50 in 800 acres.

The deficiency of a few acres, perhaps, or even 50 acres, in such a large parcel as 800 acres, might be allowed to the words "more or less." *Libby v. Dickey*, 27 Atl. 253, 255, 85 Me. 362.

Same—80 in 1,000 acres.

Where a title bond covenants to make a deed to the B. tract of land, containing 1,000 acres, more or less, and on a survey it falls short of that quantity about 80 acres, the vendee is not entitled to an abatement in the purchase price. *Phipps v. Tarpley*, 24 Miss. (2 Cushm.) 597, 599.

Same—88 in 991 acres.

"More or less," as used in a conveyance describing the property as containing 991 acres, "be the same more or less," refers to the extent of the grant, and means that the purchaser was to pay for the quantity of land in the tract, whether it was more or less than the designated number of acres; and his acceptance of the deed without making inquiry as to the number of acres estopped him from claiming a deduction in the purchase price, though the tract actually fell short 88 acres from the number designated in the deed. *Smith v. Evans* (Pa.) 6 Bin. 101, 112, 6 Am. Dec. 436.

Same—40½ in 451 acres.

Where a tract of land was described as containing 451 acres, more or less, a deficiency of 40½ acres—there having been no fraud or misrepresentation—was not sufficient to entitle the purchasers to a deduction from the purchase price agreed upon. *King v. Brown*, 54 Ind. 368, 374.

Same—11 in 98 acres.

Where a deed described the land sold as 98 acres, more or less, and gave the boundaries, it constituted a risking bargain; and,

where the land only contained 87 acres, the vendee was entitled to no relief. *Williford v. Bentley*, 28 Ky. (5 J. J. Marsh.) 181.

Same—10 in 97 acres.

Where a description in a deed calls for 97 acres, more or less, when in fact the land conveyed consisted of only about 87 acres, in the absence of fraud, no abatement of the price will be allowed. *Melick v. Dayton*, 34 N. J. Eq. (7 Stew.) 245, 249.

Same—21 in 171 acres.

Where a contract to purchase land for a gross sum described it as being 171 acres, more or less, and thereafter it appeared to contain, on survey, only 150 acres and a fraction, neither party could claim relief from the contract. *Tyson v. Hardesty*, 29 Md. 305, 309.

Same—7 in 47½ acres.

Where a deed to a farm supposed to contain 50 acres stated the amount of land conveyed to be 47½ acres, more or less, and the parties waived measurement, and took the farm at a gross sum, the vendee could not recover for the deficiency, though the quantity turned out to be 40½ acres only. *Stebbins v. Eddy* (U. S.) 22 Fed. Cas. 1192, 1193.

Same—23 in 156 acres.

That a tract of land was described in a deed as 156 acres, more or less, when in fact it was short some 23 acres, does not justify a judgment for the vendee for the deficiency. *Moore v. Harmon*, 41 N. E. 599, 600, 142 Ind. 555.

Same—28 in 173 acres.

Where land is sold at judicial sale for a gross sum, and a deed describes it as containing 173 acres, more or less, but in fact, on survey, it appears that it contains only 145 acres and a fraction, there is no ground for vacating the contract. *Hurt v. Stull*, 3 Md. Ch. 24, 27.

Same—7 in 40 acres.

In a conveyance of land not sold by the acre, but by the tract or entire body, the qualifying words "more or less" will cover any deficiency which does not justify a suspicion of willful deception, or mistake equivalent thereto. This is true whether there was willful deception in fact or not. By accepting such a conveyance the vendee waives not only any mistake, but any deception as to quantity, unless keeping in view the object of the purchase and all the attendant circumstances, some willful deception or gross mistake would, after ascertaining the true quantity, be suggested to the mind by mere comparison of that quantity with the quantity named in the descriptive words. It can-

not be said, as a matter of law, that a deficiency of 7 acres in a tract of land conveyed as 40 acres, more or less, is so gross as to justify a suspicion of willful deception, or of a mistake equivalent to fraud; nor, on the other hand, can it be said not to justify such a suspicion. *Estes v. Odom*, 18 S. E. 355, 357, 91 Ga. 600.

Same—20 in 80 acres.

Where the contract for the sale of land described it as 80 acres, more or less, including a mill seat, and it turned out that the tract contained only 60 acres, the mill seat being the main object of the purchase, and constituting the chief value, being on it, the deficiency in the quantity will not justify the rescission of the contract. *Pollock v. Wilson*, 33 Ky. (3 Dana) 25.

Same—70 in 170 acres.

Where land was sold as containing 170 acres, more or less, and the purchaser objected to the description in the deed of the quantity of acres, as he had bought the place by the piece, and not by the acre, and thereafter it was discovered that the land was 240 acres, it was no ground for relieving the vendors; the land having been sold openly and fairly, and bought by a stranger. *Eichelberger v. Barnitz* (Pa.) 1 Yeates, 307, 309.

Same—125 in 253 acres.

"More or less," as used in a deed reciting that the tract of land contained 253 acres, more or less, are not words of warranty, but part of the description of the premises sold and conveyed, and an action for breach of warranty will not lie simply because the tract contained only 128 acres. *Erskine v. Wilson*, 19 S. E. 489, 41 S. E. 198.

Same—117 in 200 acres.

A description of a tract of land in a deed called for certain natural boundaries. The written contract provided for the sale of a tract of land containing by deed 200 acres, be the same more or less. On a subsequent survey made according to the description in the deed, the tract was found to contain 317 acres. Held, that the words "more or less" should not be construed to limit the variance to a mere immaterial excess or deficiency, but that such words would be disregarded, in view of the fact that the description in the deed called for certain natural boundaries, which controlled the words "more or less." *Dale v. Smith*, 1 Del. Ch. 1, 10, 12 Am. Dec. 64.

Material deviation.

The term "more or less," in a conveyance of real estate, will not be so far binding in a court of equity as to preclude the vendee from procuring an abatement in the purchase price for a deficiency equivalent to one-

fourth of the quantity of land supposed by the vendee and vendor to be contained within the tract. *Camp v. Norfleet's Adm'r*, 5 S. E. 374, 375, 83 Va. 380.

Where land is sold at a fixed price per acre, and the vendor fraudulently represents the number of acres, the vendee is entitled to recover the difference in the price, though the deed contains, after specifying the number of acres, the phrase "more or less," when in fact the tract represented and paid for as containing 240 acres contained but 235, and the one represented as containing 80 acres contained only 77½. *Tyler v. Anderson*, 6 N. E. 600, 601, 106 Ind. 185.

Same—16 in 222 acres.

Where land to be sold was estimated as being 220 acres, or over, and the price was fixed by reckoning the land at \$150 for that number of acres, and thereafter a contract was entered into, in which the land was stated at about 222 acres, more or less, and a deed was delivered in which the land was similarly described, and thereafter the purchaser discovered that there were but 206 acres in the farm, the purchaser was entitled to relief because of his belief in the original representation as to the quantity, and because of the negotiations based thereon. *Paine v. Upton*, 87 N. Y. 327, 334, 41 Am. Rep. 371.

Same—20 in 135 acres.

Where a vendor agrees to convey a farm "said to contain 135 acres, more or less," and the deed describes the land by courses and distances, and as containing 135 acres, more or less, and there is a deficiency of over 20 acres, the purchaser, because of the considerable variance, will be entitled to an abatement in the purchase price. *Couse v. Boyles*, 4 N. J. Eq. (3 H. W. Green) 212, 216, 38 Am. Dec. 514.

Same—4 in 8 acres.

A party contracted to purchase land at a certain price; the property being described by metes and bounds, and as containing about eight acres, more or less. The actual quantities proved to be about four acres, the mistake being caused by the misrepresentation of the vendor. The mistake naturally affected the value of the premises. Held, that the words "more or less" should be considered to refer to slight or immaterial errors in description of quantity, only, and that, under the circumstances, the purchaser was entitled to rescind the contract. *Belknap v. Sealey*, 14 N. Y. (4 Kern.) 143, 152, 67 Am. Dec. 120.

Same—12 in 30 acres.

Where a deed describing certain lands by metes and bounds states that it contains thirty acres, more or less, and both parties suppose

it to contain substantially such amount, the conveyance will be set aside on the ground of mistake if it only contains 18 acres. *Hosleton v. Dickinson*, 1 N. W. 550, 557, 51 Iowa, 244.

Same—78 in 180 acres.

Where defendant sold a tract of land lying on the bank of a river for a gross sum, representing it to contain 180 acres, more or less, and the tract conveyed, by measurement, contained only 102 acres, and it appeared that the vendor had previously given the land for assessment as containing 120 acres, the vendee was entitled to an abatement for the difference between the quantity represented and 120 acres. *Harrell v. Hill*, 19 Ark. 102, 108, 68 Am. Dec. 202.

Same—1,000 in 2,600 acres.

A grant of land stated the tract as "containing, in the whole, about 2,600 acres, be the same more or less." There was a surplus over the quantity stated of nearly 1,000 acres. Held, that the words "more or less" were used as a representation of the quantity which the grantor expected to sell and the grantee to purchase. They were intended to cover a reasonable excess or deficit, and hence in the present case, the difference between the real and the represented quantity being very great, the parties will be considered to have acted under a mistake, and the purchaser shall account to the grantor for the excess. *Thomas v. Perry* (U. S.) 23 Fed. Cas. 964, 968 (cited in *Belknap v. Sealey*, 14 N. Y. 143, 156, 67 Am. Dec. 120).

Same—1,000 in 2,600 acres.

"More or less," as used in a conveyance of land, was intended to cover a reasonable excess or deficit; and, if the difference between the real and represented quantity be very great, it would be the duty of a court of equity to correct the mistake, and an excess of 1,000 acres in 2,600 acres entitles the grantor to relief. *Thomas v. Perry* (U. S.) 23 Fed. Cas. 964, 968.

Same—192 in 800 acres.

The words "more or less," in a deed for 800 acres, more or less, will not prevent the purchaser from being allowed a deduction in price when there is a deficiency of 192 acres, even though both of the parties supposed the tract to contain 800 acres. *Quesnel v. Woodlief* (Va.) 2 Hen. & M. 173, 174, note.

Same—115 in 500 acres.

A deed purported to convey a tract of land containing 500 acres, more or less. The tract fell short 115 acres. Held, that the words "more or less" were meant to cover a slight, immaterial deficit or excess, but nothing more, and did not include so great a

shortage as was shown in this case. *Smith v. Fly*, 24 Tex. 345, 350, 76 Am. Dec. 109.

Same—355 in 1,670 acres.

Where, after a contract to convey certain contiguous tracts of land, containing "1,670 acres, more or less," there is an ascertained deficiency of 355 acres, of the value of some \$1,200, the words "more or less" cannot extend so as to prevent the vendee's demand for relief; the alleged mistake amounting to so large a number of acres, and of such value. *Gentry v. Hamilton*, 38 N. C. 376, 379.

Same—204 in 1,000 acres.

A deed described the land conveyed as a tract containing 1,000 acres, more or less. The vendor's deed from the grantor called for 796 acres. Held, that the words "more or less" should be construed to have been intended to cover an immaterial excess or deficit, and that the purchaser was entitled to compensation for the deficiency. *Duvals v. Ross* (Va.) 2 Munf. 290, 295.

Same—80½ in 428 acres.

Where the description of the tract conveyed was 428½ acres of land, more or less, and the survey showed that the tract contained but 348 acres, it was considered that the case was one in which there was a fair ground for presenting a claim for deficiency. *Hoffman v. Johnson* (Md.) 1 Bland, 103, 109.

Same—10 in 166 acres.

A variation of 10 acres in a tract of 166 acres, where the land is worth \$50 an acre, is not one of the small deficiencies to be covered by the phrase "more or less." *Triplett v. Allen* (Va.) 26 Grat. 721, 724, 21 Am. Rep. 320.

MOREOVER.

"Moreover," as used in a lease at a certain sum per year, payable in monthly installments, and stipulating that, if the tenant underlet or attempted to remove any of the goods on the premises without the landlord's consent, then, at the sole option and election of the landlord, the term should cease, and, moreover, in either of said cases one whole year's rent, over and above all such rents as had already accrued, should accrue and immediately become due and owing, does not necessarily mean the rent in advance, in addition to the previous remedies mentioned, but rather an alternative remedy. *Dermott v. Wallach*, 68 U. S. (1 Wall.) 61, 65, 17 L. Ed. 680.

The term "item," or "further," or "moreover" is commonly used in the beginning of a new devise or bequest in a will, without indicating any particular intention in the disposition of the property. After a testator had devised certain houses in fee, he inserted

another separate clause, in the following language: "Further, I wish to give to W. one other three-story house" (which was properly described). In construing the will, it was held that the word "further" was not used in connection with the preceding clause of the will, and thus the grant of a fee by the first clause could not be held to apply to the latter, and therefore W. was held only to take a life estate. *Burr v. Sim* (Pa.) 1 Whart. 252, 264, 29 Am. Dec. 48.

MORMON.

A publication that another is a Mormon is libelous, as it is an injurious publication, of which the necessary effect is to impair the reputation, and lower the one to whom it is applied in the estimation of the community. This is so because of the ideas popularly associated in the mind—religious imposture, a hierarchy in government incompatible with civil and religious liberty, and the profession and practice of polygamy, an institution abhorrent to the instincts and offensive to the morals of the American people. *Witcher v. Jones*, 17 N. Y. Supp. 491, 493.

MORMON MARRIAGE.

See "Sealed."

MORNING.

The term "morning," in Rev. St. art. 1123, authorizing the sheriff to adjourn court from day to day for three days if the judge does not appear on the first day of the term, and to adjourn the court on the morning of the fourth day in the absence of the district judge and the election of a special judge, means any time from sunrise till 12 o'clock. *Texas Mexican Ry. Co. v. Douglass*, 7 S. W. 77, 78, 69 Tex. 694.

MORPHINE.

Morphine is both an opiate and a narcotic, which is so successfully and beneficially used in the modern practice of medicine and surgery for the alleviation of pain and suffering in so many of the ills to which flesh is heir that it would not be reasonable to suppose that any one of average intelligence would enter into a contract of life insurance containing a stipulation providing, in effect, that if he used this valuable remedial agent, either when prescribed for him by a physician or surgeon, or where he is suffering pain from a physical ailment, and death results therefrom, the indemnity provided shall be, in whole or in part, forfeited, unless his intention to do so is manifested by the clear and unambiguous terms of the instrument. *Dezell v. Fidelity & Casualty Co.*, 75 S. W. 1102, 1104, 176 Mo. 253.

MORTAL WOUND.

The term "mortal wound" may apparently be used to designate a wound calculated and adequate to produce death, as well as one which is necessarily mortal. One inflicting such a wound cannot exonerate himself by showing that some conduct of the deceased or his agencies after the wound was inflicted lessened the chances of his recovery, and thus caused death. *State v. Hambricht*, 16 S. E. 411, 111 N. C. 707.

MORTALITY.

"Mortality," as used in an insurance policy on live animals warranted free from mortality and jettison, means a death arising from natural causes, and not a violent death. *Lawrence v. Aberdein*, 5 Barn. & Ald. 107, 110.

MORTALITY TABLES.

Tables of mortality are an account kept for a great number of consecutive years of the ages at which men and women die, and taking the average of all such ages. By this means the probable number of years any man or woman of a given age and of ordinary health will live may be arrived at with reasonable certainty. *Merchants' & Miners' Transp. Co. v. Borland*, 31 Atl. 272, 273, 53 N. J. Eq. (3 Dick.) 282.

MORTGAGE.

See "Chattel Mortgage"; "Common-Law Mortgage"; "Dry Mortgage"; "Equitable Mortgage"; "First Mortgage"; "Formal Mortgage"; "General Mortgage"; "Imperfect Mortgage"; "Judicial Mortgage"; "Purchase Money Mortgage"; "Second Mortgage"; "Special Mortgage"; "Valid Mortgage"; "Welsh Mortgage."

Of realty and personalty as chattel mortgage, see "Chattel Mortgage."

A "mortgage," literally speaking, is a dead pledge; the word being derived from two French words, "mort," dead, and "gage," pledge. In old English law a mortgage is defined to be a "dead or unproductive pledge; a pledge of movables or immovables by one person to another as a security for a debt." In modern law, it is "the conveyance of an estate by way of pledge for the security of a debt, and to become void on payment of it." *Hardy v. Ruggles*, 1 Haw. 457, 460 (quoting 2 Burrill, Law Dict.).

A mortgage is the conveyance of an estate by way of pledge for the security of a debt, and to become void on payment of it. *Homestead Association v. Enslow*, 7 S. C. (7 Rich.) 1, 8, 9; *De Wolf v. A. & W. Sprague Mfg. Co.*, 49 Conn. 282, 318; Appeal

of Ansonia Nat. Bank, 18 Atl. 1030, 1032, 58 Conn. 257; *Brown v. Bryan*, 51 Pac. 995, 1001, 5 Idaho, 145; *Goddard v. Coe*, 55 Me. 385, 388; *Babcock v. Hoey*, 11 Iowa, 375, 377; *Jordan v. Peak*, 38 Tex. 429, 442; *Sandusky v. Faris*, 38 S. E. 563, 573, 49 W. Va. 150; *Everett v. Buchanan*, 8 N. W. 31, 34, 2 Dak. 249.

A mortgage is a conveyance of land as security. In *re Helfenstein's Estate*, 20 Atl. 151, 154, 135 Pa. 293; *Gassert v. Bogk*, 19 Pac. 281, 283, 7 Mont. 585, 1 L. R. A. 240.

A mortgage is a security against the default of a debtor in the payment of his debts. *Turner v. Watkins*, 31 Ark. 437 (cited in *Westchester Fire Ins. Co. v. Blackford*, 51 S. W. 978, 980, 2 Ind. T. 370).

A mortgage is a conveyance of lands by a debtor to his creditor as a pledge or security for the repayment of money due, with a proviso that such conveyance shall be void on payment of the money and interest on a certain day. *Hall v. Byrne*, 2 Ill. (1 Scam.) 140, 142.

A mortgage is a conveyance of lands with the proviso that the conveyance shall become void on the payment of a sum of money, and in like manner operates to vest the title in the mortgagee, subject to such condition or proviso. *Croft v. Bunster*, 9 Wis. 503, 508.

A mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession. Civ. Code Mont. 1895, § 3810; Civ. Code S. D. 1903, § 2042; Civ. Code Cal. 1903, § 2920; Civ. Code Idaho 1901, § 2800.

A mortgage is a right granted to the creditor over the property of the debtor for the security of his debt, and gives him the power of having the property seized and sold in default of payment. Civ. Code La. 1900, art. 8278.

A mortgage is a conveyance of real estate, or of some interest therein, defeasible upon the payment of money or the performance of some other condition. The defeasance may be contained in the deed itself, or in some other deed executed at the same time and referring to it, constituting with it one transaction, stipulating that the estate shall be reconveyed on the payment of a certain sum. This is a defeasance. *Bayley v. Bailey*, 71 Mass. (5 Gray) 505, 509.

A mortgage is the imposition of a lien on certain property therein mentioned, given to secure a contract; but it is something independent of the contract itself, and is collateral thereto. *Wallace v. Langston*, 29 S. E. 552, 562, 52 S. C. 133 (citing *Aultman & Taylor Co. v. Rush*, 26 S. C. 526, 2 S. E. 402).

A mortgage is but a conveyance with a clause of defeasance. It is something more than a lien. It is the grant of an estate as specific security for the money loaned. *Appeal of Datesman*, 17 Atl. 1086, 1087, 127 Pa. 348.

A mortgage is in effect a sale with a power of defeasance, which may ultimately end in an absolute transfer of title. *Willamette Woolen Mfg. Co. v. Bank of British Columbia*, 7 Sup. Ct. 187, 190, 119 U. S. 191, 30 L. Ed. 384.

A mortgage is a deed whereby one grants to another lands upon condition that if the mortgagor shall pay a certain sum of money, or do some other act therein specified, at a day certain, the grant shall be void. *Flagg v. Walker*, 5 Sup. Ct. 697, 705, 113 U. S. 659, 28 L. Ed. 1072; *Montgomery v. Bruere*, 4 N. J. Law (1 Southard) 260, 268.

A mortgage may be defined to be a contract between the parties thereto whereby a lien is created on or real estate is pledged for the payment of a debt. *Sigworth v. Meriam*, 24 N. W. 4, 5, 66 Iowa, 477.

A mortgage is a conveyance of land for the purpose of securing the payment of a sum of money, if it leaves a right of redemption upon payment of the debt; and if there be a power of sale, whether in the creditor or in some third person to whom the conveyance is made for the purpose, it is still, in effect, a mortgage. *Stephens v. Allen*, 3 Pac. 168, 171, 11 Or. 188.

A mortgage is a pledge or security for a debt, whatever may be the form which the transaction takes—whether a simple mortgage deed, in form, or a mortgage with a power of sale, or a deed in trust, or a deed absolute on its face, accompanied by an agreement in writing to reconvey or to sell or to do any other thing upon the payment of a certain sum of money. *First Nat. Bank v. Bell Silver & Copper Min. Co.*, 19 Pac. 403, 409, 8 Mont. 32; *Dupee v. Rose*, 37 Pac. 587, 588, 10 Utah, 305.

The common understanding, as well as the legal definition and effect, of a mortgage securing a debt, is a conveyance of property by one person to another as security for the payment of a definite, ascertained sum of money, due in the present, to be paid in the future, and which, so far as the property will go, secures the payment of that specific sum at all events, and irrespective of any future contingency. Such a conveyance establishes at once a covenant to repay, which raises a personal obligation on the part of the mortgagor; and it is also now the common practice to have the debt evidenced by a promissory note, single bill, bond, or some other written instrument. *Appeal Tax Court of Baltimore City v. Rice*, 50 Md. 302, 316.

The word "mortgages" has only one signification in Washington, popular or otherwise, which is security for debt or obligation, so that the use of the word "mortgages" in an instrument is sufficient to render the mortgage valid, though words purporting to grant, sell, and convey are omitted. *Marsh v. Wade*, 20 Pac. 579, 580, 1 Wash. St. 538.

The term "mortgaged," used in an instrument whereby a debtor agreed that certain property should be mortgaged as security for the payment of a debt, has a definite and certain meaning in itself, and, when used in connection with the phrase "as security for the payment of a debt," a mortgage is clearly intended. *Barroilhet v. Battelle*, 7 Cal. 450, 452.

The word "mortgage" expresses the nature of the contract of mortgage as clearly as the term "deed" or "grant," and therefore an instrument which recites that the grantor does thereby mortgage certain property is a mortgage. *Mervine v. White*, 50 Ala. 388, 389.

The quality or attribute which distinguishes a mortgage from another and different kind of security is the condition that, if the debt which it is given to secure be paid at a day specified, the conveyance is to be void, or, if not, that it becomes, as a conveyance, absolute at law, though subject in equity to the right of redemption. This is implied in the term itself—"mort," dead, and "gage," pledging. *Breese v. Bange* (N. Y.) 2 E. D. Smith, 474, 486.

A mortgage is a lien for a debt, and something more. It is a transfer of the property itself as a security for the debt. *Bingham v. Frost* (U. S.) 3 Fed. Cas. 401 (citing *Conard v. Atlantic Ins. Co.*, 26 U. S. [1 Pet] 386, 441, 7 L. Ed. 189).

A mortgage is a pledge or security for a debt, whatever may be the form which the transaction takes—whether a simple mortgage deed in form, or a mortgage with a power of sale, or a deed in trust, or a deed absolute on its face, accompanied by an agreement in writing to reconvey or to sell, or do any other thing upon the payment of a certain sum of money. *Muth v. Goddard*, 72 Pac. 621, 626, 28 Mont. 237 (citing *First Nat. Bank v. Bell Silver & Copper Min. Co.*, 8 Mont. 32, 19 Pac. 403).

Where the word "mortgage" is used in a statute, it is to be assumed that it is used in its ordinary legal signification, as well understood at common law, and that the legal liabilities incident to it were understood to follow. *Grogan v. Garrison*, 27 Ohio St. 50, 63.

A mortgage does not create an estate in real property. It is a mere security for the payment of a debt. It is an incident to that it secures. The general doctrine appears to

be that a mortgage secures a debt or obligation, and not an evidence of it, and no change in the form of the evidence or the time of payment can operate to discharge the mortgage. *Wilson v. Pickering*, 72 Pac. 821, 823, 28 Mont. 435.

A mortgage, being merely intended as a security for debt, gives merely a lien upon the property, with or without power of sale, and leaves an equity of redemption in the mortgagor, and the surplus, if any, after the payment of the debt, within the reach of creditors. *Johnson v. Robinson*, 68 Tex. 399, 4 S. W. 625.

A mortgage, at common law, is a conveyance absolute in its form, granting an estate defeasible by the performance of a condition subsequent. The estate thus created was strictly an estate on condition, and in a court of law was treated as such, to be defeated only by the performance of the condition in the manner and at the time stipulated for in the defeasance. *Shields v. Lozear*, 34 N. J. Law (5 Vroom) 496, 502, 3 Am. St. Rep. 256.

A mortgage conveys an estate or title defeasible on the performance of a condition subsequent. If the condition is performed according to its terms, the mortgage immediately becomes void, and the mortgagee is divested of his title. Tender of performance has the same effect. If the possession of the property is withheld, the mortgagor may immediately bring an action of law to obtain it. This rule applies to mortgages of personal property as well as to mortgages of real estate, but in Massachusetts a mortgagor's right of redemption of real estate after condition broken is only equitable. *Weeks v. Baker*, 24 N. E. 905, 906, 152 Mass. 20.

As affecting after-acquired property.

A mortgage is an executed contract—a present transfer of title, although conditional and defeasible. It can therefore only bind and affect property existing and capable of being identified at the time it is made. Whatever may be the agreement of the parties, it cannot bind property afterwards to be acquired by the mortgagor. *Long v. Hines*, 19 Pac. 796, 797, 40 Kan. 220, 10 Am. St. Rep. 192.

A mortgage extending to after-acquired property does not pass the legal title thereto, but is only an equitable mortgage, operating on such property as soon as it is acquired. In other words, it seizes the property or operates on it by way of estoppel as soon as it comes into existence and is in possession of the mortgagor. *Wood v. Holly Mfg. Co.*, 13 South. 948, 953, 100 Ala. 326, 46 Am. St. Rep. 56.

As an alienation or incumbrance.

See "Alien—Alienate—Alienation"; "Incumbrance (On Title)."

Assignment distinguished.

An assignment for the benefit of creditors is defined to be a transfer by a debtor of some or all of his property to an assignee in trust to apply the same, or the proceeds thereof, to the payment of some or all of his debts, and return the surplus, if any, to the debtor. It is absolute, unconditional, and indefeasible; and by it the grantor parts absolutely with the title which rests in the grantee unconditionally for the purpose of the trust. It is distinguished from a mortgage, which creates a specific lien on the property. The equitable right as well as the legal remains in the grantor, and his estate or interest in the property is such as he may sell, or may be seized and sold under judicial process by his other creditors, subject to the lien created by the mortgage. *Lochte v. Blum*, 30 S. W. 925, 927, 10 Tex. Civ. App. 385.

The essential elements of an assignment are that there shall be an ample transfer of the property of the debtor to another in trust for the payment of creditors, with either an express or an implied provision that the surplus, if any, shall be returned to the assignor. A mortgage is the transfer of the property of a debtor as security for the payment of one or more obligations, with a condition, expressed or implied, that on payment of the debt the title reverts to the mortgagor. *Smith-McCord Dry Goods Co. v. Carson*, 52 Pac. 880, 882, 59 Kan. 295.

The general distinction between a mortgage and an assignment is well understood. The one is intended to secure, and the other to satisfy, a debt. A mortgage contemplates a personal effort to pay the debt, or at least reserves the right by doing so to restore the mortgagor's title. An assignment, on the other hand, implies a surrender of his property to his creditors, without the hope of redeeming it. *Marquese v. Felsenthal*, 24 S. W. 493, 494, 58 Ark. 293. See, also, *Adams v. Bateman* (Tex.) 29 S. W. 1124, 1125; *Id.*, 30 S. W. 855, 88 Tex. 130; *Prouty v. Musquiz* (Tex.) 59 S. W. 568, 569; *Farmers' & Traders' Bank v. Martin*, 33 S. W. 565, 566, 96 Tenn. 1; *Louisville Trust Co. v. Columbia Finance & Trust Co. (Ky.)* 59 S. W. 867, 869; *Beall v. Cowan* (U. S.) 75 Fed. 139, 144, 21 C. C. A. 267.

As a charge upon the land.

A mortgage is a charge upon the land, and whatever will give the money will carry the estate along with it, to every purpose. The estate in the land is the same thing as the money due upon it. *Longan v. Carpenter*, 1 Colo. 205, 220 (citing *Martin v. Mowlin*, 2 Burrows, 978). It will be liable for debts. It will go to the executor. It will pass by a will not made and executed with the solemnities required by the statute of frauds.

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Kortright v. Cady, 21 N. Y. 343, 363, 78 Am. Dec. 145, 5 Abb. Prac. 358, 363.

As chattel or chose in action.

See "Chattel"; "Chose in Action"; "Personal Property."

Chattel mortgage.

A statute providing that all deeds of trust and mortgages whatsoever shall be void, unless they shall be recorded, is held to include a mortgage of a personal chattel, as well as lands, if not restrained by other words used with the intention to restrain them. *Hodgson v. Butts*, 7 U. S. (3 Cranch) 140, 156, 2 L. Ed. 391.

Chattel mortgage distinguished.

A mortgage on real estate is a mere security and incumbrance on the land, and gives the mortgagee no title or estate therein whatever, whereas a personal mortgage is more than a mere security. It is a sale of the thing mortgaged, and operates as a transfer of the whole legal title to the mortgagee, subject only to be defeated by the full performance of the condition. *Butler v. Miller*, 1 N. Y. (1 Comst.) 496, 500.

Conditional sale distinguished.

See "Conditional Sale."

As a contract.

A mortgage or deed of trust is a contract between the debtor and the creditor, and it is not binding upon any one until accepted by the beneficiary. *Byrd v. Perry*, 26 S. W. 749, 752, 7 Tex. Civ. App. 378.

As a conveyance.

A mortgage is literally a security for a debt, or the performance of the acts therein mentioned, but, in form, it is a conveyance, and, as such, within the intent of the registry act which requires it to be recorded to affect with notice subsequent incumbrancers and purchasers. *Watson v. Dundee Mortgage & Trust Inv. Co.*, 8 Pac. 548, 550, 12 Or. 474; *Oddfellows' Sav. Bank v. Banton*, 46 Cal. 603, 607; *Larned v. Donovan*, 32 N. Y. Supp. 731, 733, 84 Hun. 533; *Merrill v. Luce*, 61 N. W. 43, 45, 6 S. D. 354, 55 Am. St. Rep. 844; *Burns v. Berry*, 3 N. W. 924, 42 Mich. 176.

A mortgage is merely a lien upon, and passes no estate or interest in, the mortgaged premises, except for purposes of taxation, and is embraced in the term "conveyance" in Code Civ. Proc. § 963, providing for an appeal to the Supreme Court from an order in favor of or against the sale or conveyance of real property. In *re McConnell's Estate*, 15 Pac. 746, 74 Cal. 217.

A mortgage is an instrument and conveyance, within the statute requiring ac-

knowledge of married women to instruments and conveyances. *Tolman v. Smith*, 16 Pac. 189, 191, 74 Cal. 345.

A mortgage or deed of trust to secure the payment of a debt is a conveyance, within the meaning of Pasch. Dig. art. 1003, and hence a trustee in a deed of trust is not precluded from the power to sell on a default in the grantor's payment of the debt because of the want of title in himself, sufficient to enable him to convey the fee in the land mortgaged to a purchaser. *Jordan v. Peak*, 38 Tex. 429, 442. Other cases holding a mortgage a conveyance: *Reynolds v. McMullen*, 22 N. W. 41, 45, 55 Mich. 568, 54 Am. Rep. 386; *Edwards v. McKernan*, 22 N. W. 20, 23, 55 Mich. 520; *East Texas Fire Ins. Co. v. Clarke*, 15 S. W. 166, 79 Tex. 23, 11 L. R. A. 293; *Babcock v. Hoey*, 11 Iowa, 375, 378; *Tolman v. Smith*, 16 Pac. 189, 191, 74 Cal. 345; *Bingham v. Frost* (U. S.) 6 N. B. R. 130, 131, 3 Fed. Cas. 401; *Pickett v. Buckner*, 45 Miss. 226, 245. *Contra*, *Bates v. Coe*, 10 Conn. 280, 294; *Harral v. Leverty*, 50 Conn. 46, 55, 47 Am. Rep. 608; *Norris v. Heald*, 29 Pac. 1121, 12 Mont. 282, 33 Am. St. Rep. 581.

Conveyance absolute in form.

Whenever a transaction is a loan of money, a deed given for security, though absolute on its face, will be held a mortgage. *Rogan v. Walker*, 1 Wis. 527, 573.

The term "mortgage" has a technical signification in law, and, when used in legal proceedings as descriptive of a written instrument, it must be taken and construed according to its technical and legal import. Even if there were no defeasance expressed in the mortgage, yet, if in its legal import and effect it were a mortgage, an equity of redemption would be implied, and a bill would lie for the foreclosure of that equity. There are many deeds and conveyances which contain no express defeasance, but which, in equity, are mortgages only, and are absolute on their face, which are subject to an equity of redemption, to foreclose which a bill in equity is a proper proceeding. Where a bill describes a mortgage by which certain lands were mortgaged in fee to secure the payment of a certain sum of money at a given time, and alleges nonpayment of the money, admits the equity of redemption, and prays that it may be foreclosed, it sufficiently describes the mortgage to demand equitable relief, and should therefore be sustained. *Walton v. Cody*, 1 Wis. 420, 432.

In this state every transfer of an interest in real property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage; and the fact that the transfer was made subject to a defeasance may be proved, though it does not appear by the terms of

the instrument. Civ. Code, §§ 2924, 2925. Whether a deed absolute in form be a mortgage or not is a mixed question of law and fact, to be determined from all the evidence, written and parol; and, in determining it, all the facts and circumstances attending the transaction should be considered. If it were given as a security for a loan of money, a court of equity will treat it as a mortgage, but whether it was so given or not is the test by which its character must be judged. *Huscheon v. Huscheon*, 12 Pac. 410, 412, 71 Cal. 407.

In Wisconsin a mortgage on land is a mere lien or security. The title remains in the mortgagor, and the mortgagee holds the mortgage as mere security for the debt. So stringent is this rule, that it has been held by the Supreme Court that a deed in fee simple absolute, given merely to secure a debt, with a parol defeasance, is nothing more than a mortgage, leaving the title in the grantor, and giving to the grantee a mortgage security for his debt, to be enforced like an ordinary mortgage. *Wisconsin Cent. R. Co. v. Wisconsin River Land Co.*, 36 N. W. 837, 839, 71 Wis. 94.

An instrument in its inception a deed can by no subsequent event be converted into a mortgage. A mere advance in the value of the land conveyed beyond the amount of the debt for which it was transferred as a substitute could not produce that result. *Kearney v. Macomb*, 16 N. J. Eq. (1 O. E. Green) 189, 194.

Same—Defeasance clause.

An absolute deed, with a defeasance, is a mortgage. The particular form or words is not important, but it may be laid down as a general rule that wherever a conveyance, assignment, or other instrument transferring an estate is originally intended as a security or a mortgage or any other incumbrance, it is always considered in equity as a mortgage. Therefore a conveyance which recited that, if the grantor should pay to the grantee by a certain date a sum of money therein specified, then the grantee would return the property conveyed, is a mortgage. *Stephens v. Sherrod*, 6 Tex. 294, 298, 55 Am. Dec. 776.

A conveyance of land, with an agreement, condition, or stipulation incorporated therein that the same shall become null and void, or cease and determine, or become of no effect, or that the estate so conveyed shall be reconveyed, when the money is paid, is a mortgage, and not an absolute conveyance. Until quite recently a deed absolute on its face, accompanied with an oral agreement to reconvey upon payment of a specified sum, was invariably held to be a mortgage, but it is now necessary that the defeasance be in writing. The form of the defeasance is

immaterial, if the intention clearly appears from the language employed. Any stipulation or agreement that plainly indicates an intention to return or reconvey the property upon payment of the sum named constitutes a mortgage. *Pearce v. Wilson*, 2 Atl. 99, 102, 111 Pa. 14, 56 Am. Rep. 243.

The delivery of an absolute deed, together with an agreement from the grantee allowing the grantor to redeem within one year, constitutes a mortgage, and the restriction of the right of redemption is void. *Youle v. Richards*, 1 N. J. Eq. (Saxt.) 534, 537, 23 Am. Dec. 722.

Same—Separate instrument of defeasance.

An absolute deed and a defeasance made at the same time constitute a mortgage. *Friedley v. Hamilton* (Pa.) 17 Serg. & R. 70, 71, 17 Am. Dec. 638.

A deed absolute upon its face, but intended as a security for the payment of money, is a mortgage, even at law, if accompanied by a separate, contemporaneous agreement in writing to reconvey upon the payment of the debt. *Teal v. Walker*, 4 Sup. Ct. 420, 422, 111 U. S. 242, 28 L. Ed. 415.

"The notion that every one has of a mortgage is that it is the conveyance of an estate or property to secure a debt, or the performance of some particular act, subject to a defeasance, usually written in the body of the same instrument. Sometimes a mortgage deed is absolute in form, and the defeasance to which it is subject is written in a separate instrument. But it is none the less a mortgage for that reason." *People v. Roche*, 14 N. E. 701, 703, 124 Ill. 9.

At common law a mortgage is defined to be a deed conveying lands, conditioned to be void on the payment of a sum of money or the doing of some other act. This condition may be included in a deed of conveyance, or it may be by a separate deed executed, or at least taking effect, at the same time, so as to be part of one and the same transaction. It cannot be by parol, or instruments in writing not under seal. *Lund v. Lund*, 1 N. H. 39, 41, 8 Am. Dec. 29; *Hebron v. Town of Center Harbor*, 11 N. H. 571, 574.

A mortgage is a security for money loaned, and the like. There may be neither a present loan, nor an antecedent debt; but the grantee may undertake to assume some outstanding liabilities of the grantor, or to pay off some claim against the grantor, so that an obligation to reimburse him would rest upon the grantor; and the conveyance may be intended to indemnify the grantee, and to secure the performance of the grantor's future continuing obligation, in which case it would clearly be a mortgage. Where

a deed absolute on its face was executed at the same time as a bond conditioned to reconvey on receipt of a sum advanced by the grantee to pay incumbrances, together with advances for the support of grantor's family to a certain date, the two instruments constitute a mortgage. *Watkins v. Williams*, 31 S. E. 388, 389, 123 N. C. 170.

Where an absolute deed is executed, and by a different instrument the grantee agrees to reconvey to the grantor upon the payment of a stipulated sum within a limited period, it is a question of intention whether the transaction constitutes a mortgage or a conditional sale. *Crane v. Bonnell*, 2 N. J. Eq. (1 H. W. Green) 264, 266.

Conveyance with conditional defeasance.

A conveyance of lands, absolute in form, executed under a parol agreement that the grantee shall pay certain debts of the grantors, and liens upon the lands; that upon such payment the grantors shall execute their notes to grantee for the amount paid; that grantee shall convey, at grantors' request, such part of the lands as will satisfy certain judgments against grantors; that grantee shall, at his own discretion, sell any or all of the lands, and apply the proceeds to the satisfaction of the amounts paid out by him, to the cost of executing the agreement, and to a note theretofore due him by grantors; and that, after the execution of the agreement, any surplus, either in lands or money, shall be reconveyed to grantors—is a mortgage, although it is also stipulated that the grantee may retain any or all of the lands as his own, upon paying the fair cash value thereof, in satisfaction of any part of the agreement. *Turple v. Lowe*, 15 N. E. 834, 839, 114 Ind. 37.

Where the agreement by the grantee in a deed was to reconvey on payment of the sum of \$100, or to pay all costs and damages, the instrument was not a mortgage because the grantee had an election to reconvey the land or to pay costs and damages, and the fee of the land was absolutely in him if he elected so to consider it. *Hebron v. Town of Center Harbor*, 11 N. H. 571, 574.

As credits.

See "Credits."

Debt or obligation necessary.

A mortgage is a security for a debt or obligation, and an incident thereto. Therefore a debt or obligation of some kind is an essential element to a mortgage. *Carroll v. Tomlinson*, 61 N. E. 484, 485, 192 Ill. 398, 85 Am. St. Rep. 344; *Freer v. Lake*, 4 N. E. 512, 514, 115 Ill. 662; *Crane v. Chandler*, 60 N. E. 826, 828, 190 Ill. 584; *Burgett v. Osborne*, 50 N. E. 206, 211, 172 Ill. 227; *Manasse v.*

Dinkelspiel, 9 Pac. 547, 548, 68 Cal. 404; Backhaus v. Buells, 73 Pac. 342, 344, 43 Or. 558.

A mortgage is but an incident of a debt. If the debt be extinguished, there is no security. *Acers v. Acers*, 68 S. W. 196, 198, 22 Tex. Civ. App. 584.

A mortgage implies a debt, since a mortgage cannot exist without a debt. The mortgage is a mere incident to a debt or obligation secured by it, and which is an essential element in a mortgage. *City of Joliet v. Alexander*, 62 N. E. 861, 863, 194 Ill. 457.

As the debt secured.

The word "mortgage" is commonly used to signify the debt it secures, and has that signification in Laws 1869, c. 917, authorizing the consolidation of railway corporations, and providing in section 5 that all debts and liabilities incurred by either of said corporations, except mortgages, shall attach to the new corporation and be enforced against it and its property to the same extent as if said debts and liabilities had been incurred or contracted by it. *James v. Fitchburg R. Co.*, 3 N. Y. Supp. 165, 166, 50 Hun, 310.

The word "mortgage," in a contract assigning as collateral security a mortgage and the note secured thereby, and authorizing the assignee, in case of the assignor's default, to sell the mortgage, is construed to include the note or debt secured. *Watson v. Smith*, 62 N. W. 265, 60 Minn. 206.

The word "mortgage," as employed in a covenant by the grantee of mortgaged premises to pay the mortgage, was held to have been evidently used in its ordinary popular sense, as referring to the debt itself. *Hine v. Myrick*, 62 N. W. 1125, 1126, 60 Minn. 518. See *Dodge v. Bell*, 34 N. W. 739, 37 Minn. 382.

A finding that the defendant assumed and agreed to pay a "mortgage" imports that he assumed and agreed to pay the mortgage debt. *Tuttle v. Armstead*, 22 Atl. 677, 678, 53 Conn. 175.

Same—Distinguished.

A mortgage is only a security or a conveyance of land as security, and should not be confounded with the debt which it secures, and the debt is not merged in the mortgage. *Ligget v. Bank of Pennsylvania (Pa.)*, 7 Serg. & R. 218, 219.

It is the essence of a mortgage that it be not given in satisfaction, but as security, for the payment of a debt. A mortgage is but a mere security for the debt, and collateral to it. The debt is an independent incident, and remains, with all its original validity, notwithstanding the release of the mortgage. *Stamper v. Johnson*, 3 Tex. 1, 6.

A mortgage is only a security for the debt, and if the property be destroyed the

debt remains, so that the assured has as much interest in protecting the property as if there were no incumbrances on it. Hence a mortgage is not a circumstance that increases the risk. *Light v. Greenwich Ins. Co.*, 58 S. W. 851, 854, 105 Tenn. 480 (citing *Delahay v. Memphis Ins. Co.*, 27 Tenn. [3 Humph.] 684).

A mortgage is not the written evidence of the defendant's debt. The bond secured by the mortgage constitutes the written evidence. The mortgage is the mere security for the performance of the obligation or duty assumed by the mortgagor. A mortgagor is always regarded as an accessory to the principal thing, and the stipulation contained in the mortgage to pay a solicitor's fee on the foreclosure of the mortgage is not a part of the written evidence of the debt, but is a mere agreement of indemnity, a recovery upon which is dependent on the breach of the mortgagor's liability to pay at maturity the debt secured by the mortgage. *Barry v. Snowden (U. S.)* 106 Fed. 571, 572.

As deed or grant.

See "Deed"; "Grant."

Deed of trust.

A deed of trust to secure a deed is in legal effect a mortgage. It is a conveyance, made by a person other than the creditor, conditioned to be void if the debt be paid at a certain time, but, if not paid, that the grantee may sell the land and apply the proceeds to the extinguishment of the debt, paying over the surplus to the grantor. The addition of the power of sale does not change the character of the instrument any more than it does when contained in a mortgage. A deed of trust, therefore, being a mortgage, it may be foreclosed by suit. *Dupee v. Rose*, 37 Pac. 567, 568, 10 Utah, 305.

A trust deed conveying the entire legal title of the lands in controversy to a trustee, to become void on the payment by the grantor, although at common law conveying the entire legal title to the trustee, subject to the right of the debtor to defeat the estate on performance of the condition, is merely a mortgage. Where an instrument is given as security for the payment of money or the performance of some collateral act, it is a mortgage, whatever may be its form. *Hurley v. Estes*, 6 Neb. 386, 389, 391.

A deed conveying land to a trustee as security for the payment of a debt and conditioned to be void if the debt be paid when due, or at some other specified time, but in default of payment empowering the trustee to sell the land and apply the proceeds to the extinguishment of the debt and pay over the surplus to the grantor, is sometimes called a "deed of trust in the nature of a mortgage," but it contains all the elements necessary to constitute a mortgage, and is in

legal effect a mortgage. *De Wolfe v. A. & W. Sprague Mfg. Co.*, 49 Conn. 282, 318.

A mortgage with a power of sale, and a deed of trust where the power of sale is placed in a third person, are in substance the same. A deed of trust executed to secure a given debt, payable at a specified time, upon real estate is, under the statutes of Idaho, a mortgage. *Brown v. Bryan*, 51 Pac. 995, 1001, 5 Idaho, 145.

The term "mortgage," in Rev. St. § 4106, providing the manner of the execution of a deed, mortgage, or lease of real estate, includes an instrument purporting, in the habendum clause, to pass title absolutely in a certain bank, but afterward providing that it is in trust that the mortgagor is to hold possession of the premises until sold by the mortgagee, and the proceeds applied in the payment of certain debts, etc. *National Bank of Columbus v. Tennessee Coal, Iron & R. Co.*, 57 N. E. 450, 452, 62 Ohio St. 564.

Under Civ. Code 1886, § 1869, providing that if on satisfaction of a mortgage the holder does not discharge it of record he shall forfeit a penalty, the maker of a deed of trust to secure a debt cannot recover the penalty on defendant's refusal to satisfy the deed of record within three months after request, as a deed of trust is not a mortgage. *Southern Building & Loan Ass'n v. McCants*, 25 South. 8, 10, 120 Ala. 616.

Same—Distinguished.

The chief practical difference between a deed of trust with power of sale and a plain mortgage, is that the deed of trust may be foreclosed according to its terms by the trustee without the authority of the court, whereas a simple mortgage can be foreclosed only under the decree of the court. *Axman v. Smith*, 57 S. W. 105, 106, 156 Mo. 286; *Cornell v. Conine-Eaton Lumber Co.*, 47 Pac. 912, 914, 9 Colo. App. 225.

Mortgages and deeds of trust have certain characteristics in common, but they are distinguishable. In 1 Jones, *Mortg.* (5th Ed.) § 62, the author says: "There is a well-settled distinction between a deed of trust and a deed of trust in the nature of a mortgage; the one being for the trust purposes, unconditional and indefeasible, while the other is conditioned and defeasible in the same way that a mortgage is." In *Hoffman v. Mackall*, 5 Ohio St. 124, 131, 64 Am. Dec. 637, the court say that a deed of trust in the nature of a mortgage is a conveyance in trust by way of security, subject to a condition of defeasance, or redeemable at any time before the sale of the property. By an absolute deed of trust the grantor parts absolutely with the title, which vests in the grantee unconditionally for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of raising a fund to

pay debts, while the former is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. *Rogers v. Shewmaker*, 60 N. E. 462, 463, 27 Ind. App. 631, 87 Am. St. Rep. 274 (citing *Turpie v. Lowe*, 114 Ind. 37, 48, 15 N. E. 834, 839; *Woodruff v. Robb*, 19 Ohio, 212; 2 *Perry, Trusts*, §§ 602a, 602g; *Shillaber v. Robinson*, 97 U. S. 68, 24 L. Ed. 967).

A deed of trust is not synonymous with "mortgage," even when used in reference to security for debt. A deed of trust has no feature in common with a mortgage, except that it was executed to secure an indebtedness. In a mortgage there is a right, after condition broken, to foreclose on the part of the mortgagee, and a right of redemption on the part of the mortgagor. These two rights are reciprocal. When the one cannot be enforced, the existence of the other is denied, and when there is wanting the instrument, whatever its resemblance in other respects, it is not a mortgage. *Southern Building & Loan Ass'n v. McCants*, 25 South. 8, 10, 120 Ala. 616.

Defeasance unnecessary.

It is not of the essence of a mortgage that there should be a defeasance, and there may be a defeasance of a deed of conveyance without constituting a mortgage. The question whether a conveyance amounts to a mortgage does not turn on this point. *Flagg v. Mann* (U. S.) 9 Fed. Cas. 202, 222.

As an estate on condition.

A mortgage in fee is an estate on condition, defeasible by the performance of the condition. This condition may be either annexed to and be a part of the deed conveying the estate, or it may be contained in another deed executed at the same time and part of the same transaction, and providing that the estate recited to have been conveyed is to be defeated on the performance of the condition. *Erskine v. Townsend*, 2 Mass. 493, 494, 8 Am. Dec. 71.

As an estate in fee.

A mortgage is in form an estate in fee, and vests a legal estate in the mortgagee. *Curtis v. Francis*, 63 Mass. (9 Cush.) 427, 457.

As an executed contract.

A mortgage is an executed contract, a present transfer of title, although conditional and defeasible. It can therefore only bind and affect property existing and capable of being identified at the time it is made, and, whatever may be the agreement of the parties, it cannot bind property afterwards to be acquired by the mortgagor. *Barnard v. Eaton*, 56 Mass. (2 Cush.) 294, 303; *New England Nat. Bank v. Northwestern Nat. Bank*, 71 S. W. 191, 195, 171 Mo. 307, 60 L. R. A. 256.

A mortgage is an executed conditional transfer of the real estate mortgaged. *Bucklin v. Bucklin*, 1 Abb. Dec. 242, 247.

As interest in land.

See "Interest (In Property)."

Lease.

It has often been held that where, upon a conveyance of an estate or interest in land, there is a stipulation in the deed itself, or in a separate deed executed at the same time and constituting with the conveyance one transaction, that the estate shall be reconveyed upon the payment of money, such stipulation constitutes a defeasance as much as if the words were "on condition" or "provided, however," etc. So a conveyance for a term of years, containing an agreement that the lessee will reconvey the premises to the lessor upon the payment of a specified sum with interest thereon, is a mortgage, and the relation of the parties is that of mortgagor and mortgagee. *Nugent v. Riley*, 42 Mass. (1 Metc.) 117, 119, 35 Am. Dec. 355.

The word "mortgages," used in the statute requiring the registration of mortgages, must be extended to include a lease assigned by way of a mortgage. *Johnson v. Stagg* (N. Y.) 2 Johns. 510, 523.

As passing legal title.

A mortgage is a mere security, and under it no estate in the land passes to the mortgagee, either before or after condition broken. *McGurren v. Garrity*, 9 Pac. 839, 840, 68 Cal. 566; *Hyams v. Bamberger*, 36 Pac. 202, 204, 10 Utah, 3; *Sellwood v. Gray*, 5 Pac. 196, 197, 11 Or. 534; *Hunt v. Bowman*, 63 Pac. 747, 748, 62 Kan. 448.

A mortgage of real estate, though "in form a conveyance of the legal title, is now regarded as a mere security for the debt, the legal title remaining in the grantor." *Sparks v. Hess*, 15 Cal. 186, 194; *Shields v. Lozeur*, 34 N. J. Law (5 Vroom) 496, 502, 3 Am. St. Rep. 256; *Cummings v. Jackson*, 38 Atl. 763, 765, 55 N. J. Eq. 805; *Verner v. Betz*, 19 Atl. 206, 208, 46 N. J. Eq. 256, 7 L. R. A. 630, 19 Am. St. Rep. 387; *Ellison v. Dolbey* (Del.) 49 Atl. 178, 179, 3 Pennewill, 45; *Seals v. Chadwick* (Del.) 45 Atl. 718, 720, 2 Pennewill, 381; *Chappell v. Jardine*, 51 Conn. 64, 68; *McKelvey v. Creevey*, 45 Atl. 4, 5, 72 Conn. 464, 77 Am. St. Rep. 321; *Harral v. Leverty*, 50 Conn. 46, 55, 47 Am. Rep. 608; *Dunlap's Adm'r v. Wright*, 11 Tex. 597, 603, 604, 62 Am. Dec. 506; *Duty v. Graham*, 12 Tex. 427, 432, 433, 62 Am. Dec. 534; *Hall v. Bartlett* (N. Y.) 9 Barb. 297-300; *Crouse v. Michell*, 90 N. W. 32, 34, 130 Mich. 347, 97 Am. St. Rep. 479; *Scott v. Neely*, 11 Sup. Ct. 712, 714, 140 U. S. 106, 35 L. Ed. 358.

A mortgage, as between the parties, does not pass legal title to the grantee. The title remains in the mortgagor until it is divested by foreclosure and sale. *Byrne v. Hudson*, 59 Pac. 597, 598, 127 Cal. 254; *Wright v. Henderson*, 12 Tex. 43, 44; *Hurley v. Estes*, 6 Neb. 386, 389.

A mortgage, as between the mortgagor and mortgagee, so long as the former continues in possession of the premises, is merely a security for the payment of money, and does not absolutely convey the legal title to the premises. *Walker's Adm'r v. Farmers' Bank* (Del.) 10 Atl. 94, 100, 8 Houst. 258.

A mortgage is a conveyance of an estate by way of pledge for the security of a debt, to become void on its payment. The legal ownership of the estate conveyed vests in the grantor, and in equity the mortgagor remains the actual owner until he is debarred by his own default or by judicial decree. *Sampson v. Williamson*, 6 Tex. 102, 113, 55 Am. Dec. 762.

"By our laws a mortgage is considered, as between the mortgagor and the mortgagee, and so far as it is necessary to give full effect to the mortgage, as a security for the performance of the condition, as a conveyance in fee, but for all other purposes it is considered, especially until entry for condition broken, as a mere charge or incumbrance, which does not divest the estate of the mortgagor." *White v. Whitney*, 44 Mass. (3 Metc.) 81, 84.

Under the Territorial Statutes of 1839 in Wisconsin, a real estate mortgage, until after the extinguishment of the equity of redemption in the manner provided by law, vested in the mortgagee a mere lien, and a taking possession even of the mortgaged premises did not operate to vest the legal title to the land mortgaged in the mortgagee. *Slaughter v. Bernards*, 72 N. W. 977, 981, 97 Wis. 184.

A mortgage is a conveyance of an estate in the lands, as well as the creation of a lien. In *re Meek's Estate*, 29 Atl. 41, 42, 161 Pa. 860.

A mortgage in fee serves a complex purpose—is a security for the debt, and at the same time a conveyance of the estate. In strictness it creates a conditional estate or an estate on defeasance. It transfers the estate to the mortgagee on the condition that if the debt is paid on the day named it shall be void. If default is made, the estate which before was conditional becomes absolute. *Pickett v. Buckner*, 45 Miss. 226, 242.

A mortgage is at common law a conveyance of title subject to a condition that, if a debt secured thereby be paid as stipulated, the conveyance is to become inoperative, and until the debt secured is paid the

title is in the mortgagee, under the California Constitution, providing that if a mortgage shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the property affected thereby, the mortgage operates to transfer the mortgagor's interest in the mortgaged property to the mortgagee, for the purpose of assessment and taxation, to the extent of the debt secured. *Santa Clara County v. Southern Pac. R. Co.* (U. S.) 18 Fed. 385, 391.

Lien indicated.

See, also, "Lien."

The term "mortgage," used in a writing, indicates a lien, and is enforceable without the addition of other formal words, and the expression "a lien is created to secure the performance of an obligation" is equivalent to meaning that the thing is mortgaged. *Bullock v. Grinstead*, 24 S. W. 867, 868, 95 Ky. 261.

As a mere incident of the debt.

In equity a mortgage is a mere incident of the debt, and can be used by the mortgagee only as a means for obtaining satisfaction thereof. So completely is the mortgagee's interest in the land annexed to the debt that, in equity, whatever transfers the debt transfers that interest, and an attempt to transfer the interest without the debt is futile, both at law and in equity. *Blue v. Everett*, 39 Atl. 765, 766, 56 N. J. Eq. 455.

A mortgage is an incident to the debt it secures. It follows the debt when the debt is assigned, and it is discharged in whole or in part when the debt is paid in whole or in part, and where barred by limitation is revived by payment on the debt. *Ewbank v. Ewbank*, 42 S. E. 194, 195, 64 S. C. 434.

A mortgage is only an incident to a debt, which is the principal thing. It is merely security for the debt. Where there is no debt and no relation of debtor and creditor, there can be no mortgage. *Cawley v. Kelley*, 19 N. W. 65, 66, 60 Wis. 315.

As a mere security for the debt.

The equity doctrine is that the mortgage is a mere security for the debt, and only a chattel interest, and that, until a decree of foreclosure, the mortgagor continues the real owner of the fee. *Killebrew v. Hines*, 10 S. E. 159, 161, 104 N. C. 182, 17 Am. St. Rep. 672 (citing 4 Kent, Comm. 159).

A mortgage is regarded in equity as a mere security for a debt, and only a chattel interest, and until foreclosure the mortgagor continues the real owner of the fee, and may lease it, sell it, etc. *Hale v. Horne* (Va.) 21 Grat. 112, 121.

A mortgage is deemed a mere security for a debt, and the property may be sold under execution, subject to the lien. *Mallalieu v. Wickham*, 42 N. J. Eq. (15 Stew.) 297, 299, 10 Atl. 880.

As money.

See "Money."

Note or other security unnecessary.

The condition of a release deed recited that the parties to whom the deed was given had lent to the releasors the sum of \$1,000, to be paid in three years, and then recited, "If we shall pay said money this deed shall be void, else valid." *Hinman, J.*, said of the instrument: "Here is every element which enters into the ordinary definition of a mortgage—a conveyance of land by a debtor to a creditor as a security for the payment of the debt, or, as is very briefly expressed by Judge Swift: 'It is a contract of sale executed with a power to redeem.' It is true that no note, or other written security except the mortgage deed, was taken for the money, and in this respect alone it is distinguishable from an ordinary loan and mortgage. But it is well settled that no security was necessary to constitute the transaction a loan and mortgage. If the conveyance was intended as a security for the money, that is enough; and the condition here expressly recites that there was a loan, and that it was to be paid at a time fixed." *Jarvis v. Woodruff*, 22 Conn. 548, 550.

As personal property.

A mortgage on real property is personal property within the meaning of a statute requiring the taxation of personal property. *Gallatin County v. Beattie*, 3 Mont. 173, 175.

A mortgage or deed of trust is a simple security for the debt, and, when considered in connection with the debt secured, it is personal assets. A mortgage is but a mere security for the debt and collateral to it. *Augusta National Bank v. Beard's Ex'r*, 42 S. E. 694, 696, 100 Va. 687.

Mortgages, no matter what the situs of the land pledged, are personal property. In *re Handley's Estate*, 37 Atl. 587, 588, 181 Pa. 339.

A mortgage is considered as a chattel or personal property interest, the only end or result of a mortgage being security for the payment of a debt. *Oakman v. Walker*, 38 Atl. 63, 65, 69 Vt. 344.

Power of sale unnecessary.

A stipulation to give a mortgage on property is complied with by giving the mortgage in the usual form, and does not require or allow the other party to demand a mortgage with a power of sale. A power of sale is not an ordinary accompaniment of

a mortgage, but is a power coupled with an interest, in its nature irrevocable, which entirely changes the character of the instrument by cutting off the right of redemption. *Capron v. Attleborough Bank*, 77 Mass. (11 Gray) 492, 493.

Power to sell implied.

The term "mortgage," in a power of attorney to give a mortgage, is held to be used in its popular and customary sense; that is, as descriptive of an instrument, containing not only a conditional conveyance of the land, but also a power to sell in default of payment. *Wilson v. Troup* (N. Y.) 2 Cow. 195, 230, 14 Am. Dec. 458.

The word "mortgage," as used in the statute creating a corporation, and authorizing it to mortgage certain of its property, was used by the Legislature in its ordinary, well-understood and common-law sense, and the ordinary legal liabilities incident to a mortgage were intended to follow the execution of the power conferred. Prominent among such liabilities is the sale of the mortgaged premises on default of the payment of the debt for which the mortgage is given as a security. *Medical College of Ohio v. Zeigler*, 17 Ohio St. 52, 64.

The power given by act of Congress March 3, 1871, to a particular railroad company to mortgage lands granted to it for means to construct and operate its road, did not include the power to sell and assign such lands. *Southern Pac. Ry. Co. v. Esquilbel*, 20 Pac. 109, 114, 4 N. M. (Johns.) 337.

As a purchase.

A mortgage of real estate is a purchase, within the meaning of the recording laws, and a mortgagee is, to the extent of his claim, a purchaser of the land. But this has no application in a state where a mortgage conveys no title. *Hitchcock v. Nixon*, 47 Pac. 412, 413, 16 Wash. 281.

As record.

See "Record."

As sale or transfer.

See "Sale"; "Transfer."

Subject in esse required.

A mortgage is an executed conveyance, subject to a condition, and has all the elements of a sale. Like a sale, it requires a subject in esse and in the power of the mortgagor. *Edgell v. Hart*, 9 N. Y. (5 Seld.) 213, 217, 59 Am. Dec. 532 (citing 2 Bouv. Law Dict. 485, pls. 1, 2, 3, 6; *Blackb. Sales*, 122; *Rapelye v. Mackie* [N. Y.] 6 Cow. 250; *Outwater v. Dodge* [N. Y.] 7 Cow. 85).

As written instrument.

See "Written Instrument."

MORTGAGE LIEN.

As property, see "Property."

MORTGAGE SECURITY COMPANY.

Laws 1874, c. 324, requiring "mortgage security companies" to make a certain report, includes a company authorized to loan its money on mortgaged security, though the business of the company is not confined to making such loans. *People v. Mutual Trust Co.*, 96 N. Y. 10, 14.

MORTGAGED.

Corporators, in giving their assent to the mortgaging of the property of the company, passed a resolution "that the real and personal property of the Star Printing Co. may be mortgaged." Held, that the words "may be mortgaged" were sufficiently broad to authorize the satisfaction and cancellation of a mortgage on some of its chattels or personal property, and the substitution of another mortgage on the same and other chattels. *Star Printing Co. v. Andrews*, 9 N. Y. Supp. 731, 732, 58 Super. Ct. (26 Jones & S.) 188.

MORTGAGED PROPERTY.

A mortgage on a stock of merchandise provided that it should be a lien on any goods the mortgagor might thereafter purchase and place in the stock to supply the place of those he should sell, and further provided that, if at any time before the maturity the mortgagor should deem it necessary for his more perfect and complete security, he might enter the store or place where the goods might be, and take and carry away the mortgaged property. Held, that the term "mortgaged property" referred not only to the property in the hands of the mortgagor at the time the mortgage was executed, but to the property subsequently acquired by the mortgagor. *Francisco v. Ryan*, 43 N. E. 1045, 1049, 54 Ohio St. 307, 56 Am. St. Rep. 711.

MORTGAGEE.

As a grantee, see "Grantee."

As occupant of land, see "Occupant—Occupier."

As owner, see "Owner."

As purchaser, see "Purchaser."

A "mortgagee" is a creditor having a lien on land for his debt, with the right of possession, and is not the owner, even after condition broken. *Wilder v. Davenport's Estate*, 5 Atl. 753, 757, 58 Vt. 642.

In Laws 1855, c. 427, requiring purchasers at tax sales to give notice, etc., to mortgagees, "mortgagees" includes assignees

whose assignment shall be duly recorded, and personal representatives. *People v. Edwards*, 10 N. Y. Supp. 335, 337, 56 Hun. 377.

A mortgagee is a person having a claim to the property embraced in the mortgage under a written instrument, within Code, § 3835, making it a crime to sell personal property with intent to defraud any person who has a claim thereto under any written instrument. *May v. State*, 22 South. 611, 612, 115 Ala. 14.

The word "mortgagee" may include any person claiming under such party or having any right. Pub. St. N. H. 1901, p. 63, c. 2, § 17.

A mortgagee by virtue of his mortgage becomes the legal owner of the land, and consequently entitled by law to the immediate possession, or to the receipt of the rent if the land be in lease. *Bank of Washington v. Hupp* (Va.) 10 Grat. 23, 48.

Whenever the word "mortgagee" occurs in provisions relating to the summoning of a mortgagor of personal property as trustee of the mortgagee, it shall be construed to mean the mortgagee, assignee of the mortgagee, or other person holding his interest. *V. S. 1894, 1846*.

MORTGAGEE IN GOOD FAITH.

See "Good Faith."

MORTGAGEE IN POSSESSION.

A mortgagee in possession is one who takes possession of the mortgaged land by virtue of an agreement between him and the mortgagor, and in recognition of the relation between them, on a bill to redeem brought by the mortgagor, he must account for the income of the property. *Freeman v. Campbell*, 42 Pac. 35, 109 Cal. 360.

To constitute one a mortgagee in possession, he must be in possession by reason of the agreement or assent of the mortgagor or his assigns that he may have possession under the mortgage and because of it. The right to take possession under his mortgage being taken away, nothing remains but to foreclose, or make some arrangement for his better security with the owner of the fee. Having no right to take possession under his mortgage, the mortgagee can get none except by the agreement or assent of the one who owns that right, which need not necessarily be expressed, but may be implied from the circumstances. The assent, express or implied, of the mortgagor, that the mortgagee may take possession under or because of his mortgage, is the essence of a mortgagee in possession. *Rogers v. Benton*, 38 N. W. 765, 768, 39 Minn. 39, 12 Am. St. Rep. 618.

To constitute a mortgagee in possession, the mortgagee must be in possession by reason of the agreement or assent of the mortgagor or his assigns that he have possession under the mortgage and because of it. It is the legal right of the mortgagor to retain possession of the mortgaged premises until a valid decree foreclosing his equity of redemption is entered, a valid sale made, and deed issued thereunder; but this legal right may be waived or surrendered by consent or agreement of the parties, either express or implied. Thus, when a mortgagor surrenders possession to a purchaser at a void foreclosure sale, who enters under the rights which he supposed he acquired at the sale, believing himself to be the owner of the premises, the mortgagor will be deemed to have waived his legal right to retain possession thus taken, and the purchaser will thenceforth be deemed to be a mortgagee in possession. *Kelso v. Norton*, 70 Pac. 896, 898, 65 Kan. 778, 93 Am. St. Rep. 308.

A lienholder living in the family of a homestead claimant, who is in possession of the property as a homestead, is not to be deemed a mortgagee in possession, accountable for rents and profits, or liable to pay taxes as such. *Baker v. Grand Island Banking Co.* (Neb.) 93 N. W. 428, 429.

MORTGAGEE OF RECORD.

An assignee of a mortgage which has been recorded, although the assignment is not of record, is a "mortgagee of record," within the meaning of Gen. St. c. 12, § 36, cl. 4, authorizing a mortgagee of record to redeem from a tax sale. *Hawes v. Howland*, 136 Mass. 267, 269.

A mortgagee, after going into possession of the premises, is still a mortgagee of record, within St. 1888, c. 390, § 57, giving a mortgage of record two years after notice of a tax sale to redeem therefrom. In *Re Lancy*, 59 N. E. 115, 116, 177 Mass. 431.

MORTGAGOR.

As owner, see "Owner."

The term "mortgagor," as used in Comp. Laws, § 4365, providing that when a mortgage has been satisfied the mortgagee must, on demand of the mortgagor, execute a release, includes grantee or heir. *Jones v. Fidelity Loan & Trust Co.*, 63 N. W. 553, 555, 7 S. D. 122.

Under Rev. St. §§ 4150, 4151, providing that mortgages not followed by a change of possession shall be void as to subsequent mortgages, etc., recorded as required by the latter section, which provides that the mortgage shall be deposited with the clerk of the township where the mortgagor resides at the

time of the execution thereof, it is held that the term "mortgagor" means each mortgagor, and so a mortgage of goods and chattels, executed by members of a partnership—one of whom lives in the county where the property is situate, and the other in another county of this state—upon property jointly owned by them, which is not accompanied by an immediate delivery, and followed by an actual and continued possession, of the things mortgaged, is void as against an assignee for the benefit of creditors of such mortgagors, subsequently appointed, unless, pursuant to Rev. St. § 4150, the mortgage, or a true copy thereof, be properly filed in the township where each of the mortgagors resides, notwithstanding the fact that such assignee had, at the time of the execution of the mortgage and of the assignment, full knowledge of the execution and filing of the mortgage in the township where one of said mortgagors resided and where the goods and chattels were situate. *Westlake v. Westlake*, 24 N. E. 412, 47 Ohio St. 315.

The word "mortgagor" may include any person claiming under such party or having any right. Pub. St. N. H. 1901, p. 63, c. 2, § 17.

MORTMAIN.

Alienation in mortmain, in its primary signification, is an alienation of lands or tenements to any corporation aggregate, ecclesiastical or temporal, the consequence of which in former times was that, by allowing lands to become vested in objects endued with perpetuity of duration, the lords were deprived of escheats or other feudal profits, and the general policy of the common law, which favored the free circulation of property, was frustrated, although it is true that at the common law the power of purchasing lands was incident to every corporation. *Perin v. Carey*, 65 U. S. (24 How.) 465, 495, 16 L. Ed. 701.

The mortmain acts were acts, the object of which was to prevent lands from getting into the possession and control of religious corporations. The term "mortmain," as its derivation signifies, is not necessarily confined to the landed possessions of corporations; it equally applies to all property that, from the nature of the purposes to which it is devoted, or the character of the ownership to which it is subjected, is, for every practical purpose, in a dead or unserviceable hand. *Yates v. Yates* (N. Y.) 9 Barb. 324, 325, 333. See, also, *Thompson v. Bennet* (N. H.) Smith, 327, 329.

MORTUARY.

The origin of mortuaries is by no means clear, but they seem to have been in very early times voluntary, as a sort of offering

to the church for any possible omissions of which the deceased person may have been guilty in respect to the dues of the church. Afterwards the second best beast of the deceased seems to have been claimed as a mortuary of right. At any rate, so early as the reign of Edward the First, the right to a mortuary had become matter of custom. *Ayrton v. Abbott*, 14 Q. B. 1, 19.

MOSS.

See "Sea Moss."

Mosses which are not used as drugs, and are crude and unmanufactured, are properly classified under Tariff Act 1890, par. 653, placing moss, seaweeds, and vegetable substances, crude or unmanufactured, not otherwise specially provided for in the act, on the free list, and such mosses do not come within paragraph 560, which relates only to mosses used as drugs. *Shaw v. Prior* (U. S.) 68 Fed. 421, 423.

MOST.

The use of the word "most" in an instruction, in an action against a railroad company for setting fire from its engines, requiring evidence that defendant used the "most" approved fire arresters in use, is not erroneous as requiring a greater degree of diligence than is either practicable or demanded by the law. "We think that such a charge is less exacting than one that requires evidence of the use of the best engines and the best appliances, because the last-named qualifications are more a matter of speculation and opinion than the former, and may be much more difficult of ascertainment and proof." *Missouri Pac. Ry. Co. v. Bartlett*, 16 S. W. 638, 639, 81 Tex. 42.

MOST CONTIGUOUS.

A fire policy provided that proofs of loss should be accompanied by a certificate under the seal of a magistrate or notary public "most contiguous" to the place of the fire. Held, that the phrase "most contiguous" did not require a strict literal compliance any more than any ordinary contract, and that, in determining the contiguity of the magistrate to the place of the fire, the place of his business, and not his residence, would be regarded. "Nor will a nice calculation of distance be gone into to ascertain the nearest magistrate who might have given the certificate, the proximity of a magistrate to the fire being all that can be required." *Turley v. North American Fire Ins. Co.* (N. Y.) 25 Wend. 374, 378.

MOST DESTITUTE.

The residuary clause of a will provided that the residue of the testator's estate

should be sold, and the income applied by the executors for a term of ten years for the relief of the "most destitute of the testator's relatives," not to extend beyond the children of the testator's brothers and sisters and their families. Held, that by the "most destitute of my relatives" the testator meant those comparatively destitute, and by the words "their families" he intended his brothers and sisters, their wives and husbands, and his nephews and nieces, their wives, husbands, and children, who were relatively the most destitute legatees. *Garnsey v. Kenison*, 10 Atl. 706, 708, 64 N. H. 354.

MOST EXACT CARE.

In the statement of the rule that a railroad is bound to exercise toward a passenger the "most exact care" in providing against those injuries which can be avoided by human foresight, the words "most exact care" do not mean the utmost care and diligence which men are capable of exercising. They mean the most exact care consistent with the nature of the carrier's undertaking, and with a due regard for all other matters which ought to be considered in conducting the business, including the desirable speed, the price of transportation, the necessary cost of different devices and provisions for safety, and the relative risk of injury from different possible causes of it. *Dodge v. Boston & B. S. S. Co.*, 19 N. E. 373, 377, 148 Mass. 207, 2 L. R. A. 83, 12 Am. St. Rep. 541.

MOST NEEDY.

A will devising testator's property in trust, to be distributed among his next of kin who are the most needy, was construed to be invalid as to the individuals to be selected, but the devise was held to be valid as to all of testator's next of kin. *Fontaine's Adm'r v. Thompson's Adm'r*, 80 Va. 229, 230, 56 Am. Rep. 588.

MOST REMARKABLE.

Rev. St. p. 721, § 5, requiring surveyors, after their survey of a line for a proposed highway, to make return, etc., and reference to the "most remarkable" places, means such places and objects along and near the line of the road on either side as may seem to them most likely to be useful as monuments by which the true location of the road may at any future time be determined. *Hoffman v. Rodman*, 39 N. J. Law (10 Vroom) 252, 256.

MOTHER.

See "Come by the Mother."

The word "mother" is not equivalent to the word "parent," as used in Pen. Code,

art. 376, providing for the punishment of any person selling intoxicating liquor to a minor without the written consent of the parent of such minor, for parent includes both parents, father and mother. *Lantzner v. State*, 19 Tex. App. 320, 321.

"Mother," as used in Rev. St. c. 38, subd. 1, § 2, making the crime of abortion punishable as murder if the death of the mother results from such abortion, means a woman pregnant with child. *Howard v. People*, 57 N. E. 441, 445, 185 Ill. 552.

"Mother," as used in Acts 1895, p. 167, §§ 1, 2, providing that actions against a husband who has fraudulently married a seduced female, or the "mother" of a bastard child, with intent to avoid civil or criminal liability, may be brought on relation of the wife on abandonment within two years, means an unmarried woman who has either been delivered of or is pregnant with a bastard child. In fact, a woman may be said to be the mother of the child begotten from the beginning of the period of gestation. The word "mother" ordinarily means a woman who has borne a child, but that is not the sense or meaning in which the word is used in the statute. *Latahaw v. State*, 59 N. E. 471, 474, 156 Ind. 194.

"Mother," as used in Acts 1898, p. 83, authorizing the mother of deceased to bring an action for damages for death by wrongful act, does not include a natural mother. *Alabama & V. Ry. Co. v. Williams*, 28 South. 853, 854, 78 Miss. 209, 51 L. R. A. 836, 84 Am. St. Rep. 624.

MOTION.

See "Collateral Motion"; "Enumerated Motions"; "Special Motion."

In parliamentary law.

A motion is a "proposition made to the house by a member, which, if adopted, becomes the resolution, vote, or order of the house." *Pierson v. City Council of Dover*, 39 Atl. 675, 676, 61 N. J. Law, 404.

A motion is a proposal made to evoke action on the part of the council or other assembly, and, when acted upon, it becomes the formal expression of the will or resolution of the city council. *El Paso Gas, Electric Light & Power Co. v. City of El Paso*, 54 S. W. 798, 799, 22 Tex. Civ. App. 309.

In practice.

As answer, see "Answer."

A "motion," in practice, is defined as an application to a court, by one of the parties in the cause, in order to obtain some rule or order. *Citizens' St. R. Co. v. Reed*, 63 N. E. 770, 771, 28 Ind. App. 629.

An application for an order is a motion. Rev. St. Wis. 1898, § 2813; Rev. Codes N. D. 1899, § 5715; Code Civ. Proc. S. D. 1903, § 549; Gen. St. Minn. 1894, § 5225; Ballinger's Ann. Codes & St. Wash. 1897, § 5080a; Code Civ. Proc. N. Y. 1899, § 768; Ann. St. Ind. T. 1899, § 3409; Code Civ. Proc. S. C. 1902, § 402; Clark's Code N. C. 1900, § 594; Code Civ. Proc. Cal. 1903, § 1003; Rev. St. Utah 1898, § 3323; Ann. Codes & St. Or. 1901 § 534; In re Lima & Honeoye Falls Ry. Co., 22 N. Y. Supp. 967, 969, 68 Hun, 252; McGuire v. Drew, 23 Pac. 312, 314, 83 Cal. 225.

A motion is an application for an order. Wesley v. Bennett (N. Y.) 6 Abb. Prac. 12, 13.

A motion is an application for an order, and an application for an order to vacate an order of arrest is therefore a motion. Rogers v. McElhone (N. Y.) 12 Abb. Prac. 292, 293.

A motion is an application for a rule or order of court. Low v. Cheney (N. Y.) 8 How. Prac. 287, 288.

A motion is an application for an order addressed to a court or judge by a party to a suit or proceeding, or one interested therein. Rev. St. Wyo. 1899, § 3595; Bates' Ann. St. Ohio 1904, § 5121; Reid v. Fillmore (Wyo.) 73 Pac. 849, 850.

A motion is an application for an order, addressed to the court, or a judge in vacation, by any party to a suit or proceeding, or one interested therein. Cobbey's Ann. St. Neb. 1903, § 1577.

A motion is an application for an order, addressed to the court, or a judge in vacation, by any party to a suit or proceeding, or any one interested therein or affected thereby. Gen. St. Kan. 1901, § 5009; Rev. St. Okl. 1903, § 4724.

A motion is a written application for an order, addressed to the court or a judge in vacation, by any party to an action, or by any one interested therein. Code Iowa 1897, § 3831.

"A motion is properly an application for a rule or order, made viva voce. It is distinguished from the more formal applications for relief by petition or complaint. The grounds of a motion are often required to be stated in writing and filed. In practice, the form of the application itself is often reduced to writing and filed. But making out and filing the application itself is not to make the motion. If nothing more were done, it would not be error in the court to entirely ignore the proceeding. The attention of the court must be called to it. The court must be moved to grant the order." People v. Ah Sam, 41 Cal. 645. We adopt these views with the modification that we do not consider that the learned judge used

the words "viva voce" in their exact literal signification. The application might be submitted to the court without argument or comment, but the attention of the court must be called to it in some way by some movement of counsel. Wallace v. Lewis, 24 Pac. 22, 23, 9 Mont. 399.

A motion, in general, relates to some incidental question collateral to the main object of the action, and it is not a remedy, but is based on some remedy. In re Jetter, 78 N. Y. 601, 605.

An application for a new trial on the judge's minutes is a motion. Cohen v. Krulwitch, 80 N. Y. Supp. 689, 81 App. Div. 147.

Costs of the appeal to the General Term from an order of the Special Term are "costs of the motion," within the meaning of those words in the statute staying all proceedings until costs of the motion are paid. Phipps v. Carman (N. Y.) 26 Hun, 518.

Costs of an appeal from an order granting a new trial are not "costs of a motion," within Code Civ. Proc. § 779, which provides that where costs of a motion or any other sum of money directed by an order to be paid are not paid within the time fixed for the purpose, etc., all proceedings on the part of the party required to pay them, except to review or vacate an order, are stayed, without further direction of the court, until the payment thereof. Eisenlord v. Clum, 5 N. Y. Supp. 512, 52 Hun, 461.

Same—Notice of motion.

A notice of motion is not a motion, and should not be so treated. The careful practitioner will either prepare and file his motion in writing, stating the grounds thereof, or have the same entered in the minutes. This is not necessary, however. The motion may be made orally. But in every case, whether made in writing entered on the minutes, or stated orally, the same should be preserved by bill of exception, and brought to this court in that way on appeal, so that we can see from the record that a motion was made and the ground on which it was made. Herrlich v. McDonald, 22 Pac. 299, 80 Cal. 472.

MOTION FOR NEW TRIAL.

As pleading, see "Pleading."

The office of a motion for a new trial is twofold: First, to present the errors complained of to the trial court for review and correction, or to secure a new trial; second, to preserve the same errors in the record, so that the ruling of the trial court, when granting or refusing a new trial, may be reviewed by the appellate court. Armstrong v. Gaddis (Miss.) 32 South. 917, 918.

Primarily the office of a motion for a new trial is to afford the court an opportunity to correct errors in its own proceedings without subjecting parties to the expense and inconvenience of appeal or petition in error. *Chadron Loan & Bldg. Ass'n v. Scott* (Neb.) 98 N. W. 220.

A motion for a new trial is practically an appeal to the sound discretion of the court to prevent a material or probable wrong, and it is never to be granted if the court can see that substantial justice has been used, notwithstanding irregularities that may have occurred. *York v. Stiles*, 42 Atl. 876, 21 R. I. 225.

A motion for a new trial is a motion addressed to the discretion of the court, and the decision of the court in granting or refusing it, alone, is not the proper subject of a bill of exceptions. *Schofield v. Territory*, 56 Pac. 306, 313, 9 N. M. 526.

A motion for a new trial on a case-made is addressed to the sound discretion of the court, and where the party relies on some defect in the proofs which is afterwards supplied by evidence which could not have been controverted had it been produced at the proper time, and the court sees that a new trial would be of no use, the motion will be denied. *Fry v. Bennett* (N. Y.) 1 Abb. Prac. 289, 308, 316.

The motion for new trial is addressed to the discretion of the court, and its action is not the subject of review, but the motion for new trial is a remedy accorded to a party litigant for the correction by the trial court of injustice done by the verdict of a jury. It is one of the most important rights which a party to a jury trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury. *Felton v. Spiro*, 78 Fed. 576, 581, 24 C. C. A. 321.

MOTION FOR JUDGMENT ON PLEADING.

A motion for judgment on the pleadings is both a demurrer and a motion. It is a demurrer in so far as it objects to a pleading on the ground of insufficiency, and a motion in so far as it is an application for an order for judgment in consequence of some defect. *Power v. Gum*, 9 Pac. 575, 576, 6 Mont. 5.

A motion for judgment on the pleadings is in fact a demurrer, and, if sustained by the court and final judgment is entered thereon, it has the same effect as if the demurrer to the complaint had been sustained and final judgment entered in favor of the party demurring. *Haug v. Great Northern Ry. Co.* (U. S.) 102 Fed. 74, 70, 42 C. C. A. 167.

A motion for a judgment on the pleadings bears a very close resemblance to a demurrer, and in some respects is simply a demurrer. *Floyd v. Johnson*, 43 Pac. 631, 632, 17 Mont. 469.

A motion for judgment on the pleadings is not a demurrer. It partakes of some of the qualities of a demurrer, but it is not a demurrer, and is no part of the record on appeal. It is a matter of exception, and can only be made a part of the record by a bill of exceptions. It partakes of the nature of a demurrer, in that it admits all facts that are well pleaded, and if it is overruled the order overruling it is not a final judgment from which an appeal will lie, but the party may plead over or proceed to trial on the issue joined. On the contrary, if it is sustained, judgment goes at once, whereas if a demurrer is sustained the order is not a final judgment; the party has a right to plead over, and it is only in case of a refusal to plead over that final judgment can be rendered on a demurrer. *Sternberg v. Levy*, 60 S. W. 1114, 1117, 159 Mo. 617, 53 L. R. A. 438.

MOTION FOR NONSUIT.

"A motion for a nonsuit," says Lord, C. J., in *Brown v. Oregon Lumber Co.*, 24 Or. 315, 33 Pac. 557, "is in the nature of a demurrer to the evidence. It admits not only all that the evidence proves, but all that it tends to prove. The evidence given for the plaintiff must be taken to be true, together with every inference of fact which the jury might legally draw from it. Whether there is any evidence tending to prove material allegations upon which a cause of action is based is a question of law for the court, but whether a given amount of evidence is sufficient to sustain such allegations is a question of fact for the jury. When there is no evidence tending to sustain the plaintiff's cause of action, it is the duty of the court to grant the nonsuit and withdraw the case from the jury." *Vanbebbler v. Plunkett*, 38 Pac. 707, 708, 26 Or. 562, 27 L. R. A. 811.

A motion for a nonsuit is a demurrer to the evidence only, and when the bill of exceptions fails to show a motion for a judgment on the pleadings, or that the court's attention was called to the failure to reply to the answer as one of the grounds for the motion, this court must necessarily assume that the motion for a nonsuit applied alone to the evidence. *Louisville & N. R. Co. v. Copas*, 26 S. W. 179, 180, 95 Ky. 460.

MOTION FOR VENIRE DE NOVO.

Counsel are right in criticising the phrase "motion for venire de novo" as applied to the special finding of a court, but the phrase is a convenient one, commendable on account of its brevity, its place not easily

supplied, and its employment justified by general usage, so that while its employment is not defensible on philological grounds, still it has a place in our legal terminology, and should not now be cast aside. Its meaning is well known, and its application is often made to the findings of the court, as well as to the verdicts of juries. A motion for a venire de novo lies only for defects apparent on the face of the record. *Johnson v. Horsford*, 149 Ind. 572, 575, 10 N. E. 407, 408.

MOTION IN ARREST OF JUDGMENT.

A motion in arrest of judgment is a suggestion to the court, on the part of the defendant, that judgment had not been legally rendered against him. Code Cr. Proc. Tex. 1895, art. 825.

A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on plea or verdict of guilty, or on a verdict against the defendant on a plea of former conviction or acquittal. Rev. St. Okl. 1903, § 5559; Pen. Code Cal. 1903, § 1185; Cr. Code N. Y. 1903, § 467; Code Cr. Proc. S. D. 1903, § 432; Pen. Code Idaho 1901, § 5524. It may be founded on any of the defects in the indictment or information that are grounds of demurrer, unless the objection to the indictment or information has been waived by a failure to demur, and must be made before or at the time the defendant is called for judgment. Pen. Code Idaho 1901, § 5524.

A motion in arrest of judgment is a motion filed after the verdict, and before judgment, to prevent the rendition of the judgment. *Bliss v. Arnold*, 8 Vt. 252, 255, 30 Am. Dec. 467.

A motion in arrest of judgment must ordinarily, if not uniformly, be based on some matter of law arising upon the record, and which of itself shows that a judgment of law could not be supported. *United States v. McKnight* (U. S.) 112 Fed. 982, 983.

A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a verdict of guilty or finding of the court, and may be granted by the court for either of the following causes: First, that the grand jury who found the indictment had no legal authority to inquire into the offense charged, by reason of its not being within the jurisdiction of the court; and, second, that the facts stated did not constitute a public offense. *State v. Knowles*, 8 Pac. 861, 864, 34 Kan. 393.

A motion in arrest of judgment in a criminal case can only be founded on some fundamental defect in the indictment. The defect must appear from the record itself, and evidence extrinsic to the record cannot

be received, though it was given at the trial. *Leslie v. State*, 65 Pac. 849, 851, 10 Wyo. 10.

A motion in arrest of judgment arises from intrinsic causes appearing on the face of the record. It is not confined to the pleadings, but may reach a defective judgment. *Westfield Gas & Milling Co. v. Abernathy*, 35 N. E. 399, 400, 8 Ind. App. 73.

A motion in arrest of judgment raises no objection to the evidence, but challenges the sufficiency of the facts of record, apart from any showing by bill of exceptions. *Adams v. Shirk* (U. S.) 104 Fed. 54, 61, 43 C. C. A. 407.

A motion in arrest is much in the nature of a demurrer which goes to defects on the face of the pleadings. *Hall v. State*, 75 S. W. 716, 717, 110 Tenn. 365.

MOTION IN ERROR.

A motion in error stands on the same footing as a writ of error. The only difference is that on a motion in error no service is required to be made on the opposite party, because, being before the court when the motion is filed, he is bound to take notice of it at his peril. *Treadway v. Coe*, 21 Conn. 283, 284.

MOTION MAN.

A motion man is a licensee carrying on work on his own account, on the land of the licensor, to quarry out. He is not a tenant, as he has no right of possession in the land worked by him, but merely the privilege of quarrying rock on it. *Inhabitants of Rockport v. Rockport Granite Co.*, 58 N. E. 1017, 1018, 177 Mass. 246, 51 L. R. A. 779.

MOTION OF COURSE.

See "Of Course."

MOTION TO DIRECT VERDICT.

A motion to direct a verdict for a defendant at the close of any evidence in the case is in the nature of a demurrer to the evidence. It answers the same purpose, and should be tested by the same rules. A demurrer to the evidence admits not only the facts therein stated, but also every conclusion which a jury might fairly or reasonably infer therefrom. *Chicago G. W. R. Co. v. Healy* (U. S.) 86 Fed. 245, 248, 30 C. C. A. 11.

MOTION TO DISMISS FOR WANT OF EQUITY.

A motion to dismiss for want of equity is not the equivalent of a demurrer, nor is it appropriate to reach mere defects or insufficiencies of pleading curable by amendment, which is matter of right at any time before final decree. It should be entertained only

when, admitting the facts apparent on the face of the bill, whether illy or well pleaded, the complainant is without right to equitable relief. When it is apparent, if the facts were well pleaded, a case for relief would exist, the defendant should be put to a demurrer specifying the grounds of objection, affording the complainant the opportunity of removing them by amendment. *Blackburn v. Fitzgerald*, 80 South. 568, 569, 130 Ala. 584 (citing *Seals v. Robinson*, 75 Ala. 368; *Hopper v. Savannah & M. R. Co.*, 69 Ala. 529).

MOTION TO EXPUNGE.

A motion to expunge, under Gen. St. § 882, can only be used to strike out scandalous and impertinent matter in a pleading, and objections to irrelevant matter can only be raised by demurrer. *Appeal of Freeman*, 43 Atl. 185, 187, 71 Conn. 708.

MOTION TO QUASH.

A motion to quash an alternative writ of mandamus is analogous to a demurrer in an ordinary action. *Williams v. New York*, N. H. & H. R. R. Co., 40 Atl. 925, 927, 71 Conn. 43.

MOTION TO SET ASIDE JUDGMENT.

A motion to set aside or strike off a judgment must be on the ground of irregularity appearing on the face of the record, while a motion to open it is an appeal to the equitable power of the court to let the defendant into a defense. The motion to strike off a judgment is essentially a common-law proceeding, a short and summary substitute for an *audita querela*, a writ of error *coram nobis*, or a *certiorari* or a writ of error from a superior court, by which the same relief was administered. Being for irregularity apparent on the face of the proceedings, it is in the nature of a demurrer to the record, and is not confined to any particular kind of judgments, nor limited as to the time it may be taken advantage of, nor affected by matters dehors the record, except so far as defendant may have put himself in position to be estopped from making the objection. *North v. Yorke*, 34 Atl. 620, 174 Pa. 349.

MOTION TO STRIKE OUT.

A motion to strike out a plea is properly made when it has been filed irregularly, is not sworn to—if that is required—or wants signature, or any defect of that character; but if a real and important issue of law is to be made, that issue should be raised by demurrer. *Bates v. Clark*, 95 U. S. 204, 208.

A motion to strike out a part of the pleading has no place in the trial of the cause; it has to do with the issue, and not

with the trial. *Brown v. Langner*, 58 N. E. 743, 745, 25 Ind. App. 538.

A motion to strike out a cross-bill is precisely what the motion to strike out a part of an answer is not. It is a substitute for a demurrer, and raises the question of the legal sufficiency of the allegations of the cross-bill as the basis for the relief prayed. *Hanneman v. Richter*, 53 Atl. 177, 178, 63 N. J. Eq. 753.

While it is true that a motion to strike out a pleading is not the equivalent of a demurrer thereto, yet, where the motion has been sustained, it must be held that it, like a demurrer, admits the truth of all the facts well pleaded for the purposes of the motion. *Faylor v. Brice*, 7 Ind. App. 551, 555, 34 N. E. 833.

MOTION TO SUPPRESS DEPOSITION.

A motion to suppress a deposition relates to some irregularity in the taking or certifying of the deposition, or to some matter dehors the document, but objection to a deposition for incompetency is not made by a motion to suppress. *Hoyberg v. Henske*, 55 S. W. 83, 87, 153 Mo. 63.

MOTIVE.

Predominant motive, see "Predominant."

Motive is that which stimulates or incites an action. *Willis v. Jolliffe* (S. C.) 11 Rich. Eq. 447, 489.

"A motive is some cause or reason that moves the will and induces action." In re *Eaves* (U. S.) 80 Fed. 21, 26.

Motive is an inducement, or that which leads or tempts the mind to indulge a criminal act. *People v. Fitzgerald*, 50 N. E. 846, 847, 156 N. Y. 253.

Intent distinguished.

"Intent" and "motive" are not identical, and intent often exists where a motive is wholly wanting. When a man does not act, or omits to do an act, with knowledge of the consequences, he intends the consequences just as truly as he intends to do or to omit the thing done or omitted. *Warren v. Tenth Nat. Bank* (U. S.) 29 Fed. Cas. 287, 289.

Motive is the moving power which impels to action for a definite result; intent is the purpose to use a particular means to effect such result. In the popular mind, intent and motive are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. When a crime is clearly proven to have been committed by a person charged therewith, the question of motive may be of little or no importance, but criminal intent is always essential to the commission of crime. *People*

v. Molineux, 61 N. E. 286, 296, 168 N. Y. 264, 62 L. R. A. 193.

MOTOR.

The word "motor," in Supp. Rev. p. 869, § 30, empowering street railways, with the consent of the municipal authorities, to use electric or chemical motors as a propelling power of its cars, was construed to mean the motion-producing contrivance of the car, and not to embrace the entire car, though the word is sometimes loosely used to designate a whole car. The statute does not authorize the erection of trolley poles and the stretching of wires in a public street. *State v. Inhabitants of City of Trenton*, 23 Atl. 281, 282, 54 N. J. Law (25 Vroom) 92.

MOTOR VEHICLE.

Whenever the term "motor vehicle" is used in the section regulating the speed of motor vehicles, it shall include all vehicles propelled by any power other than muscular, excepting the cars of electric and steam railways, and other motor vehicles running only upon rails or tracks. *Gen. St. Conn. 1902*, § 2089.

MOULD.

A mould is a receptacle into which a softer material is injected, to take its shape when hardened. *Rubber-Coated Harness-Trimming Co. v. Welling*, 97 U. S. 7, 10, 24 L. Ed. 942, 943.

The words "mold" and "mould" have the same meaning. In the *Century Dictionary* it is said the proper spelling is "mold," like "gold" (which is exactly parallel phonetically), but "mould" has long been in use, and is still commonly preferred in Great Britain. *McCarty v. United States (U. S.)* 101 Fed. 113, 115, 41 O. C. A. 242.

The statute of Vermont imposing a penalty for having in possession any mould, pattern, die, etc., adapted or designed for coining, is intended to reach every part of the apparatus of coining, however much more might be necessary to make that effective. Hence, if it be shown that defendant had in his possession one-half of a mould, it is sufficient without proof that he also had the other half. *State v. Griffin*, 18 Vt. 198, 202.

MOUNTAIN.

"Mountain," as a denomination of land in ejectment brought in Ireland, may be shown to be certain. Ejectments have been brought there of mountain, and certificate has been given by the judges of Ireland that the term "mountain" does not necessarily include situation, but describes quality; that

lines, recoveries, writs of dower, and settlements of it are frequent there, and ejectments usually brought of it. *Cottingham v. King*, 1 Burrow, 623, 629.

"Mountain," in the general acceptance, is used to denote the situation, and not the quality, of land. *Lord Kildare v. Fisher*, 1 Strange, 71.

MOUNTEBANKERY.

Boastful and vain pretensions, appearing as negroes, imitating their traits, language, and actions, and performing pretended feats as psychologists, was an exhibition within an act against "mountebankery." *Thurber v. Sharp (N. Y.)* 13 Barb. 627, 628.

MOUNTED OFFICER.

A "mounted officer," within Rev. St. U. S. § 1261, providing for the payment of certain compensation to mounted officers of the army, is one who, by statute, regulations, or army organizations, is required to be mounted at his own expense, whether he or his company be fully equipped or not. In *re Harrold*, 23 Ct. Cl. 295, 298.

MOUSE.

A mouse is a small rodent quadruped. *Sparks v. Brown*, 46 Mo. App. 529, 536.

MOUSE-COLORED MULE.

A mouse-colored mule is one whose color is that of a mouse. *Sparks v. Brown*, 46 Mo. App. 529, 536.

MOUTH.

The mouth of a creek, river, or slough which empties into another creek, river, or slough is the point where the middle of the channel intersects. *Pol. Code Cal. 1903*, § 3908.

The mouth of a creek or river, or the junction of a creek or river with a river, is the point where the middle of the channel of each intersects the other. *Rev. St. Ariz. 1901*, par. 931.

MOVABLE.

See "Indoor Movables."
Goods and movables, see "Goods."

A movable is something substantive which has locality and may move or be moved, including money and bonds for money, but not a debt merely as such. *Wood's Adm'r v. George's Adm'r*, 36 Ky. (6 Dana) 343, 344.

Where, after several legacies, testatrix gave all her wearing apparel, furniture, etc., and "every movable whatever," the word "movable" should be construed as meaning things of the same nature as those before specified, and hence did not embrace choses in action. *Jackson v. Vandersprengle's Ex'r* (Pa.) 2 Dall. 142, 1 L. Ed. 323.

"Movable," as an adjective applied to property, signifies that it is capable of being moved or put out of one place into another, and therefore necessarily implies that such property has an actual locality and is susceptible of locomotion or a change of place. As used by a testator in bequeathing to his son "all the movable property" that he should die possessed of, it did not include a judgment, the same not having any locality. *Strong v. White*, 19 Conn. 238, 245.

As used in the definition of "occupancy," as the taking possession of movables belonging to no one, "movables" must not be construed to mean that which can be moved, for, if so, it would include much known to be realty. But it means such things as are not natural parts of earth or sea, but are on the one or in the other." *Goddard v. Winchell*, 52 N. W. 1124, 86 Iowa, 71, 17 L. R. A. 788, 41 Am. St. Rep. 481.

"Movables," in the Spanish civil law, included all corporeal things which could move naturally by themselves or be moved by man. *Sullivan v. Richardson*, 14 South. 692, 708, 83 Fla. 1.

The words "goods and movables," when used in a will bequeathing testator's goods and movables, will include bonds belonging to the testator, unless there is something in the context of the whole will which will restrain such a construction. *Jackson v. Robinson*, 1 Yeates, 101, 102, 1 Am. Dec. 293.

The movable property of a railroad is such property as in its "ordinary use is taken from one part of the line to another, such as cars, locomotives, and their attachments and usual accompaniments." *Ohio & M. R. Co. v. Weber*, 96 Ill. 443, 448.

Things movable, by their nature, are such as may be carried from one place to another, whether they move by themselves, as cattle, or cannot be removed without an extraneous power, as inanimate things. Civ. Code La. 1900, art. 473.

MOVABLE ESTATE.

The term "movable estate" seems to be regarded as synonymous with "personal estate." *Den v. Sayre* (N. J.) Penning. 183, 187.

MOVABLE FREEHOLD.

Lord Coke refers to what he designates a "movable freehold," as where the owner
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of seashore acquires or loses land as the water recedes or approaches. *Holman v. Hodges*, 84 N. W. 950, 952, 112 Iowa, 714, 58 L. R. A. 673, 84 Am. St. Rep. 367.

MOVE.

Act Feb. 1, 1879, makes it unlawful to "transport or move" cotton in the seed during the nighttime, etc. The indictment under such act used the words "transport or remove." Held, that the words "move" and "remove," as so used, were equivalent in meaning. *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128.

MOVEMENT.

See "Mechanical Movement."

MRS.

The contraction "Mrs." is not a proper Christian name. It only distinguishes the person named as a married woman, and is no name. It cannot be used for the Christian name of a party to an action, as it must be stated with certainty who are the parties, and actions to be properly brought must be commenced and prosecuted in the proper Christian and surnames of the parties. *Frank v. Levie* (N. Y.) 5 Rob. 599, 600; *Elberson v. Richards*, 42 N. J. Law (13 Vroom) 69, 70 (citing 1 Chit. Pl. 256); *Schmidt v. Thomas*, 33 Ill. App. 109, 112.

A notice, by a town furnishing support to a pauper, to the town chargeable with such support, designating the pauper as "Mrs. Phelps," is insufficient, as there may be many persons answering to such designation, and the mere fact that there is no other person answering such name in the town answerable with her support will make no difference. *Town of Salem v. Town of Montvill*, 38 Conn. 141, 143.

Presumption of disability to sue.

The placing of the title of "Mrs." before the plaintiff's name in a writ does not raise a general legal presumption of disability to sue, even if it appears that the suit is brought to recover for the services of a minor son, for there are a large class of women who are entitled to be called "Mrs.," yet who have no husbands by reason of death or divorce. *Ballard v. St. Albans Advertiser Co.*, 52 Vt. 325, 328.

MUCH.

See "So Much as Remains."

Where a statute provided that, in case taxes upon lots should become delinquent, so much of the lots should be sold as was necessary to satisfy the tax, the word

"much," used instead of "many," indicated that the tax on each lot should be made from a portion of that lot, and not that one lot should be sold for the purpose of satisfying the tax on all. *City of Washington v. Pratt*, 21 U. S. (8 Wheat.) 681, 687, 5 L. Ed. 714.

MULATTO.

A "mulatto" is one begotten between a black and a white, and the term includes every one coming within the definition, whether the taint in the blood be derived from the father or the mother. *State v. Scott*, 1 Bailey (S. C.) 270, 273; *Thurman v. State*, 18 Ala. 276, 278. The term does not include a person whose father was a mulatto and whose mother was a white woman. *Inhabitants of Medway v. Inhabitants of Natick*, 7 Mass. 88, 89.

In legal as well as common parlance, the term "mulatto" is understood to be a mixture of the white and negro race, and all, therefore, who are tinged with the blood of the latter are mulattoes. *State v. Hayes*, 1 Bailey (S. C.) 275.

The term "mulatto," as used in the Spanish and French West Indies, applies to persons who are an intermixture of a white person with a negro. *Daniel v. Guy*, 19 Ark. 121, 131.

Every one who is not of white blood is a "mulatto," within Act April 16, 1850, § 14, providing that no black or mulatto person or Indian shall be allowed to give evidence in favor of or against a white man. *People v. Hall*, 4 Cal. 399, 403.

As determined by proportion of blood.

A mulatto is a person having one-fourth or more of negro blood in his veins. *Scott v. Raub*, 14 S. E. 178, 181, 88 Va. 721; *Gentry v. McMinnis*, 33 Ky. (3 Dana) 382, 385, 386.

By statutes enacted before the Civil War in Virginia, Kentucky, Arkansas, and Florida, the term "mulatto" was made to include every person having a fourth part or more of negro blood. *Anderson v. Milikin*, 9 Ohio St. 568, 570, 574.

The term "mulatto" or "person of color" within the meaning of the Code means a person of mixed blood, descended on the part of the father or mother from negro ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person. *Civ. Code Ala.* 1896, § 2.

The definition of the term "mulatto," as understood in this state, seems to be vague, signifying generally a person of mixed white, or European, and negro descent, in whatever proportion the blood of the two

racess may be mingled in the individual; but it is not invariably applicable to every admixture of the African blood with the European, nor is one bearing all the features of the white to be ranked with the degraded class, designated by the laws of this state "persons of color," because of some remote taint of the negro race. *State v. Davis* (S. C.) 2 Bailey, 558.

In the case of *Williams v. School Directors* (Ohio) *Wright*, 578, in construing statutes enumerating three descriptions of persons, "whites," "blacks," and "mulattoes," it was held that the term "mulatto" was the middle term between the extremes, or the offspring of a white and a black, and that all nearer white than black, or of the grade between the mulatto and the white, were entitled to enjoy every political and social privilege of the white citizen. *Jefries v. Ankeny*, 11 Ohio, 372, 375.

Free negro.

"Mulatto," as used in Code 1860, c. 103, § 9, providing that every person who has one-fourth or more negro blood shall be deemed a mulatto, applies to slaves, but not to free negroes. *Scott v. Raub*, 14 S. E. 178, 180, 88 Va. 721.

MULCT.

A mulct is a fine imposed for an offense; a penalty. *Cook v. Marshall County*, 93 N. W. 372, 378, 119 Iowa, 384.

MULE.

See "Mouse-Colored Mule."

As cattle, see "Cattle."

As domestic animal, see "Domestic Animal."

MULTIFARIOUSNESS.

By "multifariousness" in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them, as, for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants, in the same bill. *Bovaird v. Seyfang*, 49 Atl. 958, 960, 200 Pa. 261; *National Bank of Jefferson v. Texas Inv. Co.*, 12 S. W. 101, 102, 74 Tex. 421; *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 318, 323, 79 Am. Dec. 250; *Stafford Nat. Bank v. Sprague* (U. S.) 8 Fed. 377, 378; *Commercial Bank v. Sandford* (U. S.) 99 Fed. 154, 157; *Bassett v. Warner*, 23 Wis. 673, 685; *Henshaw v. Salt River Val. Canal Co.* (Ariz.) 54 Pac. 577, 582; *Clark v. Covenant Mut. Life Ins. Co.*, 52 Mo. 272, 275.

Multifariousness is the improperly joining in one bill distinct and independent matters, and thereby confounding them. What is more familiarly known by "multifariousness," as applied to a bill, is where a party is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever. *De Wolfe v. A. & W. Sprague Mfg. Co.*, 49 Conn. 282, 293, 295; *Benson v. Keller*, 60 Pac. 918, 919, 37 Or. 120; *Schlicher v. Vogel*, 46 Atl. 726, 727, 59 N. J. Eq. 351; *Bolles v. Bolles*, 14 Atl. 593, 44 N. J. Eq. (17 Stew.) 385; *Adams v. Jones*, 68 Ala. 117, 118.

A bill is said to be "multifarious" when distinct and independent matters are improperly joined, whether they are confounded, as the writing in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill. Multifariousness as to matter consists in uniting in the same bill distinct and disconnected subjects, matters, or causes. Multifariousness as to parties consists in joining in the same suit, either as complainants or defendants, parties who are without a common interest in the subject of the litigation, and have no connection with each other. And it is said that a defendant cannot successfully complain of multifariousness unless he can show he is brought in as a defendant upon a record, with a large portion of which he has no connection whatever. But a bill is not so multifarious where complainants have a common interest as to the point at issue, though their claims are in a sense distinct. *Perkins v. Baer*, 68 S. W. 939, 940, 95 Mo. App. 70.

"Multifariousness" is said to be the blending in one bill matters which are in their nature separate and distinct; different subjects which may embarrass the defendant in his proper defense against each, and may require different proceedings or decrees on the part of the court. But two good causes of complaint growing out of the same transaction, when all the defendants are interested in the same rights, and where the relief against each is of the same general character, do not subject the pleading to the charge of multifariousness. *Thomas v. Mason* (Md.) 8 Gill, 1, 7.

Multifariousness is the joining in one petition of distinct and independent matters, each of which would constitute a cause of action. Distinct facts forming a series of transactions tending to one common end, and all necessary to the plaintiff's equity, do not constitute multifariousness, nor does redundant or irrelevant matter that may be stricken out on motion. The fact that a petition prays for several kinds of relief, some

of which the court cannot grant, does not render the petition multifarious. It is the duty of a party coming into court to make a case that shall entitle him to some relief in the power of the court to grant, but he will not be turned out of court in consequence of having mistaken the specific relief to which he is entitled, or for having asked for more relief than he is entitled to. *McGlothlin v. Hemery*, 44 Mo. 350, 355.

Multifariousness arises from the fact either that the transactions which form the subject-matter of the suit are so separate and dissimilar that they cannot conveniently be tried in one record, or that one defendant is able to say that, as to a large part of the transactions set out in the bill, he has no interest or connection whatever. A bill is not multifarious because there are several causes of action. If they occurred out of the same transaction, and if all the defendants are interested in the same rights, and the relief against each is of the same general character, the bill may be sustained. *Barcus v. Gates* (U. S.) 89 Fed. 783, 791, 32 C. C. A. 337.

A bill is multifarious when it improperly unites in one bill against one defendant several matters perfectly distinct and unconnected, or when it demands several matters of a distinct and independent nature against several defendants in the same bill. *Hayes v. Dayton* (U. S.) 8 Fed. 702, 703; *Norris v. Hassler* (U. S.) 22 Fed. 401; *Chew v. Glenn*, 33 Atl. 722, 723, 82 Md. 370 (citing *Wales v. Newbould*, 9 Mich. 45).

In general terms, a bill in equity is multifarious where it seeks to enforce against different individuals demands which are wholly disconnected. *Gaines v. Chew*, 43 U. S. (2 How.) 619, 642, 11 L. Ed. 402; *Brown v. Guarantee Trust & Safety Deposit Co.*, 9 Sup. Ct. 127, 129, 128 U. S. 403, 32 L. Ed. 468. A petition is multifarious when there is a blending of matters which in their nature are distinct and independent. *Allred v. Tate*, 39 S. E. 101, 102, 113 Ga. 441. A bill is multifarious when it unites the demands of several matters of a distinct and different nature against several defendants. *Union Switch & Signal Co. v. Philadelphia & R. Co.* (U. S.) 69 Fed. 833, 834.

A bill is multifarious only when the orator claims several matters of different natures; but when one general right is claimed by the bill, though the defendants have separate and distinct rights, it is not multifarious. *Farrar v. Powell*, 44 Atl. 344, 345, 71 Vt. 247.

A bill is not rendered multifarious merely by the joinder as defendants of several persons claiming interests in the subject-matter under different conveyances. *Collins v. Stix*, 11 South. 380, 381, 96 Ala. 338.

A bill is multifarious where the allegations thereof do not authorize any relief against any of the defendants except one, but do warrant relief against such defendant. *Carmichael v. City of Texarkana* (U. S.) 94 Fed. 561, 574.

The question of multifariousness in a pleading depends upon the facts of each particular case and the nature of the relief prayed for. To hold a pleading multifarious, the court must be able to see that disconnected and independent causes of action are brought upon the record, requiring different and independent decrees, or that the defendant is brought upon the record with a portion of which he has no connection, or in which the different complainants, if there be more than one, have any co-interest. It sometimes, therefore, means misjoinder of causes of action, and sometimes misjoinder of parties. *Wales v. Newbould*, 9 Mich. 45, 56.

Multifariousness is to some extent a technical defense, and its validity is largely determined by historical considerations, and by early precedents in pleading. The substantial reason why two controversies closely related to each other may not in a given case be determined in one action is that, from their joinder and from their trial together, there would result either inconvenience to the court or injustice to the party. *Neall v. Curran* (U. S.) 93 Fed. 831, 832.

There is, perhaps, no rule established for the conducting of equity pleadings with reference to which there has existed less of certainty and uniformity in application than that relating to multifariousness. This effect, flowing inevitably from the variety of modes and degrees of right and interest entering into the transactions of life, seems to have led to a conclusion rendering the rule almost as much an exception as a rule, and that conclusion is that each case must be determined by its peculiar features. It is impossible from the authorities to lay down any rule or abstract proposition, as to what constitutes multifariousness, which can be universally applicable. The cases upon the subject are extremely various, and the court, in deciding upon them, seems to have considered what was convenient in particular cases, rather than to have attempted to lay down an absolute rule. The conclusion to which a close survey of the authorities will conduct us seems to be that there is not any positive, inflexible rule as to what, in the sense of a court of equity, constitutes multifariousness, which is fatal to a suit on demurrer. *Harrison v. Perea*, 18 Sup. Ct. 129, 132, 168 U. S. 311, 42 L. Ed. 478.

MULTIPLE.

In the act of 5 & 6 Wm. IV, c. 63, establishing a certain system of weights and meas-

ures and providing that all contracts, sales, etc., shall be made and had according to said standard of weight, or to the said gallon, or the parts, multiples, or proportions thereof, the term "multiple" is not to be understood in its restrictive sense, so as to comprehend only multiples numerically expressed, such as ten pounds, one hundred pounds, etc., but generally all multiples, however expressed, such as a stone, a hundredweight, or ton, or any other weight, such as a weigh, a tod, or a hobbet, supposing these words to be in use for expressing multiples of the pound avoirdupois. *Giles v. Jones*, 11 Exch. 393, 395.

MULTIPLICITY OF SUITS.

"Multiplicity of suits" is a phrase descriptive of a state of affairs where several different actions are brought on the same issue. The law abhors multiplicity of suits, and will not admit trivial distinctions. If two actions are brought for the same cause against the same person, the court will interfere and relieve. *Williams v. Millington*, 1 H. Bl. 81, 83.

The multiplicity of suits, says Sanborn, J., in *Thomas v. Council Bluffs Canning Co.*, 34 C. C. A. 428, 92 Fed. 422, which confers jurisdiction in equity, is a multiplicity of suits to which the complainant will be a party. *Turner v. City of Mobile*, 33 South. 132, 145, 135 Ala. 73.

Equity will interpose to prevent a multiplicity of suits, but "multiplicity," as herein employed, does not mean "multitude" merely, and an injunction will not be granted on that ground where the object is to obtain a consolidation of actions or to save the expense of separate actions. *Murphy v. City of Wilmington* (Del.) 6 Houst. 108, 138, 22 Am. St. Rep. 345.

MULTITUDE.

Where two persons went to a mill, taking with them a workman and entering such mill, there was not an entry with a "multitude," which of itself tends to excite terror. *Pike v. Witt*, 104 Mass. 595, 597.

MUNICIPAL.

"Municipal" has been defined to be that which belongs to a corporation or a city, and to include the rules or laws by which a particular district, community, or nation is governed. It may also mean "local," "particular," "independent." *Horton v. Mobile School Com'rs*, 43 Ala. 598, 607; *Root v. Erdelmyer* (Ind.) Wils. 99, 106; *Cook v. Port of Portland*, 27 Pac. 263, 264, 20 Or. 580, 13 L. R. A. 533; *State ex rel. Illinois Cent. R. Co. v. Board of Levee Com'rs*, 33 South. 335, 399, 109 La. 403.

"Municipal" has been defined to be of or pertaining to a town or city, or to its corporate or local government. *Sessalons v. State*, 41 S. E. 259, 260, 115 Ga. 18.

Bouvier's Law Dictionary defines the word "municipal" thus: "Strictly, this word applies only to what belongs to a city. Among the Romans, cities were called 'municipia.' These cities voluntarily joined the Roman Republic in relation to their sovereignty only, retaining their laws, their liberties, and their magistrates, who were thence called 'municipal magistrates.' With us the word has a more extensive meaning; for example, we call 'municipal law' not the law of the city only, but the law of the state. 'Municipal' is used in contradistinction to 'international'; thus we say an offense against the law of nations is an international offense, but one committed against a particular or separate community is a municipal offense." *Root v. Erdelmyer* (Ind.) *Wils.* 99, 105.

Though the word "municipal" is the adjective of "municipality," meaning "pertaining to a municipality," between the noun and the adjective there is the difference that, while the noun names the thing, the adjective merely describes a relation to the thing. The adjective is much more elastic than is the word "municipality," or even the term "municipal corporations." *State ex rel. Illinois Cent. R. Co. v. Levee Com'rs of Orleans Levee Dist.*, 33 South. 385, 399, 109 La. 408.

MUNICIPAL ACT.

A truly municipal act is one which a public officer or agent is required to perform upon a given state of facts in a prescribed manner, and in obedience to the mandate of local authority, and without regard to his own judgment or opinion concerning the propriety of the act to be performed. *People v. Treanor*, 44 N. Y. Supp. 528, 530, 15 App. Div. 508.

MUNICIPAL AFFAIRS.

The phrase "municipal affairs" has a meaning, and a most significant one, and, as used in the organic law, referred to the internal business affairs of the municipality. Const. art. 11, § 6, provides: "Cities and towns heretofore or hereafter organized, and all charters thereof framed and adopted by authority of this Constitution, except in municipal affairs, shall be subject to and controlled by general laws." The wording of this provision shows that all matters of legislation pertaining to and bearing upon municipalities do not come within the signification of the words "municipal affairs" as used in the Constitution. *Fragley v. Phelan*, 58 Pac. 923, 925, 126 Cal. 383, 388.

MUNICIPAL AUTHORITIES.

Act March 10, 1887, providing that towns or the "municipal authorities" thereof may fix the time for closing saloons at 12 o'clock at night, refers to the selectmen of the town, and does not mean justices of the peace, constables, or the grand jury, since they do not represent the town as such, or have any agency in its corporate affairs, but are the agents of the law. Neither can the words appropriately refer to town clerks, treasurers, or registers, whose duties are special and limited, without any agency representing the municipality. *State v. Hellman*, 14 Atl. 806, 807, 58 Conn. 190.

MUNICIPAL BOARD.

Other municipal board, see "Other."

MUNICIPAL BOND.

As negotiable instrument, see "Negotiable Instrument."

As promissory note, see "Promissory Note."

As property, see "Property."

A "municipal bond," in its ordinary commercial sense, means a negotiable bond. *Nalle v. City of Austin*, 22 S. W. 668, 674, 85 Tex. 520.

Evidences of indebtedness of a municipal corporation, promising to pay money at a future date, not given for the purpose of creating a new debt, but only to extend and provide for the payment of existing obligations, are not "municipal bonds" within the meaning of the statute regulating the manner of issuance, approval, and registration of such bonds. *City of Tyler v. L. L. Jester & Co.* (Tex.) 74 S. W. 359, 364.

A statutory power to issue bonds includes power to make them negotiable unless restrained by positive enactment. The character of municipal bonds is as well established as that of bills of exchange or promissory notes, and it is no more necessary to say "negotiable bonds" than to say "negotiable notes" or "negotiable bills." *Howard v. Kiowa County* (U. S.) 73 Fed. 406, 407; *Kiowa County v. Howard* (U. S.) 83 Fed. 296, 297, 27 C. C. A. 531.

MUNICIPAL CLAIM.

Taxes are "municipal claims" within the meaning of a statute providing that in certain cases, including municipal claims of every description, judgment may be entered on default of the defendant only where an affidavit is filed showing notice. *City v. Vandevier* (Pa.) 1 Leg. Gaz. R. 397, 398.

Registered taxes are not "municipal claims," within Act March 23, 1866, provid-

ing that all laws and parts of laws requiring the advertisement before suit brought of municipal claims of every description are repealed, taxes and registered taxes belonging exclusively to one department, and city claims belonging to another. *City of Philadelphia v. Scott*, 72 Pa. (22 P. F. Smith) 92, 96.

The words "municipal claim," as used in an act relating to municipal liens, means the claim filed to recover for the grading, gutting, macadamizing, or otherwise improving the cartways of any public highway, for grading, curbing, recurbings, paving, repaving, construction, or repairing the footways thereof, for laying water pipes, gas pipes, culverts, sewers, branch sewers, or sewer connections therein, for assessments for benefits in the opening, widening, or vacation thereof, or in the changing of water courses or the construction of sewers through private lands, for the removal of nuisances, or for water rates, lighting rates, or sewer rates. 4 P. & L. Dig. Laws Pa. 1897, col. 1269, § 55.

MUNICIPAL CORPORATION.

See, also, "Municipality."
Charter of, see "Charter."

A municipal corporation is a body corporate and politic, established by law to share in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district incorporated. *East Tennessee University v. City of Knoxville*, 65 Tenn. (6 Baxt.) 166, 171; *City of Wahoo v. Reeder*, 43 N. W. 1145, 1146, 27 Neb. 770; *Shipley v. Hacheney*, 55 Pac. 971, 972, 34 Or. 303 (citing Dill. Mun. Corp. [4th Ed.] §§ 19, 20, 23); *Appeal of Lehigh Water Co.*, 102 Pa. 515, 517; *Coyle v. Gray* (Del.) 80 Atl. 728, 731, 7 Houst. 44, 40 Am. St. Rep. 109; *Downs v. Commissioners of Town of Smyrna* (Del.) 45 Atl. 717, 718, 2 Pennewill, 381; *Beach v. Leahy*, 11 Kan. 23, 30; *Johnson County Com'rs v. Searight Cattle Co.*, 31 Pac. 268, 277, 3 Wyo. 777; *Fischer Land & Improvement Co. v. Bordelon*, 27 South. 59, 62, 52 La. Ann. 429 (citing 1 Dill. Mun. Corp. § 20); *Wetherell v. Devine*, 6 N. E. 24, 27, 116 Ill. 631 (citing 1 Dill. Mun. Corp. § 9b).

A municipal corporation is an investing of the people of the place with the local government thereof. *Cuddon v. Eastwick*, 1 Salk. 192, 193; *Attorney General v. City of Eau Claire*, 37 Wis. 400, 436; *Salt Lake City v. Wagner*, 2 Utah, 400, 403; *City of Wahoo v. Reeder*, 43 N. W. 1145, 1146, 27 Neb. 770; *Coyle v. McIntire* (Del.) 80 Atl. 728, 732, 7 Houst. 44; *Brickerhoff v. Board of Education* (N. Y.) 37 How. Prac. 490, 514.

"A municipal corporation is defined by Bouvier to be a public corporation created by

government for political purposes, and having subordinate and local powers of legislation." *Treadway v. Schnauber*, 46 N. W. 464, 1 Dak. 236; *Heller v. Stremmel*, 52 Mo. 309, 311; *Curry v. District Tp. of Sioux City*, 17 N. W. 191, 192, 62 Iowa, 102; *Winspear v. District Tp. of Holman*, 37 Iowa, 542, 544; *City of Covington v. Highlands Dist., Campbell County* (Ky.) 68 S. W. 668, 671 (quoting Bouv. Law Dict.).

A municipal corporation is a public corporation created by the government for political purposes, and having subordinate and local powers of legislation—an incorporation of persons, inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government. *City of Philadelphia v. Fox*, 64 Pa. (14 P. F. Smith) 169, 180.

Burrill's Law Dictionary thus defines the term "municipal corporation": A public corporation; a corporation created by government for political purposes, and having subordinate legislative powers, to be exercised for local purposes, such as a county, city, town, or village. *Root v. Erdelmyer* (Ind.) Wils. 99, 106 (citing 2 Kent, 275).

"A municipal corporation is a public institution created for public purposes. The municipality is a political subdivision or department of the state, governed, regulated, and constituted by public law." *Payne v. Treadwell*, 16 Cal. 220, 222.

"We get our term 'municipal corporations' from the word 'municeps,' or 'municipitia,' meaning the right of a freeman; the right to vote. By naming cities municipal corporations, the right of local self-government was indicated as existing in their inhabitants. Enc. Dict. p. 131. The meaning of the word 'municipal' is thus illustrated: 'Pertaining to local self-government.'" *State v. Denny*, 21 N. E. 252, 259, 118 Ind. 382, 4 L. R. A. 79.

A municipal corporation is the legislative grant of local self-government to the inhabitants within a certain designated territory, which is known as the city, town, or village, and corporate powers granted are exercised by its inhabitants in its corporate name. *State v. McAllister*, 18 S. E. 770, 774, 38 W. Va. 485, 24 L. R. A. 343.

A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people. *State v. Downs*, 57 Pac. 962, 963, 60 Kan. 788.

Municipal corporations, within Const. art. 10, § 1, providing that the taxing power may be exercised by the General Assembly and by counties and other municipal corporations, are those which derive their existence from legislative enactment. *City of St. Louis v. Bircher*, 76 Mo. 431, 433.

There is a clear distinction between most municipal corporations as they existed in Great Britain and those of more recent date in the United States. The former depend upon prescription for their existence and capacity, while the latter find every element of their jurisdiction within their respective charters. *Herzo v. City of San Francisco*, 33 Cal. 134, 145.

A municipal corporation is a governmental institution designed to create a local government over a limited territory. *Langley v. City Council of Augusta*, 45 S. E. 486, 487, 118 Ga. 590.

A municipal corporation includes organized cities and towns, and organizations with political and legislative powers for the local civil government and police regulation of the inhabitants. *James v. Fell Tp. Poor Board*, 7 Pa. Dist. R. 12.

"Municipal corporations," says Beach, *Pub. Corp.* vol. 1, § 8, embrace incorporated cities, villages, and towns which are full-fledged corporations, with all the powers, duties, and liabilities incident to such a status. *Duval County v. Charleston Lumber & Mfg. Co. (Fla.)* 33 South. 531, 532, 60 L. R. A. 549.

Municipal corporations are created by the state to assist in some degree in the maintenance of good order of the whole community, but primarily to administer the local affairs of the city, town, or district incorporated. *Board of Directors for Leveeing Wabash River v. Houston*, 71 Ill. 318, 322.

In the act relating to the authority of municipal corporations to issue bonds, the term "municipal corporation" shall mean town, city, school district, village, or village precinct. *Pub. St. N. H.* 1901, p. 491, c. 43, § 1.

A municipal corporation, in its historical and strict sense, is the incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them, in their corporate capacity, to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is a distinctive purpose, and a distinguishing feature of a municipal corporation proper. 1 *Dill. Mun. Corp.* § 20. A municipal corporation is a subordinate branch of the government of the state. *State v. Douglas County Com'rs.* 47 Neb. 428, 452, 453, 66 N. W. 434, 438 (*citing Mayor v. Ray*, 86 U. S. [19 Wall.] 468, 476, 22 L. Ed. 164).

As an agent or instrumentality of the state.

A municipal corporation is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects

of government. *City of Philadelphia v. Fox*, 64 Pa. (14 P. F. Smith) 169, 180; *Darby v. Sharon Hill*, 4 Atl. 722, 723, 112 Pa. 66; *City of Kansas City v. Vineyard*, 30 S. W. 326, 327, 128 Mo. 75.

A municipal corporation is an agency of the state to discharge some of the functions of government. *People v. Coler*, 59 N. E. 716, 718, 166 N. Y. 1, 52 L. R. A. 814, 82 Am. St. Rep. 605.

Municipal corporations are instrumentalities of the states for the convenient administration of government within their limits. *Chicago League Ball Club v. Chicago*, 77 Ill. App. 124, 139.

A municipal corporation is an agency established by the state for the administration of a town or district. *Commonwealth v. Culp (Pa.)* 16 Phila. 496, 498.

Municipal corporations are the instrumentalities of the state for the more convenient administration of local affairs, and for that purpose are invested with certain legislative power. *Lewis v. Denver City Waterworks Co.*, 34 Pac. 993, 995, 19 Colo. 236, 41 Am. St. Rep. 248.

Municipal corporations are but limited agencies of the general legislative power that resides in the state. They have only such powers as are conferred upon them by the larger sovereignty known as the state. *Bee-son v. City of Chicago (U. S.)* 75 Fed. 880, 881.

Municipal corporations are the creatures of the states in which they are located. They derive their powers from the Constitution and the statutes. *In re Pryor*, 41 Pac. 958, 959, 55 Kan. 724, 29 L. R. A. 398, 49 Am. St. Rep. 280.

Municipal corporations are simply agents of the state for local purposes, and possess merely such powers as are expressly given, or may be properly implied because essential to effectuate what is expressly granted. *Green County v. Shortell (Ky.)* 75 S. W. 251, 254.

Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as any Legislature may confer, and these may be enlarged, abrogated, or entirely withdrawn at pleasure. *State v. Steunenberg*, 45 Pac. 462, 463, 5 Idaho, 1; *Meriwether v. Garrett*, 102 U. S. 472, 511, 26 L. Ed. 197; *Commonwealth v. Moir*, 49 Atl. 351, 352, 199 Pa. 534, 53 L. R. A. 837, 85 Am. St. Rep. 801.

A municipal corporation is but a branch of the state government, and is established for the purpose of aiding the Legislature in making provision for the wants and welfare of the public within the territory for

which it is organized; and it is for the Legislature to determine the extent to which it will confer upon such corporation any power to aid it in the discharge of an obligation which the corporation has imposed upon itself. *Chico High School Board v. Butte County Sup'rs*, 50 Pac. 275, 276, 118 Cal. 115.

Municipal corporations are merely instrumentalities of the state for the better administration of the government in matters of local concern. When such a corporation is created, the power of taxation is vested in it as an essential attribute for all the purposes of its existence, unless its exercise be in express terms prohibited. *United States v. New Orleans*, 98 U. S. 381, 392, 25 L. Ed. 225.

A municipal corporation is a public instrumentality established to aid in the administration of the affairs of the state. Neither its charter, nor any legislative act regulating the use of property held by it for governmental or public purposes, is a contract, within the meaning of the Constitution of the United States. *City of Covington v. Commonwealth of Kentucky*, 19 Sup. Ct. 383, 387, 173 U. S. 231, 43 L. Ed. 679.

As possessing a double character.

Municipal corporations possess a double character,—the one, governmental, legislative, or public; the other, in a sense, proprietary or private. In its governmental or public character, the corporation is made by the state one of its instruments—the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state, and not for itself. But in its proprietary or private character the powers are conferred on the municipal corporation, not from considerations connected with the government of the state at large, but for the private advantage of the particular corporation as a distinct legal personality. *Safety Insulated Wire & Cable Co. v. City of Baltimore* (U. S.) 66 Fed. 140, 143, 13 C. C. A. 375; *Niles Waterworks v. City of Niles*, 26 N. W. 525, 532, 59 Mich. 311.

A municipal corporation possesses two classes of powers and two classes of rights—public and private. In all that relates to one class, it is merely the agent of the state, and subject to its control; in the other, it is the agent of the inhabitants of the place—the incorporators—maintains the character and relations of individuals, and is not subject to the absolute control of the legislature, its creator. *Coyle v. Gray* (Del.) 30 Atl. 728, 732, 7 Houst. 44, 40 Am. St. Rep. 109.

A municipal corporation is a compound being. It exercises governmental powers, and also possesses the capacity to receive and dispose of property like private individ-

uals. In the former capacity, the exercise of its delegated discretion cannot be controlled by the judiciary, but in the latter its acts are subject to judicial control. *Holland v. City of San Francisco*, 7 Cal. 361, 377.

Municipal corporations possess a double character—the one, governmental, legislative, or public; the other, in a sense, proprietary or private—and that distinction, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common-law liability of municipal corporations for the negligence of their servants, agents, and officers in the execution of corporate duties and powers. *Glanfortone v. City of New Orleans* (U. S.) 61 Fed. 64, 70, 24 L. R. A. 592.

The primary and fundamental idea of a municipal corporation, says Judge Dillon, is an institution to regulate and administer the internal concerns of the inhabitants of a defined locality in matters peculiar to the place incorporated, or, at all events, in common to the state or people at large. But it is a constant practice of the states in this country to make use of the incorporated instrumentality, or of its officers, to exercise powers, perform duties, and execute functions that are not strictly legal or municipal in their nature, but which are in fact state powers exercised by local officers within defined territorial limits. In theory, the two classes of powers are distinct, but the line which separates one from the other is often difficult to trace. *Hamlin v. City of Biddeford*, 49 Atl. 1100, 1102, 95 Me. 308.

A municipal corporation, from the nature of the ends intended to be accomplished by its creation, is a compound being, acting in different capacities. It exercises power of government over others, and can pass laws affecting the liberty and property of others, and compel obedience by the infliction of penalties. These are its governmental powers, but, in addition thereto, it also possesses the capacity to own and dispose of property like an individual or a private corporation, and may be a trustee for others. *Holland v. City of San Francisco*, 7 Cal. 361, 377.

A municipal corporation may be said to possess a dual character. In one capacity, it is a property holder, a mere business agency, and is charged with the management of the financial and business interests of the municipality. In another capacity, it is an arm of sovereignty, and is charged with legislative and governmental powers. The power given to cities and towns to control their streets, direct their improvement, and regulate their use is a legislative power, and contracts lawfully made by a municipality are as obligatory and inviolable as contracts made between private individuals; but, in

the absence of statutory authority, any contract, whether in the form of an ordinance or otherwise, which directly or indirectly surrenders or restricts the exercise of a governmental or legislative function or power may at any time be terminated or annulled by the municipality. *Snouffer v. Cedar Rapids & M. C. Ry. Co.*, 92 N. W. 79, 86, 118 Iowa, 287 (citing *Lake Roland El. Ry. Co. v. City of Baltimore*, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126; *Rittenhouse v. City of Baltimore*, 25 Md. 336; *Telegraph Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 18 L. R. A. 454, 21 Am. St. Rep. 764; *Goszler v. City of Georgetown*, 19 U. S. [6 Wheat.] 593, 5 L. Ed. 339; *Richmond County Gaslight Co. v. Town of Middletown*, 59 N. Y. 228; *Gaslight & Coke Co. v. City of Columbus*, 50 Ohio St. 65, 33 N. E. 292; *Bailey v. City of Philadelphia*, 167 Pa. 569, 31 Atl. 925, 46 Am. St. Rep. 691; *Springfield Fire & Marine Ins. Co. v. Village of Keesville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667).

A "municipal corporation," though public, may occupy toward individuals the position of a private corporation, and be liable on its contracts, or for the wrongful acts of its officers done under its authority, and in pursuance of its will, express or implied. *Peck v. City of Austin*, 22 Tex. 261, 263, 73 Am. Dec. 261.

As a company.

See "Company."

As a corporate body or person.

See "Corporate Body" . "Person."

As embracing inhabitants.

A municipal corporation, in its historical and proper sense, is the incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local self-government is the distinct purpose and the distinct feature of a municipal corporation proper. The only fault with this definition, if there be any, is that it does not embrace the inhabitants, as well as the territory; for the term embraces both the territory and its inhabitants. *State v. Barker*, 89 N. W. 204, 206, 116 Iowa, 96, 57 L. R. A. 244, 93 Am. St. Rep. 222 (citing *Dill. Mun. Corp. § 20*).

As a part of the state.

"A municipal corporation is a part of the state government, exercising delegated political powers for public purposes." *City of Baltimore v. Root*, 8 Md. 95, 102, 63 Am. Dec. 696.

A municipal corporation is not only a representative of the state, but is a portion

of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state. *United States v. Baltimore & Ohio R. Co.*, 84 U. S. (17 Wall.) 322, 329, 21 L. Ed. 597; *Atlantic Trust Co. v. Town of Darlington* (U. S.) 63 Fed. 76, 81; *City of Springville v. Johnson*, 37 Pac. 577, 10 Utah, 351.

A municipal corporation is a subordinate branch of the government. It represents the state sovereignty in a limited district and for specific purposes. *Lewis v. Shreveport* (U. S.) 15 Fed. Cas. 494, 496.

A municipal corporation is a subordinate branch of the domestic government of the state. It is instituted for public purposes only, and has none of the peculiar qualities of a trading corporation, instituted for the purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a legal government institution it exists for the benefit of the people within its corporate limits. *Scott v. City of La Porte* (Ind.) 68 N. E. 275, 280.

As a political power.

A municipal corporation, like a state, a county, or a city, is much more than a person, in which respect it differs from a private corporation. While nominally a person, it is virtually a political power. *City of Louisville v. Commonwealth*, 62 Ky. (1 Duv.) 295, 297, 85 Am. Dec. 624.

A municipal corporation, like a state or county, is within its prescribed sphere a political power. The city, to the extent of the jurisdiction delegated to it by its charter, is but an effluence from the sovereignty of the state. It governs for the state, and its authorized legislation and local administration of law are a legislative and local administration by the state through the agency of that municipality. *Byrne v. Chicago Gen. Ry. Co.*, 48 N. E. 703, 705, 169 Ill. 75.

A municipal corporation, while nominally a person, is virtually a political power, a constituent element of one sovereignty, and its local legislation and administration are the legislation and administration of the state. *Wooster v. Plymouth*, 62 N. H. 193, 208.

As political or public corporation.

Judge Dillon, in his work on *Municipal Corporations*, defines municipal corporations as consisting of villages, towns, and cities, as distinguished between them and public corporations; saying: "All corporations intended as agencies in the administration of civil government are public, as distinguished from private corporations." Thus an incorporated school district or county, as well as a city, is a public corporation; but the school district or county is not, while the

city is, a municipal corporation. *Brown v. Board of Education of City of Newport*, 57 S. W. 612, 613, 108 Ky. 783.

The term "municipal corporations" is synonymous with the term "political corporations" or "public corporations." It is often used to signify "a community clothed with extensive civil authority." *Winspear v. District Tp. of Holman*, 37 Iowa, 542, 544.

"The word 'municipal,' as originally used, in its strictness applied to cities only, but the word now has a more extended meaning; and, when applied to corporations, the word 'political,' 'municipal,' and 'public' are used interchangeably." *Curry v. District Tp. of Sioux City*, 17 N. W. 191, 192, 62 Iowa, 102 (cited in *Cook v. Port of Portland*, 27 Pac. 263, 264, 20 Or. 580, 13 L. R. A. 533).

In Const. 1870, art. 10, § 9, authorizing the General Assembly to vest the corporate authority of cities, towns, and villages to make local improvements by special assessments, and authorizing all other municipal corporations to assess and collect taxes for all municipal purposes, is not used "in the primary sense of cities, towns, and villages, but in the more enlarged sense of public local corporations, exercising some governmental function." *Wilson v. Trustees of Sanitary Dist.*, 27 N. E. 203, 206, 133 Ill. 443.

"The term 'municipal corporation,' in its more general sense, may be made to include both towns and counties and other public corporations, created by government for political purposes. In its more common and limited signification, however, it embraces only incorporated villages, towns, and cities." As used in Const. art. 4, § 50, providing that the General Assembly shall not have power to authorize any municipal corporation to pass any laws inconsistent with the general laws of the state, it is used in the latter sense, and means incorporated cities or towns. *Dunn v. Wilcox County Revenue Court*, 4 South. 661, 662, 85 Ala. 144.

Ordinarily the term "municipal corporation" is used to distinguish public political corporations from private corporations, and it generally includes within its meaning a public political municipal or quasi municipal corporation. *West Plains Tp. v. Sage* (U. S.) 69 Fed. 943, 949, 16 C. C. A. 553.

Board of water commissioners.

There can be no "municipal corporation" that is not the direct representative of the people of its locality, and hence a board of commissioners, incorporated as a municipal agency, which furnishes the city with water, is not a municipal corporation. *O'Leary v. Board of Fire & Water Com'rs*

of Marquette, 79 Mich. 281, 287, 44 N. W. 608, 7 L. R. A. 170, 19 Am. St. Rep. 169.

County.

The term "municipal corporations" includes counties. *Glenn v. York County Com'rs*, 6 S. C. (6 Rich.) 412, 418.

The term "municipal corporation" includes a county, under section 1 of the general municipal law. *People v. Carpenter*, 52 N. Y. Supp. 781, 783, 31 App. Div. 603.

In its usual sense and common usage the term "municipal corporations" includes counties and townships. All public corporations, including counties, cities, and townships, are frequently referred to as "municipalities" and "municipal corporations," to distinguish them from private corporations. *Rathbone v. Hopper*, 45 Pac. 610, 611, 57 Kan. 240, 34 L. R. A. 674.

The term "municipal corporations" in the clause of the Alabama Constitution providing that private property shall not be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner, includes counties. *Ex parte Selma & G. R. Co.*, 45 Ala. 696, 732, 6 Am. Rep. 722.

Const. art. 1, § 14, which provides that no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money, etc., refers to such corporations as are for the purpose of public government, and therefore includes counties. *Pacific Coast Ry. Co. v. Porter*, 15 P. 774, 775, 74 Cal. 261.

The constitutional amendment empowering the Legislature to authorize municipal corporations to levy assessments for local improvements, without regard to a cash valuation of the property assessed, held to authorize such legislation in respect to counties. *In re Dowlen*, 31 N. W. 517, 518, 36 Minn. 430.

A county is not a "municipal corporation" in the full sense of the term. It is only a quasi corporation, and possesses such powers and is subjected to such liabilities only as are specially provided for by law. *Schweiss v. First Judicial Dist. Ct.*, 45 Pac. 289, 23 Nev. 226, 34 L. R. A. 602. A county is not, in the proper sense of the word, a "municipal corporation." *Johnson County Com'rs v. Searight Cattle Co.*, 31 Pac. 268, 277, 3 Wyo. 777; *Stermer v. La Plata Com'rs*, 38 Pac. 839, 842, 5 Colo. App. 379.

A county is not a municipal corporation, within Rev. St. § 3053, providing that actions to recover back taxes must be brought against the officer who made the collection, or his personal representative, with a proviso that when the money derived from such

taxes has been paid over to a municipal corporation, for whose use and benefit it was levied, then the action shall be brought against such corporation. *Powder River Cattle Co. v. Johnson County Com'rs*, 29 Pac. 361, 365, 3 Wyo. 597.

A municipal corporation is a government, possessing powers of legislation, and is charged with a general care for the welfare of the people; while a county organization is merely the involuntary agent of the state, charged with the interests of the state in the particular county, and clothed with certain administrative functions, limited in extent, and clearly defined by law. *City of Williamsport v. Commonwealth*, 84 Pa. 487, 499, 24 Am. Rep. 208.

County agricultural society.

The words "municipal corporation," as used in Const. art. 15, § 10, which provides that no corporation, except for municipal purposes or for the construction of railroads, plank roads, and canals, shall be created for a longer time than 30 years, includes a county agricultural society, organized for the promotion of agriculture and all the kindred arts, which has no capital stock and cannot pay dividends. *Kent County Agricultural Soc. v. Houseman*, 46 N. W. 15, 16, 81 Mich. 609.

Irrigation district.

Irrigation districts are not municipal corporations, within the strict and better use of that term. Every public corporation formed by the state for the purpose of carrying out any of the duties which the state owes to any locality, and which by its terms is made obligatory to all the inhabitants of the district or locality affected thereby, must be held to be included in the words "other municipal corporation," as used in Const. art. 8, § 6, relating to the incurring of indebtedness by a county, town, city, school district, or other municipal corporation. It does not follow, however, that every corporation which may be created by the state as an agency for the performance of some public or quasi public duty comes within such definition. One of the essentials of a municipal corporation is that for the purpose for which it was organized it must affect all within its boundaries alike; and this is true, although such corporation is constituted for a single purpose. For instance, a school district, though organized only for the purpose of facilitating the education of its children, affects all the taxpayers of the district alike. The same may be said of a county. It has only limited powers, but those powers are to be exercised for the benefit of all the inhabitants alike. Such is not the case of an irrigation district; for, while it is true that its powers and privileges are subject to the will of the majority

of the electors therein, yet when it acts thereunder it does not equally affect all of its inhabitants. It will thus be seen that, if we are to hold that every corporation which the Legislature sees fit to make use of for the purpose of aiding in the government of any district or locality, or providing for the inhabitants therein any right or privilege common to all, is a municipal corporation within the inhibition of the Constitution, yet it will not follow that the corporations of the kind contemplated by the irrigation act are also municipal corporations. *Directors of Middle Kittitas Irr. Dist. v. Peterson*, 29 Pac. 995, 996, 4 Wash. 147.

Railroad.

In Const. art. 1, § 14, providing that no right of way shall be appropriated for any corporation, other than municipal, unless full compensation therefor be first made in money, or ascertained and paid into court, irrespective of any benefit from any proposed improvement, the word "municipal" refers to such corporations as are for public government, and thus includes a county, but will not include a railroad company. *Pacific Coast Ry. Co. v. Porter*, 15 Pac. 774, 775, 74 Cal. 261.

Road district.

Road districts are not municipal corporations; and cannot assess taxes. *Dixon County v. Chicago, St. P., M. & O. R. Co.*, 95 N. W. 340, 341, 1 Neb. Unof. 240.

Sanitary district.

A sanitary district, no more than an irrigation district, a reclamation district, or a drainage district, possesses police powers properly belonging to cities and municipal bodies exercising local and governmental functions. Although in the nature of public corporations, they are not "municipal corporations" in the proper sense of that term. All municipal corporations are public corporations, but the converse does not follow that all public corporations are municipal corporations. In some of the cases expressions may doubtless be found which would seem to indicate that "public corporations" and "municipal corporations" are synonymous; but it is nevertheless inaccurate to designate a drainage district or sanitary district, although corporations, as municipalities. In *re Werner*, 62 Pac. 97, 99, 129 Cal. 567.

A sanitary district is a municipal corporation organized to secure, preserve, and promote the public health. *People v. Nelson*, 27 N. E. 217, 219, 133 Ill. 565, 579.

School district or township.

The board of president and directors of the St. Louis public schools is not a "municipal corporation" within a statute providing

that no person shall be eligible to the office of justice of the county court who shall hold any office under a municipal or railroad corporation. *Heller v. Stremmel*, 52 Mo. 309, 311.

The term "municipal corporation" in Act Jan. 31, 1888, requiring the board of county commissioners or mayor or common council of any incorporated town or city or tribunal, transacting the business of any "other municipal corporation," to require bonds from contractors, applies to school districts. *Maxon v. School Dist. No. 34*, 31 Pac. 462, 464, 5 Wash. 142.

A school district is a municipal corporation, within the meaning of Const. art. 16, § 5, providing that the permanent school fund may be invested in national, state, county, and municipal bonds. Undoubtedly school districts are not strictly municipal corporations, within the definitions given in the text-books; and in some of the states they have been held to be municipal corporations and in others not, in construing the laws of the particular states. If the provision is to be held to be a limitation of the power to invest, and we think that it must be, the special prohibition would in a measure be useless. The apparent intent was to draw a distinction between private and public securities, and only to prohibit investing the permanent school fund in private securities. *State v. Grimes*, 34 Pac. 833, 836, 7 Wash. 191.

"A municipal corporation, in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of the city or town for the purposes of local government thereof. Municipal corporations, as they exist in this country, are bodies politic and corporate, of the general character above described, established by law, partly as an agency of the state to assist in the civil government of the county, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated." 1 Dill. Mun. Corp. p. 38. In the same connection the same author says that the phrase "municipal corporation" is also "used in a still broader sense, which includes the public or quasi corporations." *Id.* p. 39. The courts of other states have taken the same view of the municipal character of school districts as our own courts have. *Andrews v. Estes*, 11 Me. (2 Fairf.) 267, 26 Am. Dec. 521; *Gaskill v. Dudley*, 47 Mass. (6 Metc.) 546, 39 Am. Dec. 750. In this case, Chief Justice Shaw said: "School districts, so far as they are corporations, are corporations of the same kind as towns, organized for the same purpose, charged with the same duties." *Whitney v. Inhabitants of Stow*, 111 Mass. 370; *Connell v. Woodard*, 6 Miss. (5 How.) 665, 37 Am. Dec. 173. The provi-

sions of the act, which declares "that any person or persons who shall hereafter as laborer, mechanic, merchant, or trader, in pursuance of or in conformity with the terms of any contract for any public improvement made between any person or persons, and any city, town, township, or other municipality in this state, authorized by law to make contracts for the making of any public improvement, perform any labor, or furnish any material towards the performance or completion of any such contract made with said city, town, township, or other municipality" (Act March 30, 1892), extend to and include school districts. *Public Instruction Com'rs v. Fell*, 29 Atl. 816, 817, 52 N. J. Eq. (7 Dick.) 689.

The term "municipal corporations," properly speaking, only includes cities, towns, and villages, and does not embrace school districts. *Freeland v. Stillman*, 30 Pac. 235, 236, 49 Kan. 197.

The term "municipal corporations," as used in Laws 1871, c. 79, providing for contesting certain elections in municipal corporations, does not embrace school districts; the court observing that, although a school district possesses corporate capacity and is declared in the Constitution to be a body corporate, it does not fall within the definition of a municipal corporation. A school district belongs in the same class as counties and townships, which are known to the law as quasi corporations, rather than as corporations proper. They possess some corporate attributes, but they are special agencies in the administration of civil government, and their corporate attributes are to enable them more readily to perform their public duties. *Freeland v. Stillman*, 30 Pac. 235, 236, 49 Kan. 197.

A civil or school township is a municipal corporation. It is an impersonal something. It exists only by virtue of a statute. It is without knowledge, action, or existence, save in law. It can only act by and through its legal officer and representative—its trustee. It is wholly passive and submissive, and can protect itself only through its proper representative. For all legal purposes and business transactions, the trustee of the township is the representative and agent thereof, and acts for it. *Davis v. Steuben School Tp.*, 50 N. E. 1, 4, 19 Ind. App. 694.

State.

The term "municipal corporation," in Code Civ. Proc. § 3400, providing a means for enforcing mechanics' liens against municipal corporations, does not include the state. Where the term "corporation" is used, it cannot possibly have any applicability to the state, because the state is not a corporation, but a sovereign, which creates corporations, and by whose permission alone cor-

porations are allowed to exist. It would be a great stretch of construction for the court to bring a sovereign state within its jurisdiction, where the Legislature has only conferred the right to act as against corporations. *Tice v. Atlantic Const. Co.*, 65 N. Y. Supp. 79, 81, 52 App. Div. 284.

State University.

Strictly speaking, the State University is not a municipal corporation. *Spalding v. People*, 49 N. E. 993, 996, 172 Ill. 40.

Town.

A town is often called in common parlance, and sometimes unguardedly in statutes, a municipal corporation, in connection with counties, cities, and villages; but, when so called, it is in the sense of a mere corporation or quasi corporation, or of corporations sub modo only, and not in the sense of a municipality proper. *Eaton v. Manitowoc County Sup'rs*, 44 Wis. 489, 493; *Cathcart v. Comstock*, 14 N. W. 833, 841, 56 Wis. 590.

Village.

A village is a municipal corporation, although of the lowest grade. *City of Wahoo v. Reeder*, 43 N. W. 1145, 1146, 27 Neb. 770.

Under Laws 1892, c. 687, § 3, a village is a municipal corporation. In *re* *Lansin-burgh Board of Health*, 60 N. Y. Supp. 27, 29, 43 App. Div. 236.

A village is a municipal corporation created for the purpose of local government, which may sue and be sued, as used in Comp St. c. 14, art. 1, § 61, prescribing the qualifications of those entitled to vote at elections held in villages. *State v. Chichester*, 47 N. W. 934, 81 Neb. 325, 11 L. R. A. 104.

MUNICIPAL COURTS.

The Constitution declaring that the Legislature may vest in municipal courts such jurisdiction as may be deemed necessary, means municipal courts such as have been established by laws of other states. *State v. McArthur*, 13 Wis. 383, 385.

Const. art. 6, § 1, providing that the Legislature may establish such "municipal courts" as may be deemed necessary, means the mayor's and recorder's courts. *Uridias v. Morrill*, 22 Cal. 473, 478.

MUNICIPAL ELECTION.

Pub. St. c. 7, § 57, providing that whoever at any municipal election knowingly gives more than one ballot at one time of balloting at such election shall be punished, etc., does not apply to a ballot given at an annual town meeting on a question of pledg-

ing the credit of the town, or of uniting it with another town, or of licensing the sale of intoxicating liquors, or on any matter of town concern which may be voted for by ballot. It only applies to ballots cast in elections for officers. *Commonwealth v. Howe*, 10 N. E. 755, 757, 144 Mass. 144.

An election held, under Acts 1879, p. 88, providing that the common council of any city contemplating building waterworks shall submit the question to the qualified voters at a special or general election, notice of which shall be published for three weeks before the day of such election, to vote on such question, is a "municipal election," within the meaning of Acts 1877, p. 92, declaring it to be unlawful for any person to sell or give away intoxicating liquors on the day of any municipal election in the city where the same may be holden. *State v. Kidd*, 74 Ind. 554, 556.

MUNICIPAL FINE.

A "municipal fine," within Const. art. 6, § 4, providing that the Supreme Court has jurisdiction over the subject-matter of appeals involving the legality of municipal fines, is a fine imposed by a municipal corporation. The word "municipal" is not used in its broadest and most enlarged, but in its strictest sense, as indicating an inferior power or jurisdiction; and hence the term "municipal fine" cannot include all fines imposed by the laws of the state. *People v. Johnson*, 30 Cal. 98, 102.

Code Civ. Proc. § 112, gives justices of the peace jurisdiction of actions for penalties under a certain amount given by statute or municipal ordinance, where no issue is made as to the legality of the "municipal fine," tax, assessment, or toll. Held, that the words "municipal fine," as used in the statute, did not include a penalty imposed by statute for transacting an insurance business without obtaining a certificate of authority to do so from the insurance commissioner, but that such a penalty is one "given by statute," and hence is recoverable before the justice. In *re* *Thomas*, 22 Pac. 80, 80 Cal. 40.

MUNICIPAL FRANCHISE.

Though all corporate franchises are the subject of legislative, and not of municipal, grant, many franchises are granted by the Legislature on condition that they shall not be exercised by the grantee without first obtaining the consent of the municipality within whose limits the franchises are to be exercised; so that a provision that a franchise tax on certain corporations shall not be considered to apply to any corporation which has not or may not exercise any municipal

franchises, refers to franchises of this character. *State v. Plainfield Water Supply Co.*, 52 Atl. 230, 67 N. J. Law, 357.

MUNICIPAL JURISDICTION.

The phrase "municipal jurisdiction" does not necessarily designate the jurisdiction of a common council, but may designate the jurisdiction of any public authority, administering a business pertaining to a city, such as would have to be administered by the common council in the absence of specially constituted authority. *State v. Levee Com'rs of Orleans Levee Dist.*, 33 South. 385, 400, 109 La. 403.

MUNICIPAL LAW.

"Municipal law" is defined by Blackstone to be "a rule of civil conduct prescribed by the supreme power of the state, commanding what is right, and prohibiting what is wrong." *Currie's Adm'rs v. Mutual Assur. Soc. (Va.)* 4 Hen. & M. 315, 346, 4 Am. Dec. 517; *People v. Tiphania (N. Y.)* 3 Parker, Cr. R., 241, 244; *In re Higbee*, 5 Pac. 693, 694, 4 Utah, 19; *Hunt v. Chicago & D. Ry. Co.*, 20 Ill. App. 282, 288. This definition is criticised in *Davis v. Ballard*, 24 Ky. (1 J. J. Marsh.) 563, 565, 576, as incompatible with the genius of our form of government; neither is it literally true as applicable to our system, in that we accept no supreme power except that of the people. The following definition is there given: "Municipal law may be properly defined to be a rule of civil conduct prescribed by any power in the state having, according to its constitution or form of government, authority to act."

Municipal law is a rule of civil conduct, prescribed or recognized by the supreme powers in the state, commanding what in its opinion is right and convenient, and prohibiting what is wrong and inconvenient. The rule of civil conduct is based upon certain principles, which can neither be ignored nor left out. These principles, controlled in their application by custom, constitute the common law. *Hulings v. Hulings Lumber Co.*, 18 S. E. 620, 627, 38 W. Va. 351.

The term "municipal law" means the internal law of a state, and is used in contradistinction to "international law." The term is not confined to the law of a city only. *Winspear v. District Tp. of Holman*, 37 Iowa, 542, 544; *Cook v. Port of Portland*, 27 Pac. 263, 264, 20 Or. 580, 13 L. R. A. 533.

Burrill's Law Dictionary thus defines the term "municipal law": "The rule of law by which a particular district, community, or nation is governed. The particular law of a state or nation, as distinguished from public or international law. A rule of civil conduct prescribed by the supreme

power in a state. In a strict sense, the law of a particular place, such as a city or town. Originally the law of a municipium, or free town." Wharton's Law Dictionary defines the words "municipal law" thus: "That which pertains solely to the citizens and inhabitants of a state, and is thus distinguished from political law, commercial law, and the law of nations. It is now, however, more usually applied to the customary laws that obtain in any particular city or province, and which have no authority in neighboring places." In *Walk. Am. Law*, 219, it is said: "Public corporations are those which are founded with public means and for public purposes. Their criterion is that no individual has any interest in their foundation, except as a member of the general body politic. To this class belong all municipal corporations, beginning with the United States, and descending down through states, counties, townships, school districts, and the like. These are for the most part denominated 'quasi corporations,' since, with the exception of cities and boroughs, they require no special act of incorporation. They possess scarcely any other corporate properties than those of holding property and being parties to suits." *Root v. Erdelmyer (Ind.)* Wils. 99, 106.

MUNICIPAL LIEN.

A "municipal lien" is a creature of statute, and must aver on its face all the facts necessary to sustain its validity, and unless it does so it may be merely stricken off by the court on motion. *Bradford City v. Foster*, 5 Pa. Dist. R. 523, 525.

MUNICIPAL MARKET.

A "municipal market" consists—First, in a place for the sale of provisions and articles of daily consumption; second, convenient fixtures; third, a system of police regulations fixing market hours, making provisions for the lighting, watching, cleaning, detecting false weights and unwholesome food, and other arrangements calculated to facilitate the intercourse and insure the honesty of buyer and seller; fourth, proper officers to preserve order and enforce obedience to rulers. *City of Cincinnati v. Buckingham*, 10 Ohio, 257, 261.

MUNICIPAL OFFENSE.

A "municipal offense" is an offense against a particular state or separate community. *Cook v. Port of Portland*, 27 Pac. 263, 264, 20 Or. 580, 13 L. R. A. 533; *Winspear v. District Tp. of Holman*, 37 Iowa, 542, 544.

MUNICIPAL OFFICER.

The term "municipal officer" includes the mayor and aldermen of cities, the selectmen

of towns, and the assessors of plantations. Rev. St. Me. 1883, p. 59, c. 1, § 6, subd. 23.

Where it was necessary to allege, in an action in the name of a town to recover taxes, that the selectmen had directed the action to be brought, an allegation that the municipal officers had directed the action to be brought was sufficient; the term "municipal officers" including selectmen. *Inhabitants of Wellington v. Small*, 36 Atl. 107, 108, 89 Me. 154.

Clerk of probate court.

Const. art. 9, § 11, providing that the fees, salary, or compensation of no "municipal officer" who is elected or appointed for a definite term of office shall be increased or diminished during said term, should be construed to include the clerk of the probate court of a county; the statute establishing probate courts providing for the election of a clerk thereof for a term of four years. *Cook County v. Sennott*, 26 N. E. 491, 136 Ill. 314.

School officers.

Comp. St. c. 10, § 1, providing that all municipal officers shall take and subscribe a certain oath which shall be indorsed on their bonds, means the officers of all incorporated villages, towns, and cities, and does not include school district officers. *Frans v. Young*, 46 N. W. 528, 529, 30 Neb. 360, 27 Am. St. Rep. 412.

School directors are not municipal officers. *Chalfant v. Edwards*, 33 Atl. 1048, 1049, 173 Pa. 246.

Superintendent of public instruction.

The superintendent of public instruction in the city of Baltimore, being appointed at the pleasure of the board of school commissioners, in pursuance of the power conferred on it by City Charter (Acts 1898, c. 123) § 100, is merely an employé of that department of the city government, and not a "municipal official," within section 26 of the charter, which provides that all municipal officials shall be registered voters of the city; and hence the fact that one not a registered voter was appointed was no ground for restraining payment of his salary. *City of Baltimore v. Lyman*, 48 Atl. 145, 146, 92 Md. 591, 52 L. R. A. 406, 84 Am. St. Rep. 524.

MUNICIPAL ORDINANCE.

See "Ordinance."

MUNICIPAL PURPOSES.

Municipal purposes are public or governmental purposes, as distinguished from private purposes. Such purposes "embrace, by the common speech of man before and since the days of Blackstone, state or national

purposes, and therefore, while cities and towns and villages are for municipal purposes, there are also other corporations for municipal purposes that are not of that class." As used in Const. art. 11, § 2, prohibiting the creation of corporations by special law, except for municipal purposes, the term has the broader and more general meaning, and is not confined to municipal corporations strictly speaking. Incorporation of a port is for municipal purposes within the meaning of the Constitution. *Cook v. Port of Portland*, 27 Pac. 263, 264, 20 Or. 580, 13 L. R. A. 533.

Const. art. 6, § 1, authorizing the Legislature to establish courts "for 'municipal purposes' only in incorporated cities and towns," restricts the jurisdiction of such courts, when created, to such matters as relate to the affairs of the incorporated cities or towns, where alone they are authorized to be established. *Meagher v. Storey County*, 5 Nev. 244, 249.

The words "municipal purposes," as used in Revenue Law, § 136, enacting that all laws except those enacted for municipal purposes on the subject of taxation are hereby repealed, are not words of any definite technical import, and may be so construed as to apply to a corporation established to carry on the business of a public free school and to raise funds for its support. *Horton v. Mobile School Com'rs*, 43 Ala. 598, 607.

A tax on the capital stock of a national bank for school purposes, or for a donation by a township to aid in building a railroad, is not a tax levied for municipal purposes, within the meaning of Act March 15, 1867 (3 Ind. St. 34, § 9), providing: "Nothing in this or any other act shall be so construed as to authorize the taxation of stock in the bank of the state of Indiana, or in any national bank for municipal purposes." The word "municipal," as used in the statute, is employed in its original restricted sense, having reference to the incorporated cities and towns in the state having authority to levy and collect taxes, and the restriction extends only to taxes for such city or town purposes. *Root v. Erdelmeyer*, 37 Ind. 225, 226, 227.

MUNICIPAL REGULATIONS.

The terms "by-laws," "ordinances," and "municipal regulations" have substantially the same meaning, and are the laws of the corporate district, made by the authorized body, in distinction from the general laws of the state. They are local regulations for the government of the inhabitants of the particular place. They are not laws in the legal sense, though binding on the supreme power of the state, from which alone a law can emanate, and therefore cannot be statutes, which are the written will of the Legislature, expressed in the form necessary to

constitute parts of the law. *City of Ruth-
erford v. Swink*, 35 S. W. 554, 555, 96 Tenn.
564.

MUNICIPAL REVENUE.

All taxes collected for municipal pur-
poses from all sources whatsoever shall be
designated "municipal revenue." Rev. St.
Mo. 1899, § 5346.

MUNICIPAL TAX.

Comp. St. 1893, c. 12a, § 83, providing
that all municipal taxes shall be collected
from the personal property of the person or
persons or body corporate owning the same,
whenever the same is practicable, etc., does
not apply to special taxes levied by a city
for special assessments for municipal im-
provements, so as to authorize the city to
sell the property for nonpayment of such
assessments. *State v. Irely*, 60 N. W. 601,
603, 42 Neb. 186.

Property which is exempt from taxation
for strictly municipal purposes may be taxed
for school purposes, as a common school tax
is not a municipal tax; and it may be also
taxed for the purpose of paying subscrip-
tions by the municipality to railroads, as
such tax is not within the range required,
or essential to the existence of the munici-
pality, and cannot, therefore, be said to be
a tax for strictly municipal purposes; but
the property is not bound for additional tax-
es for the reconstruction of the streets and
alleys of the municipality. *Bamberger*,
Bloom & Co. v. City of Louisville, 82 Ky.
337, 341.

Where agricultural land within the lim-
its of a city is expressly exempted from tax-
ation for city purposes, the lands are exempt
from taxation for the purpose of raising
money to pay a bonus voted by the city to
aid the building of a railroad; but they are
not exempt from taxation for school pur-
poses, though all of the territory embraced
within the limit of the city constitutes a
school district, and though the school officers
levying the tax are the regular municipal
authorities, as the tax for school purposes
is a special tax, and not a "municipal assess-
ment" in any sense. *City of Henderson v.*
Lambert, 71 Ky. (8 Bush) 607, 610.

A tax voted by a township to pay for
a subscription to the stock of a railroad
about to be built through the township is
not a municipal tax. *Carolina, C. G. & C.*
Ry. Co. v. Tribble, 25 S. C. 260, 264.

MUNICIPALITY.

See, also, "Municipal Corporation."

A municipality is defined as "a body
formed by the incorporation of the inhabit-

ants of a particular place or district, estab-
lished to assist in the civil government of
the state by the exercise of subordinate spec-
ified powers of legislation and regulation
with respect to local and internal concerns."
Reid v. Wiley, 46 N. J. Law (17 Vroom) 473,
474 (citing 1 Dill. Mun. Corp. §§ 19, 20).

Bouvier's Law Dictionary defines the
word "municipality" thus: "The body of offi-
cers, taken collectively, belonging to a city,
who are appointed to manage its affairs and
defend its interests." *Root v. Erdelmyer*
(Ind.) Wils. 99, 105.

The term "municipality," as used in ref-
erence to the authority to fill vacancies in
the office of city alderman belonging to mun-
icipalities generally, means the city or town
councils, through which municipal action is
expressed and had. *Rittman v. Payne*, 58 S.
W. 350, 68 Ark. 338.

A municipality is defined to be "a city;
a municipal corporation." *Fitzgerald v.*
Walker, 55 Ark. 148, 17 S. W. 702, 704.

A municipality is a public corporation,
as distinguished from a private trading cor-
poration. In re *Guarantee Trust & Safe De-
posit Co.*, 3 Pa. Dist. R. 205, 208.

A municipality is a state agency for
governmental purposes. It exercises politi-
cal governmental powers delegated by the
state. As to such powers, and to the duties
which attach to their exercise in the admin-
istration of justice and the preservation of
the public peace, it is "imperium in imperio"
—a part of the governmental machinery of
the commonwealth. *City of Lexington v.*
Thompson (Ky.) 68 S. W. 477, 479, 57 L. R.
A. 775.

County.

"Municipality," as used in Const. § 157,
providing that no county, city, town, taxing
district, or other municipality shall be author-
ized or permitted to become indebted, in any
manner or for any purpose, to an amount
exceeding in any year the income and reve-
nue provided for such year, without the con-
sent of two-thirds of the voters thereof, cov-
ers not merely incorporated villages, towns,
and cities, but counties and taxing districts.
Brown v. Board of Education of City of New-
port, 57 S. W. 612, 613, 108 Ky. 783.

A strict application of the term "muni-
cipality" in Act Jan. 4, 1894, § 11, authorizing
the General Assembly to organize systems of
town governments for counties and make
special provision for municipal government
and for the protection of charter rights and
powers of municipalities, would limit it to
incorporated cities, towns, and villages; but
it is true, also, that it may properly be used
in characterizing the government of a county
or town. *Carolina Grocery Co. v. Burnet*,

39 S. E. 381, 385, 61 S. C. 205, 58 L. R. A. 687.

Counties are "municipalities," within the meaning of Laws 1895, c. 138, § 2, declaring that "municipalities in this state are hereby empowered to make the donations herein mentioned for the establishment and building of such home" (i. e., State Home for Feeble-Minded Persons). In *Eaton v. Manitowoc County Sup'rs*, 44 Wis. 489, 493, it is said: "Towns are often called in common parlance, and sometimes unguardedly in statutes, 'municipal corporations,' in connection with counties, cities, and villages; but, when so called, it is in the sense of mere corporations or quasi corporations, or of corporations sub modo only, and not in the sense of municipalities proper." *Lund v. Chipewa County*, 93 Wis. 640, 644, 67 N. W. 927, 929, 34 L. R. A. 131.

Improvement district.

The word "municipality," as employed in Const. art. 16, § 1, prohibiting a county, city, town, or municipality from issuing any interest-bearing evidences of debt, except to pay an existing indebtedness, signifies a city or municipal corporation; and hence an improvement district, though organized for a limited municipal purpose, was not a municipality within the meaning of the Constitution. *Memphis Trust Co. v. Directors of St. Francis Levee Dist.*, 62 S. W. 902, 903, 69 Ark. 284.

Joint senatorial district.

A municipality is generally defined and understood to mean a division of the state for the purpose of self-government. The word as used in Acts 1901, p. 495, relating to primary elections, and providing that all political parties in certain counties shall nominate candidates for office in any county, city, town, township, or municipality as prescribed in the act, "may be said to be a tautological expression, and adds nothing to the sense or meaning expressed by the words 'county, city, town, or township,' immediately preceding it; nor can it be said to extend the provision of the act to any other or greater subdivision than those intended by the term 'county, city, town, or township.'" Certainly this term, as employed in the statute, cannot be construed to intend or mean a joint senatorial district." *State v. Elliot*, 63 N. E. 222, 224, 158 Ind. 168.

School board.

A school board is included within the term "municipality," as used in *Hurd's Rev. St.* 1897, c. 82, § 38, which provides that any person who shall furnish material or labor to any contractor for a public improvement shall have a lien on the money coming to such contractor, if he shall before payment thereof notify the official of the state, town-

ship, or municipality. *Spalding Lumber Co. v. Brown*, 49 N. E. 725, 727, 171 Ill. 487.

The board of education of a city is held a municipality, under a statute limiting the indebtedness of municipalities, etc. *Brown v. Board of Education of City of Newport*, 57 S. W. 612, 613, 108 Ky. 783.

School district.

A school district is a municipality, within the meaning of an eight-hour law regulating the time of labor for municipalities. *State v. Wilson*, 69 Pac. 172, 173, 65 Kan. 237.

School districts are not municipalities, but mere territorial divisions for limited purposes, and belong to the class of quasi corporations which exercise some of the functions of a municipality within a prescribed sphere. *Briegel v. City of Philadelphia*, 19 Atl. 1038, 135 Pa. 451, 20 Am. St. Rep. 885.

A school district township is not a municipality, within Laws 1894, c. 62, § 14, which provides that one-half the taxes levied and collected on saloons under the act shall be paid over by the county treasurer to the municipality in which the business is conducted. Appellant's contention is that the word "municipality" applies only to incorporated cities and towns, and several definitions are quoted in support of this contention. Appellee contends that this court has in a number of cases stated that a school district, such as plaintiff, is a municipality, and that the terms "municipality" and "municipal corporation" are synonymous. It is true that these terms had been used in some instances as synonymous, but not when the question was so directly presented as now. It is the legislative intention in the use of this word for which we are now to inquire, rather than the technical or general sense in which it is used; yet these are probably to be considered in arriving at the legislative intention. It is a fact that places for the sale of intoxicating liquors are very generally within incorporated cities or towns, and that it is exceptional when that business is carried on elsewhere. While chapter 62 requires a tax to be assessed and collected, whether or not the place be within the incorporated limits of a city or town, we are satisfied that, in providing for a disposition of the revenue derived from this tax, only counties and incorporated cities and towns were contemplated. *District Tp. of Sheridan v. Frahm*, 70 N. W. 721, 722, 102 Iowa, 5.

Town.

In common parlance, and even in legislative and judicial language, the word "municipality" is applied to towns, as well as to cities and incorporated villages. *Miller v. Town of Jacobs*, 35 N. W. 324, 325, 70 Wis. 122.

MUNICIPIA.

"Municipia" was the name given in the Roman Law to cities enjoying the right of local self-government. *Brickerhoff v. Board of Education* (N. Y.) 37 How. Prac. 499, 515; *Winspear v. District Tp. of Holman*, 37 Iowa, 542, 544.

MUNITIONS OF WAR.

Living fat cattle are "munitions of war," within Act July 16, 1812, prohibiting American vessels from trading with the enemies of the United States and transporting munitions of war from the United States to Canada. *United States v. Sheldon*, 15 U. S. (2 Wheat.) 119, 122, 4 L. Ed. 199.

MURDER.

See "Assault with Intent to Commit Murder"; "Cold-Blooded Murder."

Murder, at common law, occurs where a person of sound memory and discretion unlawfully kills any reasonable creature in being and in the peace of the commonwealth with malice aforethought, either express or implied. *Kilpatrick v. Commonwealth*, 31 Pa. (7 Casey) 198, 201; *Commonwealth v. Sal-yards*, 27 Atl. 993, 995, 158 Pa. 501; *Kilpatrick v. Commonwealth* (Pa.) 3 Phila. 237, 238; *Commonwealth v. Moore* (Pa.) 2 Pittsb. R. 502, 503; *Commonwealth v. Sayres* (Pa.) 12 Phila. 553, 555; *Commonwealth v. Martin* (Pa.) 9 Kulp, 69, 70; *Territory v. Bannigan*, 46 N. W. 597, 1 Dak. 451; *Bonfanti v. State*, 2 Minn. 123, 128 (Gil. 99, 103); *Milton v. State*, 6 Neb. 136, 138; *Craft v. State*, 3 Kan. 450, 481; *State v. Estep*, 24 Pac. 986, 987, 44 Kan. 572; *State v. Nixon*, 4 Pac. 159, 164, 32 Kan. 205; *Farrar v. State*, 15 S. W. 719, 720, 29 Tex. App. 250; *People v. McCann*, 16 N. Y. 58, 66, 69 Am. Dec. 642; *State v. Wieners*, 66 Mo. 13, 15, 25; *Fields v. State*, 9 Tenn. (1 Yerg.) 156, 162; *Hotema v. United States*, 22 Sup. Ct. 895, 896, 186 U. S. 413, 46 L. Ed. 1225; *United States v. Meagher* (U. S.) 37 Fed. 875, 878; *Guiteau's Case* (U. S.) 10 Fed. 161, 162; *United States v. Carr* (U. S.) 25 Fed. Cas. 306, 308; *State v. Jones* (Del.) 47 Atl. 1006, 1007, 2 Pennewill, 573; *State v. Harrigan* (Del.) 31 Atl. 1052, 9 Houst. 369; *State v. Miller* (Del.) 32 Atl. 137, 138, 9 Houst. 564.

Murder is the killing of a reasonable being with malice aforethought—that is, with a deliberate intention or formed design; and the law presumes all homicide to be committed with malice aforethought, amounting to murder, until the contrary appears from circumstances of alleviation, excuse, or justification. *State v. Zellers*, 7 N. J. Law (2 Halst.) 220, 243; *Clarke v. State*, 23 South. 671, 674, 117 Ala. 1, 87 Am. St. Rep. 163; *Brown v. State*, 20 South. 103, 104, 109 Ala. 70; *State*

v. Mills, 21 S. E. 106, 107, 116 N. C. 992; *Whiteford v. Commonwealth* (Va.) 6 Rand. 721, 723, 18 Am. Dec. 771.

Murder is the unlawful killing of another with malice. *Robertson v. Commonwealth* (Va.) 20 S. E. 362, 364.

Murder is the unlawful killing of a human being with malice aforethought. *People v. Evans*, 56 Pac. 1024, 1025, 124 Cal. 206; *People v. Schmidt*, 63 Cal. 28; *United States v. Martin* (U. S.) 17 Fed. 150, 156; *State v. McDonald*, 46 Pac. 872, 873, 14 Utah, 173 (citing Comp. Laws Utah 1888, § 4452); *State v. Sloan*, 56 Pac. 364, 367, 22 Mont. 293; *State v. Meyer*, 3 Atl. 195, 199, 58 Vt. 457.

Murder is the unlawful killing of a human being with malice aforethought, either express or implied. *People v. O'Callaghan*, 9 Pac. 414, 415, 2 Idaho, 143; *State v. Shuff* (Idaho) 72 Pac. 664, 666; *Taylor v. People*, 42 Pac. 652, 655, 21 Colo. 426; *Murphy v. People*, 13 Pac. 528, 529, 9 Colo. 435; *People v. Foren*, 25 Cal. 361, 366; *People v. Nichol*, 34 Cal. 211, 212; *People v. Haun*, 44 Cal. 96, 98; *People v. Cronin*, 34 Cal. 191, 209; *People v. Jefferson*, 52 Cal. 452, 453; *People v. Murray*, 10 Cal. 309, 310; *McWhirt's Case* (Va.) 3 Grat. 594, 605, 46 Am. Dec. 196; *State v. Neal*, 37 Me. 468, 469; *State v. Conley*, 39 Me. 78, 87; *State v. Foreman* (Del.) 41 Atl. 140, 141, 1 Marv. 517; *Brannigan v. People*, 24 Pac. 767, 769, 3 Utah, 488; *State v. Thompson*, 12 Nev. 140, 144; *State v. Symmes*, 19 S. E. 16, 17, 40 S. C. 383; *State v. Bowers*, 43 S. E. 656, 658, 65 S. C. 207, 95 Am. St. Rep. 795 (citing *State v. Coleman*, 8 S. C. 237); *Territory v. Lucero*, 46 Pac. 18, 20, 8 N. M. 543; *Marion v. State*, 20 N. W. 289, 16 Neb. 349.

Murder is the killing of a human being with malice aforethought. *People v. Enoch*, (N. Y.) 13 Wend. 159, 167, 27 Am. Dec. 197; *Mitchell v. State*, 26 Tenn. (8 Yerg.) 514, 525; *State v. Johnson*, 23 N. C. 354, 362, 35 Am. Dec. 742; *Anderson v. State*, 5 Ark. (5 Pike) 444, 445.

Murder is the unlawful and felonious killing by one man of another with malice aforethought. *State v. Peo* (Del.) 33 Atl. 257, 258, 9 Houst. 488; *State v. Walker* (Del.) 33 Atl. 227, 9 Houst. 464.

Murder is the unlawful killing of a human being, in the peace of the public, with malice aforethought, either express or implied. Gen. Laws Colo. § 813; *Kent v. People*, 9 Pac. 852, 857, 8 Colo. 563; *May v. People*, 6 Pac. 816, 821, 8 Colo. 210; *Adams v. People*, 109 Ill. 444, 450, 50 Am. Rep. 617; *Kirkham v. People*, 48 N. E. 465, 466, 170 Ill. 9; Cr. Code Ill. § 140; *Dillard v. State*, 46 S. W. 533, 535, 65 Ark. 404.

Murder is defined by the law to be the unlawful killing of a human being, then and there in the peace of the United States, with

malice aforethought, either express or implied. *Williams v. United States* (Ind. T.) 69 S. W. 371, 372.

"Murder is the voluntary killing of any person of malice prepense or aforethought, either expressed or implied by law. East, P. C. c. 5, § 2." *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 308, 52 Am. Dec. 711.

Murder is the killing of any reasonable creature with malice. *State v. Reed*, 9 N. C. 454, 455.

Murder is the unlawful intentional killing of a human being with malice aforethought. *Dowdy v. State*, 23 S. E. 827, 96 Ga. 653.

Murder is the unlawful and malicious killing of a human being. *McCabe v. Commonwealth* (Pa.) 8 Atl. 45, 52.

Murder is defined by the Montana statutes as the unlawful killing of a human being with malice, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned. Under this definition it is held that where defendant lawfully abandoned his wife, leaving her exposed to the cold in the nighttime, and expressly refused to provide her with clothing, by reason of which she died, he was guilty of murder. *Territory v. Manton*, 14 Pac. 637, 639, 7 Mont. 162.

Any unlawful killing of one human being by another is murder of some kind. *Sutherland v. State*, 48 N. E. 246, 247, 148 Ind. 695.

The words "murder and kill," in an indictment for an assault with a dangerous weapon, which charges by way of aggravation that the assault was made with the intent to kill and murder, does not invalidate the indictment, as charging two distinct offenses, as the usual form of charging murder has always been to use in conclusion the words "murder and kill." *Commonwealth v. Clarke*, 39 N. E. 280, 162 Mass. 495.

By statute murder is the unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed. *Armstrong v. State*, 11 South. 618, 619, 30 Fla. 170, 17 L. R. A. 484.

Under the Code of Alabama murder is designated as a willful, deliberate, malicious, and premeditated killing; and the form of the indictment is: "A. B. unlawfully and with malice aforethought killed C. D." Thus a charge defining murder as the unlawful killing of one person by another with malice, either express or implied, was disapproved. *Fisher v. State*, 43 Ala. 17, 21.

"Murder is a conclusion drawn by the law from certain facts." *People v. Aro*, 6 Cal. 207, 209, 65 Am. Dec. 503.

At common law murder is a technical term of known and settled meaning, and consists of the stroke and the consequent death. *State v. McCoy* (La.) 8 Rob. 545, 547, 41 Am. Dec. 301.

The killing of a slave with malice aforethought is murder; "he being a reasonable, or, more properly, a human, being." *State v. Reed*, 9 N. C. 454, 455.

Murder is the killing of any human being with malice aforethought, without authority, justification, or extenuation by law, and is of two degrees, the first and second, which shall be found by the jury. *Republic of Hawaii v. Tsunikiichi*, 11 Hawaii, 341, 345.

There is in Iowa but one crime called murder. The so-called degrees of this offense do not constitute distinct crimes, but gradations of the same crime, devised for the purpose of permitting punishment to be varied according to the greater or less enormity characterizing the act. *State v. Phillips*, 92 N. W. 876, 878, 118 Iowa, 660.

Murder, as defined by Pen. Code, § 187, "is the unlawful killing of a human being with malice aforethought." An information merely stating that defendant is accused of a felony, and that at a certain time and place he unlawfully and with malice aforethought killed Lee Wing, contrary to the form, force, and effect of the statute, is insufficient to sustain a conviction for murder, as it neither states that a human being was killed, nor did it use the term "murder," from which the fact might be implied. *People v. Lee Look*, 70 Pac. 660, 137 Cal. 590.

2 Rev. St. p. 657, § 5, declares that the killing of any human being is murder in the following cases: (1) When perpetrated from a premeditated design to effect death; (2) when perpetrated by an act imminently dangerous to others and evincing a depraved mind, regardless of the other's life, although without any premeditated design; (3) when perpetrated without any design to effect death by a person engaged in the commission of a felony. *Fitzgerrold v. People* (N. Y.) 1 Cow. Cr. R. 25, 26.

Under Cr. Code, § 2078, homicide is murder in the following cases: First, when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being; second, when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; third, when perpetrated without any design to effect death by a person engaged in the commission of any felony. *Reeves v. Territory*, 61 Pac. 828, 832, 10 Okl. 194.

The word "murdered" ex vi termini imports death. *Cordell v. State*, 22 Ind. 1, 5;

Lane v. State, 51 N. E. 1056, 1057, 151 Ind. 511.

At common law there was no classification of murder into degrees, but all malicious homicides were of the same grade and subject to the same penalty. Blanton v. State, 24 Pac. 439, 440, 1 Wash. St. 265; People v. Bealoba, 17 Cal. 389, 394.

There are only two kinds of felonious homicide known to the laws of the United States. One is murder, and the other is manslaughter. Under the statutes of the United States there are no degrees of murder, nor do such statutes contain a definition of murder. To define it resort must be had to the common law. By that law murder occurs where a person of sound memory and discretion unlawfully and feloniously kills any human being in the peace of the sovereign, with malice prepense or aforethought, express or implied. United States v. Lewis (U. S.) 111 Fed. 630, 632; United States v. King (U. S.) 34 Fed. 302, 306.

Blow and death in same jurisdiction required.

"Murder" is a technical term of well known and settled meaning, and when used in penal act giving certain United States courts jurisdiction of murder committed on the high seas, it is the same as if the statute had provided that such court should have jurisdiction in a case of felonious killing upon the high seas. Therefore the death, as well as the mortal stroke, must happen on the high seas to constitute a murder there. United States v. McGill, 26 Fed. Cas. 1088, 1090.

In some statutes, ancient and modern, the term "murder" is perhaps used in a general sense, by way of recital or reference only, meaning possibly any malicious homicide; but the term "murder" in its strict and legal sense, and as importing a legal offense, has a more limited meaning apart from special statute. It is said to be necessary, in order to constitute the offense of murder, that the blow and death happen under the same sovereignty, and that the death occur within a year and a day after the felonious act. In Rev. St. U. S. § 1043, providing that no person shall be prosecuted for treason or other capital offense, willful murder excepted, unless the indictment is found within three years next after such treason or capital offense is done or committed, is used in its strictly legal sense, and not a mere popular sense. What is excepted, therefore, is the offense of willful murder committed against the sovereignty of the United States, indictable as willful murder under some statute of the United States, and cognizable as murder by its courts. Where a seaman on an American schooner shot another in the harbor of Havana, who died therefrom in the hotel three days afterwards at Havana, he

was not guilty of willful murder within the meaning of the statute. United States v. Hewecker (U. S.) 79 Fed. 59, 61.

Death within a year and a day required.

Murder is a complex term, denoting several facts, of which the death of the party is one of the most essential. The mortal stroke or the administering of poison does not constitute the crime, unless the sufferer dies thereof within a year and a day. Commonwealth v. Macloon, 101 Mass. 1, 10, 100 Am. Dec. 89.

The facts necessary to constitute the crime of murder are that the wound is inflicted with a felonious intent, that it is mortal, and that death ensues from the effects of the wound within a year and a day after its infliction. People v. Steventon, 9 Cal. 273, 275.

Deliberation and premeditation.

At common law, malice aforethought, to constitute murder, need not be deliberate. Malice existing before the act, so as to be its moving cause or concomitant, was enough. The statutory division of murder into degrees does not materially change its common-law elements. The line of division is, in general, between cases where the malice aforethought is deliberate and those where it is not. Nye v. People, 35 Mich. 16.

While the law requires, in order to constitute murder, that the killing shall be willful, deliberate, and premeditated, still it does not require that the willful intent, deliberation, or premeditation shall exist any length of time before the killing is committed. It is sufficient if there was a design or determination to kill distinctly formed in the mind at any moment before or at the time the act which resulted fatally was committed. Territory v. Evans, 17 Pac. 139, 141, 2 Idaho (Hasb.) 425.

Intent.

In order that there may be a conviction of murder, there must be an intention to kill. Daly v. Stoddard, 66 Ga. 145, 146.

The act of killing, to constitute murder, must be intentional; that is, the party must have intended to commit the deed. There must be premeditation. But there is no point of time in which this premeditation is required to exist. It may be for an hour, a day, or for one moment. There must be evidence that he meditated the act before the act was done. State v. Meyer, 3 Atl. 195, 199, 58 Vt. 457.

It is not the intention to use a deadly weapon, but the intention to kill, of which the use of the weapon is evidence, that constitutes the crime of murder. Palmore v. State, 29 Ark. 248.

To constitute murder, a guilty person need not intend to take life, but to constitute an attempt to murder he must so intend. *State v. Meadows*, 18 W. Va. 658, 675 (citing 1 Bish. Cr. Law, § 730).

A specific intention to kill is not essential at common law to constitute murder, nor is it essential, under our statute, to murder in the second degree. *State v. Decklotts*, 19 Iowa, 447.

To constitute murder, the intent need not be to take the life of the person killed, or even to inflict a personal injury upon him, but it must be equivalent in legal character to a criminal purpose aimed against life; and generally there must be an intent to commit either a specific felony, or at least an act involving all the wickedness of a felony; and, if the intent be directly to produce a bodily injury, it must be such an injury as may be expected to involve serious consequences, either periling life or leading to great bodily harm. *Wellar v. People*, 30 Mich. 16.

Homicide is not murder unless there be an intention to kill, except when the actor is engaged in the perpetration of a felony. *People v. Austin* (N. Y.) 1 Parker, Cr. R. 154, 167.

In order to convict of murder, it is not necessary that the person killed need be specially in the mind of accused while he was forming the purpose to kill and deliberating and premeditating on the killing, but it is sufficient if the person killed is one of a class against which the design and purpose to kill was directed, as where accused had formed a design to kill any one who might come to arrest him. *State v. Miller*, 7 Ohio N. P. 458, 5 Ohio S. & C. P. Dec. 703.

Where the homicide was not committed in the commission of a felony, and the circumstances do not show an evil disposition on the part of accused, there must have been an intent to kill, to render accused guilty of murder. *Fitch v. State*, 37 Tex. Cr. R. 500, 36 S. W. 584.

It requires something more than a bare intent to kill to make a killing murder. In all cases of voluntary manslaughter there is an intent to kill, but it is supposed in such cases that the slayer is incapable of exercising his reasoning faculties on account of the predominance of passion, and it is therefore said that there is no deliberation or malice aforethought. In order that the intent to kill may constitute express malice, it must be formed in a mind free from irresistible passion and capable of reason. If, instead of this, the intent to kill is the result of a mere blind impulse of passion, the killing cannot be murder in the first degree, and will not even be murder in the second degree, unless the passion was caused by an insufficient provocation, or a reasonable cooling

time had elapsed before the killing. *State v. Ah Mook*, 12 Nev. 369, 375.

Malice.

The word "murder," used as a verb, implies, of necessity, the idea of malice aforethought. *State v. Phelps*, 24 La. Ann. 493, 494.

The peculiar characteristic of the crime of murder is malice. This must exist in murder, either in the first or second degree. *State v. Murray*, 5 Pac. 55, 60, 11 Or. 413.

The chief characteristic of "murder," distinguishing it from manslaughter and every other kind of homicide, and therefore indispensably necessary to be proved, is malice prepenne or aforethought. *State v. Miller* (Del.) 32 Atl. 137, 138, 9 Houst. 564; *State v. Jones* (Del.) 47 Atl. 1006, 1007, 2 Pennewill, 573.

To make a homicide murder, malice must exist at the time of the killing. *McMillan v. State*, 35 Ga. 54.

Malice aforethought is the essence of the crime of murder. If there is no malice it would be manslaughter, but if there be malice it would be murder, but not necessarily of the first degree. *State v. Guild*, 10 N. J. Law (5 Halst.) 163, 174, 18 Am. Dec. 404.

Malice is an essential element in the crime of murder either at common law or by statute. It is not necessarily confined to an intention to take the life of the deceased, but it includes an intention to do an unlawful act which may probably result in depriving the party of life. It may be express or implied. *Warren v. State*, 44 Tenn. (4 Cold.) 130, 135.

In order to constitute the crime of murder, it must be committed with malice aforethought. The act must be done with intent to commit murder. The malice which the law requires to exist may be either express or implied; that is, announced by some previous threat or evidence of some ill will that the party had toward the murdered person, or it may be implied from the circumstances under which the killing took place. *State v. Meyer*, 3 Atl. 195, 199, 58 Vt. 457.

The malice necessary to constitute murder may be implied from any unlawful act, such as in itself denotes a wicked heart fatally bent on mischief. The law implies malice from the unlawful act of killing itself, and so lying in wait, previous threats, formed enmity and menaces, and the deliberate use of a deadly weapon are all evidences of express malice, and where they exist together with the killing the crime of murder is constituted. *State v. Foreman* (Del.) 41 Atl. 140, 141, 1 Marv. 517.

To constitute murder, it is not necessary that any animosity should exist towards the

deceased. A corrupt and wicked motive and intention to do evil is sufficient. *McAdams v. State*, 25 Ark. 405, 416.

Every willful and intentional taking of the life of a human being without any justifiable cause is murder, if done with deliberation and not in the heat of passion, and legal malice is always implied in such cases. *People v. Kirby* (N. Y.) 2 Parker Cr. R. 28, 31.

The common-law definition of murder is stated by Sir Michael Foster on page 255 of his *Crown Laws* as follows: "In every charge of murder, the fact of the killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proven by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice until the contrary appears." *State v. Bishop*, 42 S. E. 836, 838, 131 N. C. 733.

Murder is the unlawful killing of a reasonable creature in being, with malice aforethought, either expressed or implied. The malice may be implied from any unlawful act, such as in itself denotes a wicked heart fatally bent on mischief. It may be implied from the unlawful act of killing; and so lying in wait, previous threats, former enmity and menaces, and the deliberate use of a deadly weapon are all evidence of express malice, and where they exist together with the killing the crime of murder is complete. *State v. Foreman* (Del.) 41 Atl. 140, 141, 1 Marv. 517.

Means used.

Murder is the unlawful killing of a human being with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned. *People v. Nichol*, 34 Cal. 211, 212. *Taylor v. People*, 42 Pac. 652, 655, 21 Colo. 426.

A statute of Colorado defines murder to be the unlawful killing of a human being, in the peace of the people, with malice aforethought, either express or implied. The unlawful killing may be perpetrated by poisoning, sticking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome and death thereby occasioned. *May v. People*, 6 Pac. 816, 821, 8 Colo. 210.

The unlawful killing of a human being with malice aforethought is murder, whether death is produced by poison, shooting, stabbing, or any other means. The means used to commit murder is not one of the essential legal elements of that crime, though the means used to cause death, and the manner of their use, may be evidence to show that a crime of murder has been committed. *State v. Noakes*, 40 Atl. 249, 250, 70 Vt. 247.

Unlawful killing required.

A killing, to constitute murder, must be done unlawfully, and unless it be unlawful it cannot have been done with malice aforethought, though it may have been predetermined. *Armstrong v. Commonwealth* (Ky.) 23 S. W. 654, 655.

Advising suicide.

The term "murder" correctly describes the guilt of one who counsels another to commit suicide, where the other by reason of such advice kills himself. *Commonwealth v. Bowen*, 13 Mass. 356, 358, 7 Am. Dec. 154.

Death resulting from assault.

To constitute murder at the common law, when it results from a personal assault upon the deceased not made with an intent to kill, the assault must be of such a character as to necessarily endanger the life of the person assaulted. The assault must be made with such a weapon or instrument as might endanger the life of the party assailed, or, if not made with a dangerous weapon, it must be made in such a manner as to threaten great bodily harm, at least, to the party assaulted. *Pliemling v. State*, 1 N. W. 278, 279, 46 Wis. 516; *Boyle v. State*, 15 N. W. 827, 832, 57 Wis. 472, 46 Am. Rep. 41.

Death resulting from an assault made without the use of a deadly weapon, instrument, means, or force likely to produce great bodily injury is manslaughter, and not murder. *People v. Munn*, 3 Pac. 650, 651, 65 Cal. 211.

Killing in heat of passion.

It is a mistake to suppose that, if one kill another in the heat of passion, such killing cannot be murder. Every man is responsible for the control of his temper, and if for some small provocation he permits himself to get into a fury and kills a human being, it is a murder. There must be provocation such as justifies the excitement of passion. *Smith v. State*, 49 Ga. 482, 485.

It does not necessarily follow that a homicide was not murder because done in a sudden passion. There are many cases where that fact would entitle an accused to neither an acquittal nor to a verdict of manslaughter. *State v. Ashley*, 13 South. 738, 739, 45 La. Ann. 1036.

Killing in perpetration of a felony.

Under Comp. Laws, § 2327, providing that when an involuntary "killing" shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed to be murder, the killing of a human being, although

unintentional, is murder, when perpetrated by a person engaged in the commission of a felony. The defendant was so engaged, as is shown by his own testimony. The words "kill" and "murder" are under these circumstances of like signification and effect, and either could have quite properly been used in an instruction. *State v. Gray*, 8 Pac. 456, 460, 19 Nev. 212.

Killing to prevent trespass.

"You may not kill because you cannot otherwise effect your object, though the object sought to be effected is right. The purpose is indeed rightful, but it is not of such manifest necessity as to justify a resort to such desperate means; so it is clear that if one deliberately kills another to prevent trespass upon his property, whether that trespass could or could not otherwise have been prevented, he is guilty of murder. If, indeed, he had used moderate force, and this had been returned with such violence that his own life was in danger, and then he killed from necessity, it would have been excusable homicide, not because he can take life to save his property, but he might take the life of his assailant to save his own. *Bush v. People*, 16 Pac. 290, 297, 10 Colo. 566 (quoting *State v. Morgan*, 25 N. C. 186, 38 Am. Dec. 714).

Homicide distinguished.

Homicide is the destruction of the life of one human being, either by himself or by the act, procurement, or culpable omission of another. Murder is the killing with criminal intent. *People v. Vanderpool*, 1 Mich. N. P. 264, 269.

Manslaughter distinguished.

Manslaughter differs from murder in this: that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting, and, the act being imputed to the infirmity of human nature, the punishment is proportionately lenient. *Ex parte Tayloe* (N. Y.) 5 Cow. 39, 51; *State v. Wieners*, 66 Mo. 13, 21; *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 307, 52 Am. Dec. 711. See, also, *State v. Harrigan* (Del.) 31 Atl. 1052, 1053, 9 Houst. 369; *State v. Walker* (Del.) 33 Atl. 227, 9 Houst. 464.

At common law the words "murder" and "manslaughter" appear to have been terms used to designate different grades of the same offense, namely, the felonious killing of a human being. All that distinguished one grade from another were the words "malice aforethought." In *re Garvey*, 3 Pac. 903, 906, 7 Colo. 384, 49 Am. Rep. 358.

Felonious homicide at common law is of two kinds, namely, manslaughter and mur-

der, the difference between which consists principally in this: that in murder there is the ingredient of malice, while in manslaughter there is none; for manslaughter, when voluntary, arises from the sudden heat of the passions, but murder from the wickedness and malignity of the heart. *State v. Miller*, 1 Del. Term R. 183, 187.

MURDER IN FIRST DEGREE.

Murder in the first degree occurs when one purposely, of deliberate and premeditated malice, kills another. *State v. Town* (Ohio) *Wright*, 75, 76.

Murder in the first degree is any willful, deliberate, malicious, and premeditated killing of a human being. *Hawes v. State* 7 South. 302, 314, 88 Ala. 37; *Martin v. State* 25 South. 255, 257, 119 Ala. 1.

Murder in the first degree is the willful, deliberate, and premeditated killing of a human being with malice aforethought. *State v. Phillips*, 92 N. W. 876, 878, 118 Iowa, 660.

Murder is defined by the Kansas Criminal Code as follows: "Every murder which shall be committed by means of poison or by lying in wait, or by any other kind of willful, deliberate, or premeditated killing, shall be deemed murder in the first degree." *State v. McGaffin*, 13 Pac. 560, 562, 36 Kan. 315. *State v. Estep*, 24 Pac. 986, 987, 44 Kan. 572.

Rev. St. § 4338, defines murder in the first degree as "the killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or of any human being." *Bernhardt v. State*, 51 N. W. 1009, 82 Wis. 23.

Cr. Code, § 21, declares that "murder perpetrated by any act greatly dangerous to the lives of others, and indicating a depraved mind, regardless of human life, shall be deemed murder of the first degree." *Murphy v. People*, 13 Pac. 528, 529, 9 Colo. 435.

Comp. Laws 1897, § 1063, in defining murder in the first degree, provides that it shall be murder in the first degree where the offense is perpetrated by any kind of willful, deliberate, premeditated killing, or when perpetrated from a deliberate or premeditated design unlawfully and maliciously to effect the death of any human being, or perpetrated by any act greatly dangerous to the lives of others and indicating a depraved mind, regardless of human life. *Teritory v. Guillen* (N. M.) 66 Pac. 527, 529.

By Rev. St. § 5, subd. 2, it is provided that any killing is murder when perpetrated in the course of any act immediately dangerous to others, evincing a depraved mind, regardless of human life, although without premeditated design to effect the death of

any particular individual. *People v. Rector* (N. Y.) 19 Wend. 569, 615.

Murder in the first degree is defined by Code, § 786, as follows: "Every person who shall purposely and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any felony, or by administering poison, kill another, shall be deemed guilty of murder in the first degree." *Blanton v. State*, 24 Pac. 439, 440, 1 Wash. St. 265; *Leonard v. Territory*, 7 Pac. 872, 873, 2 Wash. T. 381.

By statute in Pennsylvania any murder perpetrated by means of poison, or by lying in wait, or any other kind of simple, deliberate, and premeditated killing, or which is committed in the perpetration of or attempt to perpetrate another felony, is murder in the first degree. *McGinnis v. Commonwealth*, 102 Pa. 66, 71.

Murder in the first degree is murder committed by express malice, as by lying in wait, poison, or any other premeditated murder, or in the commission of a felony. *Pennsylvania v. McFall* (Pa.) Add. 255, 256.

Murder in the first degree is every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which may be committed in the perpetration or the attempt to perpetrate any rape, robbery, burglary, or other felony. *Wag. St. p. 445, § 1; State v. Wieners*, 66 Mo. 13, 21.

Under the statute of Idaho the killing of a human being in the commission of an unlawful act, which in its consequence naturally tends to destroy life, or is committed in the prosecution of a felonious intent, is murder in the first degree. *People v. Moon-ey*, 2 Pac. 876, 877, 2 Idaho, 24.

Murder in the first degree is defined as "all murder which shall be perpetrated by means of poison, or lying in wait, torture, or any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, robbery, or burglary." *State v. Wong Fun*, 40 Pac. 95, 96, 22 Nev. 336.

All murder which shall be perpetrated by means of poison, or lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration of or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree. *McCabe v. Commonwealth* (Pa.) 8 Atl. 45, 52; *Commonwealth v. Sayres* (Pa.) 12 Phila. 553, 555; *Titus v. State*, 7 Atl. 621, 623, 49 N. J. Law (20 Vroom) 36; *People v. Foren*, 25 Cal. 361, 366; *People v. Pool*, 27 Cal. 572, 580; *People v. Nichols*, 34 Cal. 211,

213; *Bassett v. State* (Fla.) 33 South. 262, 265.

Murder by poison, lying in wait, imprisonment, starving, or any willful, deliberate, or premeditated killing, or in the commission of or attempt to commit arson, rape, robbery, or burglary, is murder in the first degree. *Wright v. Commonwealth*, 75 Va. 914, 919.

All murder which shall be perpetrated by means of poison, or lying in wait, or by any other kind of willful, deliberate, malicious, and premeditated killing, or which shall be committed in the perpetration of, or in the attempt to perpetrate, arson, rape, robbery, burglary, or larceny, shall be deemed murder in the first degree. *Sand. & H. Dig. Ark. § 1644; Cannon v. State*, 31 S. W. 150, 151, 60 Ark. 564.

All murder which is perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary, is murder in the first degree. *Rev. Laws Utah, c. 22, § 5; Brannigan v. People*, 24 Pac. 767, 769, 3 Utah, 488.

By Pub. St. c. 202, § 1, murder in the first degree is defined as murder committed with deliberately premeditated malice, or in the commission or attempt to commit a crime punishable with death or imprisonment for life, or committed with extreme atrocity or cruelty. *Commonwealth v. Gilbert*, 42 N. E. 336, 338, 165 Mass. 45.

Murder committed with deliberate, premeditated malice aforethought, or in the commission or attempt to commit any crime punishable with death, or committed with extreme atrocity or cruelty, is murder in the first degree. *Republic of Hawaii v. Nenchiro*, 12 Hawaii, 189, 202.

Murder in the first degree is the killing of a human being with express malice aforethought, or in perpetrating or in attempting to perpetrate any crime punishable with death. *State v. Brown* (Del.) 53 Atl. 354, 355; *State v. Reidell* (Del.) 14 Atl. 550, 9 Houst. 470.

Murder in the first degree consists in killing a human being with express malice aforethought, or in perpetrating or attempting to perpetrate any crime punishable with death; that is to say, in general, when it is committed with a sedate and deliberate mind and formed design to take life or do some great or serious bodily injury. *State v. Cole* (Del.) 45 Atl. 391, 393, 2 Pennewill, 344.

At common law there were two crimes of homicide only, murder and manslaughter. Murder was the unlawful killing of a human being with malice aforethought, express or

implied. Manslaughter was the unlawful killing without malice, express or implied. But homicide was sometimes murder by malice imputed by law by the conditions under which it was committed. Pennsylvania, we believe, first undertook the modern policy of statutory definition of the crime of homicide. As early as 1794 that state in substance defined murder in the first degree to be to kill by any willful, deliberate, and premeditated means, or in the commission of certain felonies, and declared all other murder to be murder in the second degree. *Hogan v. State*, 36 Wis. 226, 238.

Murder in the first degree arises when murder is committed from a deliberate and premeditated design to effect the death of a person or the killing of another. This contemplates, as well as others, the crime of killing a person not within the intent of the killer, and slain in error or by mistake. So, if the design is to kill B., and the shot, misdirected, kills C., it is murder in the first degree, if the elements exist which would make it murder in that degree, had B. been killed, in accordance with the original intent. *People v. Conroy*, 2 N. Y. Cr. R. 247, 260. See, also, *Commonwealth v. Klose* (Pa.) 4 Kulp, 111; *State v. Brown*, 7 Or. 186; *State v. Murray*, 5 Pac. 55, 60, 11 Or. 413; *State v. Raymond*, 11 Nev. 98; *State v. McGonigle*, 45 Pac. 20, 23, 14 Wash. 594; *State v. Payton*, 80 Mo. 220, 2 S. W. 394, 396. Contra, see *Bratton v. State*, 29 Tenn. (10 Humph.) 103; *Musick v. State*, 18 S. W. 95, 21 Tex. App. 69.

Deliberation and premeditation.

In order to constitute murder in the first degree, there must have been deliberation and premeditation. *People v. O'Callaghan*, 9 Pac. 414, 415, 2 Idaho, 143; *Anderson v. State*, 41 N. W. 951, 952, 26 Neb. 387; *People v. Cox*, 18 Pac. 332, 334, 76 Cal. 281; *Anthony v. State* 10 Tenn. (Meigs) 265, 33 Am. Dec. 143.

To constitute murder in the first degree, the killing must be premeditated, except, at least, when done in the perpetration of certain felonies. There must be manifest an express malice, proved by circumstances independent of the killing, as a deliberate intention to take away the life of a fellow creature; and, unless the express malice is affirmatively proved, one cannot be convicted of murder in the first degree, though his commission of the homicide is proved, and there is no evidence that it is manslaughter, or that the killing is justifiable or excusable, but in such a case the verdict should be guilty of murder in the second degree. *People v. Knapp*, 11 Pac. 793, 795, 71 Cal. 1.

To constitute murder in the first degree, there must be deliberation, as well as premeditation; and if the killing is not the in-

stant effect of impulse, but if there is hesitation or doubt to be overcome, and choice made as the result of thought, however short the struggle, it is murder in the first degree. *Leighton v. People*, 88 N. Y. 117, 120, 121.

In order to constitute murder in the first degree there need be no apprehensible space of time between the intention to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer. If such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, nor how quickly they may be followed by the act of killing. *People v. Hunt*, 59 Cal. 430, 435. See, also, *People v. Bealoba*, 17 Cal. 389; *People v. Sanchez*, 24 Cal. 17, 30; *People v. Nichol*, 34 Cal. 211; *People v. Majone*, 91 N. Y. 211, 212, 213; *State v. Wallace* (Del.) 47 Atl. 621, 2 Pennewill, 402; *Morgan v. Territory* (Ariz.) 64 Pac. 421, 422; *Ware v. State*, 27 S. W. 485, 487, 59 Ark. 379.

To authorize the inference of premeditation and deliberation, essential to constitute murder in the first degree, the lapse of any special period of time is not required; but the inference is justified from proof of the commission of an act which naturally produces death under circumstances showing that the perpetrator was not disturbed by sudden and uncontrollable emotion, excited by an unexpected and observable cause, and where he was at the time in the possession of his usual faculties. *People v. Conroy*, 97 N. Y. 62, 79.

The use of a deadly weapon only raises a presumption of malice, and not of premeditation and design. *North Carolina v. Gosnell* (U. S.) 74 Fed. 734, 736.

Where a killing is perpetrated by means of poison, lying in wait, or torture, the means used is held to be conclusive evidence of premeditation. Where the killing is done in the perpetration or attempted perpetration of another felony, the occasion is made conclusive evidence of premeditation. *People v. Sanchez*, 24 Cal. 17, 28.

It is a more accurate expression of the law, and less liable to mislead, to describe murder in the first degree as an act done after deliberation, than with deliberation. If the resolution to kill be formed deliberately and with premeditation, it cannot reduce the grade of the defense that at the time of the killing defendant was in a passion or laboring under excitement. *Casat v. State*, 40 Ark. 511, 512.

Intent.

In order to constitute the killing of a human being murder in the first degree,

there must be a specific intent to take life formed in the mind of the slayer before the act of killing was done. *Green v. State*, 10 S. W. 266, 267, 51 Ark. 189; *State v. Turner* (Ohio) Wright, 20, 30; *State v. Kale*, 32 S. E. 892, 895, 124 N. C. 816.

To constitute murder in the first degree, the killing must be done willfully; that is, of purpose, with intent that the act by which the life of a party is taken should have that effect. *Anthony v. State*, 19 Tenn. (Meigs) 265, 269, 33 Am. Dec. 143.

To constitute murder in the first degree the intent of the party killing must have been to take life. This is the definition commonly given by the statutes, whereas by the common law, if the mortal blow is malicious and death come, the perpetrator is guilty of murder, whether such intent does or does not appear to have existed in his mind. *Territory v. Halliday*, 17 Pac. 118, 120, 5 Utah, 467.

A design to commit murder may be shown from the circumstances attending the act, such as the deliberate selection and use of a deadly weapon, a preconcerted hostile meeting, privily lying in wait, a previous quarrel or grudge, antecedent menaces or threats, or in the preparation of means to effect such design or intent. *State v. Cole*, (Del.) 45 Atl. 391, 393, 2 Pennewill, 344; *State v. Faino* (Del.) 41 Atl. 134, 135, 1 Marv. 492; *People v. Bealoba*, 17 Cal. 389, 394.

If a person owns to a specific intent to unlawfully kill another, such killing is deliberate, premeditated, and malicious, and is murder in the first degree, within a statute providing that murder by poison, lying in wait, and premeditated and malicious killing, or committed in the perpetration of certain crimes, shall be murder in the first degree. This was also murder at common law, and in this respect the common law is not changed by a statute which simply carves out of the common-law offense a lesser crime, that of murder in the second degree, which includes that class of murders under the common law wherein the specific intent previously formed to take life unlawfully is wanting. *People v. Davis*, 32 Pac. 670, 671, 8 Utah, 412.

Comp. Laws. § 2323, provides that a murder which shall be perpetrated by means of poison, lying in wait, torture, or any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, etc., shall be deemed murder in the first degree. In construing a similar statute, the Supreme Court of New Hampshire said: "The Legislature did not intend that this species of killing should be murder in the first degree only when accompanied by deliberate, premeditated design to kill; for, if

such a design had been the necessary ingredient in constituting murder in the first degree, the latter part of section 1 would not have been added. If killing in the perpetration of a robbery were murder in the first degree only when accompanied with such a design, it was already included under the words 'other deliberate and premeditated killing,' and nothing further need have been said about it." *State v. Gray*, 8 Pac. 456, 460, 19 Nev. 212 (citing *State v. Pike*, 49 N. H. 399, 403, 6 Am. Rep. 533).

Malice.

The pre-existence of express malice is necessary to constitute murder of the first degree, and, when the crime has been committed with implied malice only, it is murder of the second degree. *State v. Harrigan* (Del.) 31 Atl. 1052, 9 Houst. 369.

When the killing is shown to be without extenuating circumstances, malice is presumed, and when malice is thus shown, if the evidence clearly discloses deliberation or premeditation in the act of killing, or the existence of an intention to kill while giving the fatal blow, such a killing is murder in the first, and not in the second, degree. *People v. Hamblin*, 8 Pac. 687, 689, 68 Cal. 101.

To constitute murder of the first degree, the act must be done with malice aforethought, and such malice must be actual, and not constructive. But where the act is committed deliberately with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed; for the law infers that the probable effect of any act deliberately done was intended by its actor, and intent for an instant before the blow is sufficient to constitute malice. *State v. Tatro*, 50 Vt. 483, 493.

Murder in second degree distinguished.

Murder that is willful, deliberate, and premeditated murder, is murder in the first degree. If it is not willful, deliberate, and premeditated, it is murder in the second degree. *State v. Donovan*, 10 Nev. 36, 38.

In dividing murder into two degrees, the California Legislature intended to assign to the first degree all murders of a cruel and aggravating character, and to the second all other kinds of murder which are murder at common law; and the test by which it is determined whether a murder is of the first or second degree is whether or not the killing was willful, deliberate, and premeditated. If it was such, it is murder in the first degree; and if not, it is within the second degree. *People v. Sanchez*, 24 Cal. 17, 29.

Murder in the first degree is the killing of a human being willfully, deliberately, pre-

meditatedly, and with malice aforethought, while murder in the second degree has all the elements of murder in the first degree excepting that of deliberation. *State v. Harper*, 51 S. W. 80, 90, 149 Mo. 514.

The Criminal Code of this commonwealth has divided the offenses of murder into two grades. Where the killing is done with a malicious, willful, deliberate, and premeditated intention to take human life, or where committed in the perpetration or attempted perpetration of arson, rape, burglary, or robbery, it is murder in the first degree. If the killing, however, although malicious, is not done by reason of an intention, willfully, deliberately, and premeditatedly formed, to destroy life, and not in the perpetration or attempted perpetration of the felonies above named, it is murder in the second degree. This happens when death is the result of the violence of another, where there is no intent to take human life, but only a malicious intent to do great bodily harm. *Commonwealth v. Salyards*, 27 Atl. 993, 995, 158 Pa. 501.

To constitute murder in the first degree, since the passage of Acts 1893, p. 76, c. 85, the same elements are requisite as those constituting the crime of murder in the second degree, with the additional and essential one of premeditation and deliberation. *State v. Cole*, 44 S. E. 391, 393, 132 N. C. 1069.

MURDER IN SECOND DEGREE.

Murder in the second degree is defined as all kinds of murder known at common law, other than murder in the first degree. *State v. Wong Fun*, 40 Pac. 95, 96, 22 Nev. 336; *State v. Lindsey*, 5 Pac. 822, 19 Nev. 47, 3 Am. St. Rep. 776; *State v. Thompson*, 12 Nev. 140, 144; *Brannigan v. People*, 24 Pac. 767, 769, 3 Utah, 488; *Cannon v. State*, 31 S. W. 150, 151, 60 Ark. 564; *Titus v. State*, 7 Atl. 621, 623, 49 N. J. Law (20 Vroom) 36; *Taylor v. People*, 42 Pac. 652, 655, 21 Colo. 426; *People v. Foren*, 25 Cal. 361, 366; *People v. Sanchez*, 24 Cal. 17, 29; *People v. Pool*, 27 Cal. 572, 580; *People v. Nichol*, 34 Cal. 211, 213; *McCabe v. Commonwealth (Pa.)* 8 Atl. 45, 52; *Republic of Hawaii v. Nenchiro*, 12 Hawaii, 189, 202.

Murder in the second degree is every murder committed purposely and maliciously, but without deliberation and premeditation. *State v. Estep*, 24 Pac. 986, 987, 44 Kan. 572; *Blanton v. State*, 24 Pac. 439, 440, 1 Wash. 265; *Hawes v. State*, 7 South. 302, 304, 88 Ala. 37; *State v. Town (Ohio)* Wright, 75, 76; *Marion v. State*, 16 Neb. 349, 20 N. W. 289.

Murder in the second degree is defined by statute as a killing committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation. *People v. Martin*, 53 N. Y.

Supp. 745, 33 App. Div. 282; *People v. Kelly*, 3 N. Y. Cr. R. 35, 43; *State v. Brown*, 41 Minn. 319, 323, 43 N. W. 69; *Bonfanti v. State*, 2 Minn. 123, 129 (Gil. 99, 105).

Murder in the second degree is the unlawful killing with malice, but without a deliberate, premeditated, or preconceived design to kill. *People v. Long*, 39 Cal. 694, 696.

Murder in the second degree is the killing of a human being willfully, premeditatedly, and with malice aforethought, but without deliberation. *State v. Fitzgerald*, 32 S. W. 1113, 1115, 130 Mo. 407.

If a murder is not willful, deliberate, and premeditated, it is murder in the second degree. *State v. Donovan*, 10 Nev. 36, 38.

A definition of murder in the second degree as the unlawful killing of a reasonable being with malice aforethought, either express or implied, is held not erroneous. *Fields v. State*, 52 Ala. 348, 352.

Murder in the second degree is defined by Pen. Code, § 3, as follows: "Every person who shall purposely and maliciously, but without deliberation, kill another, shall be deemed guilty of murder in the second degree." *State v. Rutten*, 43 Pac. 30, 32, 13 Wash. 203.

If a homicide is committed with malice, express or implied, but is not prompted by premeditation, then it will be murder in the second degree. *North Carolina v. Gosnell (U. S.)* 74 Fed. 734, 736.

Murder in the second degree consists in the killing of a human being without authority of law, when perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, though without any premeditated design to effect the death of any particular individual. *Territory v. Nichols*, 2 Pac. 78, 83, 3 N. M. (3 Gild.) 103; *Golding v. State*, 8 South. 311, 26 Fla. 530.

Murder in the second degree is the unlawful killing of a human being without malice aforethought, either express or implied, when the killing is not done deliberately and with some degree of coolness, or in any one of the ways specified as murder in the first degree. *Territory v. Scott*, 17 Pac. 627, 630, 7 Mont. 407.

Murder in the second degree occurs where there is no such deliberately formed design to take life, or to perpetrate or attempt to perpetrate a crime punishable with death, which is required in order to constitute first degree of murder, but where, nevertheless, the killing was without justification or excuse, without any provocation, or without sufficient provocation to rebut malice and reduce the homicide to manslaughter.

State v. Cole (Del.) 45 Atl. 391, 393, 2 Pennewill, 344; State v. Faino (Del.) 41 Atl. 134, 135, 1 Marv. 492.

Where death ensues from an act committed under circumstances showing no considerable provocation to have existed, or an abandoned and malignant heart, or that the defendant did not intend the fatal blow to produce death, yet intended the blow, it is murder in the second degree. *People v. Biggins* (Cal.) 3 Pac. 853, 856.

Murder in the second degree is defined by the statute as when the killing is perpetrated by any act imminently dangerous to another, evincing a depraved mind, regardless of human life, though without premeditated design. *Bassett v. State* (Fla.) 33 South. 262, 265.

Murder in the second degree is where a man kills another, without any, or without any considerable, provocation, when the killing is done, or the mortal wound is inflicted, with a deadly weapon, or arises from any unlawful act of violence from which the law raises the presumption of malice. *State v. Brown* (Del.) 36 Atl. 458, 464, 2 Marv. 380. *State v. Warren* (Del.) 41 Atl. 190, 1 Marv. 487; *State v. Wallace* (Del.) 47 Atl. 621, 2 Pennewill, 402.

A killing under the influence of passion, or upon provocation before the passion had time to subside, would be murder in the second degree, or manslaughter if the provocation was a sufficient one. *Anthony v. State*, 19 Tenn. (Meigs) 265, 269, 33 Am. Dec. 143.

Murder in the second degree, under our statute, occurs where there is no deliberate mind and formed design to take life, or to perpetrate or attempt to perpetrate a crime punishable with death, but where the killing was without justification or excuse. *State v. Brown* (Del.) 53 Atl. 354, 355.

Murder in the second degree is defined to be "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." *State v. Cole*, 44 S. E. 391, 393, 132 N. C. 1069 (citing Bl. Comm. p. 195).

Intent.

All murder not of the first degree is necessarily of the second degree, and includes all unlawful killing under circumstances of depravity of heart and a disposition of mind regardless of social duty, but where no intention to kill exists or can be reasonably inferred. Therefore, in all cases of murder, if no intention to kill can be inferred or collected from the circumstances, the verdict must be "murder in the second degree." *Commonwealth v. Drum*, 58 Pa. 9, 17.

Murder in the second degree occurs where there is not actual intention to kill the party slain, and yet the act that did it was a deliberate, cruel one, or performed while the accused was committing or attempting to commit a felony in law. In these cases the homicide is a malicious one, for it shows that depravity of the heart which is maliciousness; but, in the absence of evidence of preconceived design to take the life destroyed, it is not by law murder in the first degree, but is murder in the second degree. *State v. Talley* (Del.) 33 Atl. 181, 9 Houst. 417.

Although the law presumes murder in the second degree from the simple act of killing, one cannot be convicted of that offense without proof that the killing was intentional. *State v. Gassert*, 65 Mo. 352, reversing 4 Mo. App. 44.

If a common design is not to take life, but to do great bodily harm, and death results, the offense is murder in the second degree. *Commonwealth v. Neills* (Pa.) 2 Brewst. 553.

Where defendant maliciously assaulted deceased without intending to kill, but intending only to inflict bodily injuries, but did kill the deceased, the crime was murder in the second degree. *Commonwealth v. Klose* (Pa.) 4 Kulp, 111.

Malice.

In murder in the second degree malice is implied from the unprovoked wickedness of the act itself. *State v. Warren* (Del.) 41 Atl. 190, 1 Marv. 487.

Malice must exist in murder, either in the first or second degree. *State v. Murray*, 5 Pac. 55, 60, 11 Or. 413.

Murder in the first degree distinguished.

See "Murder in First Degree."

MURDER IN THIRD DEGREE.

Murder in the third degree is defined to be "when perpetrated without any design to effect death by a person engaged in the commission of any felony." *Bonfanti v. State*, 2 Minn. 123, 129 (Gil. 99, 104).

Murder in the third degree, under the Wisconsin statutes, is the killing of a human being, without a design to effect death, by a person engaged in the commission of any felony. *State v. Hammond*, 35 Wis. 315, 318; *Pliemling v. State*, 46 Wis. 516, 520, 1 N. W. 278; *Terrill v. State*, 42 N. W. 243, 74 Wis. 278. In order to make such homicide murder in the third degree, the felony committed or attempted, from which the implied malice necessary to murder must be derived, must at least have some intimate

and close relation to the killing, and must not be separate, distinct, and independent from it. It is not enough that the killing occurred soon or presently after the felony attempted or committed. There must be such a legal relation between the two that it can be said that the killing occurred by reason and as a part of the felony. *Hoffman v. State*, 59 N. W. 588, 592, 88 Wis. 166.

Murder in the third degree occurs when the killing is perpetrated without any design to effect death, by a person engaged in the commission of a felony other than certain named felonies. *Bassett v. State* (Fla.) 83 South. 262, 265.

The killing of a human being, without design to effect death, in heat of passion, but in a cruel and unusual manner, unless it be committed under such circumstances as to constitute justifiable or excusable homicide, shall be deemed murder in the third degree. *Comp. Laws N. M. § 699; Territory v. Baker*, 13 Pac. 30, 43, 4 N. M. (Gild.) 236; *Territory v. Fewel*, 17 Pac. 569, 570, 4 N. M. (Johns.) 318.

Every killing of a human being by act, procurement, or culpable negligence of another, which under the provisions of this act is not murder in the first or second degree, and which is not excusable or justifiable homicide as now defined by law, shall be deemed murder in the third degree. *Sandoval v. Territory*, 8 N. M. 573 580. 45 Pac. 1125, 1127

The difference between murder in the third and fourth degrees is that in the third degree the killing although, as in the fourth, without a design to effect the death of the person killed, is not murder in such degree, unless the killing is done in a cruel and unusual manner, while in the fourth degree murder is committed without a design to effect death, with a dangerous weapon. It has no reference whatever to the manner of killing, except it must be done by a dangerous or deadly weapon, and without legal justification or excuse. *Territory v. Pride-more*, 13 Pac. 96, 97, 4 N. M. (Gild.) 275.

MURDER IN FOURTH DEGREE.

The killing of another in the heat of passion, without a design to effect death, by a dangerous weapon, in any case except wherein the killing of another is declared to be justifiable or excusable, shall be deemed murder in the fourth degree. *Comp. Laws N. M. § 700; Territory v. Baker*, 13 Pac. 30, 43, 4 N. M. (Gild.) 236.

MURDER IN FIFTH DEGREE.

"Every other killing of a human being, in any other manner, by the act, procurement, or culpable negligence of another, where such killing is not justifiable or excusable, or is not already defined to be

murder in the third or fourth degree, shall be deemed murder in the fifth degree." *Comp. Laws N. M. § 702; Territory v. Baker*, 13 Pac. 30, 43, 4 N. M. (Gild.) 236.

MUSEUM.

As charity, see "Charity."

"Museum," as used in Act Jan., 1827, § 6, providing that every person who shall exhibit or cause to be exhibited for hire or emolument any museum shall first obtain a license authorizing the same, in the correct and proper meaning of the term, may be composed of living animals, whether they be large or small, or a mixture of both. The word "museum" is a comprehensive term, and may embrace within it a menagerie, as well as many other things. By tracing the Greek word from which "museum" is derived to its root, it is found to signify "amusement" or "to amuse," and thus the term "museum" would appear to express, not only collections of curiosity for the entertainment of the sight, but also such as would interest, amuse, and instruct the mind. *Bostick v. Purdy* (Ala.) 5 Stew. & P. 105. 108.

MUSIC.

The term "music" may be used as designating a kind of merchandise, and in this sense "music" is included in the meaning of the terms "goods, wares, and merchandise," which are forbidden by Act 1852-53, § 30, to be sold without a license, except, etc., and an indictment charging the sale of music without a license is sufficient, without alleging a sense in which the word "music" is used, as the sense is obvious from the connection. *Commonwealth v. Nax* (Va.) 18 Grat. 789, 791.

MUSICIAN.

See "Itinerant Musician."

MUSSEL BED.

A mussel bed, over which the water flows at every tide, cannot properly be called an island; but it constitutes what are called flats, and belongs to the owner of the adjoining land, if within 100 rods of high-water mark, and so connected with the shore that no water flows between that and the shore when the tide is out. *King v. Young*, 76 Me. 78, 79, 49 Am. Rep. 596.

MUST.

May construed as must, see "May."

Where the holder of a bill represented to the drawer that payment had been denied,

and the drawer said that "it must be paid," the word amounted in point of law to a promise that it should be paid, and did away with the necessity of considering the question of want of notice. *Rogers v. Stephens*, 2 Term R. 713, 719.

As used in an instruction in a personal injury case that the plaintiff did not assume the risk incident to the method under which the defendant, his master, conducted its business, unless he "must necessarily have known" of such method by the exercise of ordinary care, is not synonymous with "could have known," or "must have known." *Galveston, H. & S. A. R. Co. v. English (Tex.)* 59 S. W. 626, 628.

As discretionary.

"Must" or "shall," in a statute, is not always imperative, but may be consistent with an exercise of discretion. In *re O'Hara*, 82 N. Y. Supp. 293, 296, 40 Misc. Rep. 355 (citing *In re Thurber's Estate*, 162 N. Y. 244, 252, 56 N. E. 631, 638, 639).

"Must," as used in statutes, has been frequently construed not to be mandatory. *Brinkley v. Brinkley*, 56 N. Y. 192; *Jenkins v. Putnam*, 106 N. Y. 272, 275, 12 N. E. 613; *Spears v. City of New York*, 72 N. Y. 442; *People v. McAdam (N. Y.)* 28 Hun, 284; *People v. Ulster County Sup'rs*, 34 N. Y. 268; *Dutchess County Mut. Ins. Co. v. Van Wageningen*, 132 N. Y. 398, 30 N. E. 971. As used in Code Civ. Proc. § 641, providing that a warrant of attachment must briefly recite the grounds, it is not so far mandatory that the court cannot correct an inadvertent error in using "or" for "and," in stating the grounds which actually existed. *Stone v. Pratt*, 35 N. Y. Supp. 519, 520, 90 Hun, 39.

"Must," as used in Code Civ. Proc. § 2730, providing that on the settlement of the account of an executor or administrator the surrogate must allow to him for his services, etc., should be construed to mean "may," and hence the surrogate is vested with a discretion to refuse commissions to an executor who has been negligent in the management of the estate. In *re Rutledge*, 56 N. E. 511, 162 N. Y. 31, 47 L. R. A. 721.

The word "must," in Code Civ. Proc. § 2238, providing that the judge or justice to whom petitions for mandamus are presented must issue a precept therefor, cannot be construed as requiring the justice to withdraw his time and attention from all other necessary business of the court for that purpose. If such justice "had been the only officer to whom such an application could be regularly made, a very different construction would arise in the case." *People v. McAdam (N. Y.)* 28 Hun, 284.

The use of the word "must," in Code Civ. Proc. § 873, providing that the judge

must grant an order for the examination of an adverse party before trial upon the filing of proper affidavits, cannot be construed as taking away all jurisdiction to refuse to make the order from the court, and therefore he may so refuse if it appears that the testimony of the adverse party is not in fact necessary and material. *Jenkins v. Putnam*, 12 N. E. 613, 614, 106 N. Y. 272.

As used in Code Civ. Proc. § 812, providing that, on the return of an order to show cause on petition of a surety to be relieved from further liability on a fidelity bond for the acts or omissions of the principal occurring after the order relieving such surety, etc., the court or judge must make a decree or order relieving the surety on the bond, etc., "must" is not mandatory, but means "may," being addressed to the court's discretion. In *re Thurber's Estate*, 56 N. E. 631, 633, 162 N. Y. 244.

Code Civ. Proc. § 1678, provides that in foreclosure proceedings, if the property consists of two or more distinct buildings, etc., they must be sold separately, except where two or more buildings are situated on the same lot, and access to one is obtained through the other, when they may be sold together. Held, that the word "must" is directory merely, and a foreclosure sale of two buildings is not invalid because they have been sold together. *Wallace v. Feely (N. Y.)* 61 How. Prac. 225, 226.

"Must," as used in Rev. St. c. 70, § 41, providing that an action must be tried in the county in which the parties, or one of them, reside at the commencement of the action, is not mandatory. *Merrill v. Shaw*, 5 Minn. 148, 150 (Gil. 113, 115).

As mandatory.

"The word 'must' is mandatory. It means 'obliged,' 'required,' and imposes a physical or moral necessity. The word 'may,' when used in a statute which imposes an imperative duty, is construed to mean 'must'; but the word 'must' has never been construed to mean 'may.' It is peremptory. It excludes all discretion, and imposes on the court an absolute duty to perform the requirement of the statute in which it is employed." Code Cr. Proc. § 313, providing that an indictment must be set aside by the court in which the defendant is arraigned for certain specified acts, imposes upon the court an absolute duty to dismiss the indictment. *People v. Thomas*, 66 N. Y. Supp. 191, 193, 32 Misc. Rep. 170.

In an instruction, in an action against a street railroad company for the death of a child, that if plaintiff had made out his case by a preponderance of the evidence as laid in the declaration, the jury must find for him, "must" should be construed in its mandatory sense; it being the duty of the

jury to find in his favor under such circumstances. *West Chicago St. R. Co. v. Scanlan*, 48 N. E. 149, 168 Ill. 34.

"Must," as used in Code Civ. Proc. § 2393, relating to foreclosure by advertisement, declaring that, if the property consists of two or more distinct forms, tracts, or lots, they must be sold separately, is construed so as to make this section mandatory, and not merely directory. *Hemmer v. Hus-tace*, 3 N. Y. Supp. 850, 851, 51 Hun, 457.

"Must," as used in Code Civ. Proc. § 452, providing that the court must, on application, direct the bringing in of any party interested in the subject of the action, does not render the statute mandatory, and deprive the court of all discretion in applying it. *Uhlfelder v. Tamsen*, 41 N. Y. Supp. 438, 441, 18 Misc. Rep. 173.

"Must," as used in the Code provision that every action must be prosecuted in the name of the real party in interest, is not permissive, but mandatory. *Eaton v. Alger* (N. Y.) 57 Barb. 179, 190.

"Must," as used in Code Civ. Proc. § 110, providing that, on trial by a court of an issue of fact or law, its decision in writing must be filed within a certain time, and, if not so filed, the court must make an order for a new trial, is used in its mandatory sense. *Hodecker v. Hodecker*, 56 N. Y. Supp. 954, 957, 39 App. Div. 353.

As used in Rev. St. § 5031, providing that every other action must be brought in the county in which a defendant resides or may be summoned, except actions against an executor, administrator, guardian, or trustee, which may be brought in the county where-in he was appointed or resides, "must" should be construed in its entirety to have been used in its ordinary imperative sense. *Osborn v. Lidy*, 37 N. E. 434, 51 Ohio St. 90.

MUSTERED INTO SERVICE.

As used in Act April 18, 1861, providing that no civil process shall be issued or be enforced against "any person mustered into the service of the United States" during the term for which he shall be engaged in such service, nor until 30 days after his discharge therefrom, means persons accepted and enrolled and organized for service in the United States army under the order of the Governor of the state. The word "mustered" is used as equivalent for the accepting and enrolling of all troops for the purposes of the war, or for the organizing of them into companies and regiments. To muster is to call together a military force. It is inseparably connected with the idea of a gathering and inspection of troops, and to muster into service is to accept or approve those collected. Hence a paymaster of vol-

unteers, appointed by the President, is not mustered into service, so as to exempt him from service of process within the meaning of the statute; for he is neither approved nor accepted as a component part of any military force. *Mechanics' Sav. Bank v. Sallade* (Pa.) 1 Woodw. Dec. 23, 24.

Revised Army Regulations 1861, § 1670, providing that no volunteer will be mustered into service who is unable to speak the English language, implies that the persons mustered are not already in service. Although the word "muster" by itself may doubtless be applied to a troop of soldiers already enrolled, armed, and trained, the addition of the preposition above mentioned removes all ambiguity. *Tyler v. Pomeroy*, 90 Mass. (8 Allen) 490, 498.

MUSTIZO.

A "mustizo" is an issue of a negro and an Indian. *Miller v. Dawson* (S. C.) Dud. 174, 176.

MUTILATE.

"Mutilate" means something less than total destruction. Mere mutilation of a will could not of itself take from the will all legal force. A mutilation, however, which takes from the instrument an element essential to its validity, would have the effect to revoke it. "To mutilate," in the sense in which it is generally used by law writers and judges, means to render imperfect. It is held that the striking out of the signature of the testator is such a mutilation of the will as will destroy its effect. *Woodfill v. Patton*, 76 Ind. 575, 583, 40 Am. Rep. 269.

The term "mutilate," as applied to a person, means "to cut off a limb or an essential part of the body," and in criminal law means "to deprive a man of the use of those limbs which may be useful to him in fight." *State v. Cody*, 23 Pac. 891, 896, 18 Or. 506 (citing *Webst. Dict.*); *Bouv. Law Dict.*

St. 1881, c. 169, § 1, making it a misdemeanor to overdrive, overload, torture, torment, cruelly beat, or needlessly mutilate any living creature, includes the tearing out of the tongue of an animal without necessity therefor, or unnecessarily causing it to be done. *Hodge v. State*, 79 Tenn. (11 Lea) 528, 530, 47 Am. Rep. 307.

MUTINY.

At sea, revolt or mutiny consists in attempts to usurp the command of the vessel from the master, or to deprive him of it for any purpose by violence, or in resisting him in the free and lawful exercise of his author-

ity; the overthrowing of the legal authority of the master, with an intent to remove him against his will, and the like. *Thompson v. The Stacey Clarke* (U. S.) 54 Fed. 533, 534.

In common parlance there is little or no difference between "mutiny" and "insurrection." *McCargo v. New Orleans Ins. Co.* (La.) 10 Rob. 202, 313, 43 Am. Dec. 180.

MUTUAL

"The adjective 'mutual' is defined as reciprocally acting or related, reciprocally receiving, reciprocally giving and receiving, reciprocally interchanged; as mutual love, assistance, advantage, aversions." *Sharon v. Sharon*, 16 Pac. 345, 359, 75 Cal. 1 (citing *Webst. Dict.*).

"Mutual" means and requires reciprocity of action, correlation, and interdependence, and finds its best illustration in the relation existing between parents and children, which is always mutual. In *re Stilwell's Estate*, 34 N. Y. Supp. 1123; In *re Birdsall's Estate*, 49 N. Y. Supp. 450, 455, 22 Misc. Rep. 180 (citing In *re Butler*, 58 Hun, 400, 403, 12 N. Y. Supp. 201, 203).

The word "mutual" in itself denotes a common interest. *Robison v. Wolf*, 62 N. E. 74, 77, 27 Ind. App. 683.

The adjective "mutual," in an instruction that where there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained by a party receiving injuries under such circumstances, means reciprocal, done by each other, and expresses the idea of negligence of either or both. Such an instruction is not erroneous. *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa, 31, 39.

MUTUAL ACCOUNTS.

"Mutual accounts" are accounts where each party makes charges against the other in his books for property sold, services rendered, or money advanced. *Edmonstone v. Thomson* (N. Y.) 15 Wend. 554, 556; *Ross v. Ross* (N. Y.) 6 Hun, 80, 81 (citing *Tucker v. Ives* [N. Y.] 6 Cow. 193; *Kimball v. Brown* [N. Y.] 7 Wend. 322; *Chamberlin v. Cuyler* [N. Y.] 9 Wend. 126, 127; *Catling v. Skoulding*, 6 Term R. 189; *Sickles v. Mather* [N. Y.] 20 Wend. 72, 32 Am. Dec. 521); *Dyer v. Walker*, 51 Me. 104, 107; *Lockwood v. Hansen*, 17 Pac. 575, 576, 18 Or. 102.

An account is mutual when each party has an account against the other. *Taylor v. Parker*, 17 Minn. 469 (Gil. 447).

"Mutual accounts" means mutual and reciprocal dealings between the parties. *Aperson v. Mutual Ben. Life Ins. Co.*, 38 N. J. Law (9 Vroom) 272, 273.

Mutual accounts are those having original charges by persons against each other; accounts kept between merchants. *Purvis v. Kroner*, 23 Pac. 260, 261, 18 Or. 414.

In a mutual account each party makes charges against the other, and it consists of mutual dealings and reciprocal demands between the parties. *Ross v. Ross* (N. Y.) 6 Hun, 80, 81.

Mutual accounts are accounts consisting of debits and credits on each side, and if a part of the account be not barred by the statute of limitations none is. *Wilson v. Calvert*, 18 Ala. 274, 275.

Mutual accounts are made up of matters of set-off. There must be a mutual credit founded on a subsisting debt on the other side, or an express or implied agreement for set-off of mutual debts. *Norton v. Larco*, 30 Cal. 126, 130, 89 Am. Dec. 70.

A mutual account is one based on a course of dealing wherein each party has given credit to the other on the faith of indebtedness to him. *Gunn v. Gunn*, 74 Ga. 555, 58 Am. Rep. 447. It is essential, to bring a case within the doctrine of mutual accounts, that there must appear, not only the fact that there was indebtedness on both sides, but that the circumstances were such that each relied on the indebtedness of the other as a basis of credit. *Wagener v. Steele*, 43 S. E. 403, 117 Ga. 145.

An account covering a period of nearly 15 years, presented against the estate of a person deceased, in which the only evidence of any account or claim the deceased ever had against the claimant is a small credit for wood made later than the date of any item charged against the deceased, and two unexplained credits of cash made more than six years before the death of the deceased, is not such a mutual and open account current as excepts the account from the operation of the statute of limitations. In *re Hiscock's Estate*, 79 Mich. 537, 44 N. W. 947.

In a mutual account each has a demand or right of action against the other, as, for example, when, A. and B. dealing together, A. sells B. an article of furniture or any other commodity and afterwards B. sells A. property of the same or a different description. This constitutes a reciprocal demand, because A. and B. have a demand or right of action against each other. But this is not so when the sale is only by one to the other. Whether it is to be paid for in cash or in coin, the manner of payment can make no difference. *Lowber v. Smith*, 7 Pa. (7 Barr) 381.

Mutual accounts, such as will save those items thereof which are barred by the statute of limitations from their operation thereof, must be accounts upon which each par-

ty has the right to bring an action for accounting. Where the account is all on one side, and the demand on the other is founded on an open bond, record, or the like, this does not constitute mutual accounts, within the statute. *Mattern v. McDivitt*, 6 Atl. 83, 85, 113 Pa. 402.

An account made up on one side of sundry small charges extending over a period of three years, with two items of credit, one being for cash for a specific item constituting one of the charges, and the other for an article of merchandise, delivered by the debtor in the ordinary course of business, constitutes an open and mutual account between the parties. *Penniman v. Rotch*, 44 Mass. (3 Metc.) 216, 223.

A shopkeeper's account, containing charges of articles sold to the defendants, some of them within six years before action brought, and also containing credits given more than six years before action brought, is not a "current or mutual account," so that the charges within the six years should draw the previous charges out of the statute of limitations. *Gold v. Whitcomb*, 31 Mass. (14 Pick.) 188.

Items on both sides required

Where the items in the account are all charged against the one party and in favor of the other, it is not a mutual account. It lacks the very element essential to make it such; that is, mutuality. *Fitzpatrick v. Phelan's Estate*, 16 N. W. 606, 608, 58 Wis. 250; *Hodge v. Manley*, 25 Vt. 210, 213, 60 Am. Dec. 253; *Hay v. Kramer* (Pa.) 2 Watts & S. 137, 139; *Hallock v. Lowsee*, 3 N. Y. Super. Ct. (1 Sandf.) 220, 221; *Todd v. Todd*, 15 Ala. 743, 745.

To constitute a "mutual account," within the statute of limitations, there must be reciprocal demands; and, where the demand is only on one side, it is not a mutual account. *Ingram v. Sherard* (Pa.) 17 Serg. & R. 347.

An account made up of various items, consisting only of demands by one against another in the common way of business, is not a mutual agreement running between the two persons. *Turnbull v. Strohecker* (S. O.) 4 McCord, 210, 211.

A mutual account is an account in which there must have been reciprocal demands between the parties; and hence an account on which the items of the account are all on one side, like an account for services, cannot be a mutual account. *Fraylor v. Sonora Min. Co.*, 17 Cal. 594, 596.

Payments alone insufficient.

An account showing on one side items for goods sold and delivered at different dates, and payments by the purchaser on the 5 Wds. & P.—46

other side, is not a mutual account. *Cousins v. St. Paul, M. & M. Ry. Co.*, 45 N. W. 429, 43 Minn. 219; *Prenatt v. Runyon*, 12 Ind. 174, 176; *Gunn v. Gunn*, 74 Ga. 553, 566, 58 Am. Rep. 447; *Adams v. Patterson*, 35 Cal. 122, 124; *Weatherwax v. Cosumnes Valley Mill Co.*, 17 Cal. 344, 351.

A charge on one side and mere payments on the other do not constitute a mutual account. *Peck v. New York & Liverpool United States Mail S. S. Co.*, 18 N. Y. Super. Ct. (5 Bosw.) 226, 236.

"Mutual account" means something more than charges on one side and credits of payments on the other. Such accounts are made up of matters of set-off. There must be a mutual credit founded upon a subsisting debt on the other side, or an express or implied agreement for a set-off of mutual debts. *Miller v. Cinnamon*, 168 Ill. 447, 457, 48 N. E. 45.

A "mutual open and current account" is one consisting of demands upon which each party, respectively, might maintain an action. Where payments on account are made by one party, for which credit is given by the other, it is an account without reciprocity, and only upon one side. At least, it cannot be said to be a mutual account consisting of reciprocal demands. *Warren v. Sweeney*, 4 Nev. 101.

MUTUAL AID.

The term "mutual aid," in the title of Act Oct. 10, 1868, entitled "An act to establish a mutual aid association" to raise funds for a certain purpose, implies an association or enterprise entered upon by more persons than one for reciprocal support, aid, or assistance between the associates. To predicate mutual aid of a partnership or joint adventure in any of the ordinary avocations formed or conducted on joint account and for common profit is certainly a strained construction of language. *Boyd v. State*, 53 Ala. 601, 606.

MUTUAL AID ASSOCIATION.

As benevolent association, see "Benevolent Association."

MUTUAL ASSENT.

Mutual assent is a meeting of the minds of both parties, and such an assent is vital to the existence of a contract. *Mutual Life Ins. Co. of New York v. Youngs' Adm'r*, 90 U. S. (23 Wall.) 85, 107, 23 L. Ed. 152.

MUTUAL ASSUMPTION OF MARITAL RIGHTS.

Civ. Code, § 55, providing that consent alone will not constitute marriage, but it

must be followed by a solemnization or by a "mutual assumption of marital rights, duties, or obligations," cannot be construed to mean that the relation of the parties must be made public; but, evidence of consent being given, proof of cohabitation is sufficient to show a mutual assumption of marital rights and duties. It imports the acts and conduct of the two parties toward each other, and rights and duties belonging to the marriage relation, which cannot possibly be embraced in the word "copulate," or the word "consummation," or even, perhaps, the word "cohabitation." *Sharon v. Sharon*, 16 Pac. 345, 348, 75 Cal. 1.

MUTUAL BENEFIT ASSOCIATION.

As public charity, see "Public Charity."

MUTUAL CONDITIONS.

Where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other. *Huggins v. Daley* (U. S.) 99 Fed. 606, 609, 40 C. C. A. 12, 48 L. R. A. 320.

MUTUAL COMBAT.

A mutual combat is one in which both parties enter willingly. *Aldrige v. State*, 59 Miss. 250, 255.

"Mutual combat" is the mutual intent to fight, and does not necessarily imply mutual blows. If the intent exists, and but one blow be struck, a mutual combat exists, though the first blow kills or disables one of the parties. *Tate v. State*, 46 Ga. 148, 158.

MUTUAL CONSENT.

"Mutual consent," as used in St. 1855, p. 275, providing that the charge to the jury may be given orally by the mutual consent of the parties, should be construed to include an express waiver of a written charge; for the right to a written charge cannot be waived without the assent of each of the parties entitled to the privilege. *People v. Kearney*, 43 Cal. 383, 384.

Consent is not mutual, unless the parties all agree upon the same thing in the same sense. But in certain cases, defined by the article on interpretation, they are to be deemed so to agree without regard to the fact. Rev. Codes N. D. 1899, § 3856; Civ. Code S. D. 1903, § 1209.

MUTUAL CONTRACTS.

A contract, to be mutual, must be binding upon both parties, and be capable of specific performance by either party against the other or for damages for failure to per-

form the contract. *Jordan v. Indianapolis Water Co. (Ind.)* 61 N. E. 12, 15.

MUTUAL COVENANTS.

A mutual covenant is one where either party may recover damages from the other for the injury he may have received from a breach of the covenants in his favor. *Balley v. White*, 3 Ala. 330, 331.

MUTUAL CREDITS.

Mutual credit is a knowledge on both sides of an existing debt due to one party and credited by the other, founded on a trusting to such debt as a means of discharging it. *Klinney v. Tabor*, 29 N. W. 86, 90, 62 Mich. 517; *King v. King*, 9 N. J. Eq. (1 Stockt.) 44, 48; *Burton v. Willen*, 33 Atl. 675, 680, 6 Del. Ch. 403; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580, 589; *Duncan v. Lyon* (N. Y.) 3 Johns. Ch. 351, 359, 8 Am. Dec. 513; *Scott v. Armstrong*, 13 Sup. Ct. 148, 150, 146 U. S. 499, 36 L. Ed. 1059 (citing *Blount v. Windley*, 95 U. S. 173, 177, 24 L. Ed. 424).

The term "mutual credits," as used in the bankruptcy law of 1867, requires a connection between the claims. *Gray v. Rollo*, 85 U. S. (18 Wall.) 629, 631, 21 L. Ed. 927; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580, 589.

The term "mutual credits" imports not only mutual debts, but also all credits and transactions ex contractu, where the credit or contract must ultimately terminate in a debt, though the debt had not been liquidated and become due and payable at the time of bankruptcy, and extends the right of set-off to any such debt or claim which a creditor of the bankrupt would have the right to prove and receive a general dividend for under the commission. *Osgood v. De Groot*, 36 N. Y. 348, 353.

J., being desirous of making a shipment for his own advantage, but not in his own name, represented to the merchants through whom the shipment was to be made that the goods were the property of A., and shipped on his account, and A., at J.'s instance, wrote to the merchants corroborating J.'s statement and directing them to insure, and to advance money to J. on the goods, which was done. It was held that this was a credit given to A. by J. by the delivery of goods. In its nature likely to terminate in a debt, and that therefore, J. having subsequently become bankrupt, A. was entitled to recover the proceeds of the shipment from the merchants, and to set off against them a debt due from the bankrupt to him; it being a case of "mutual credit" within St. 5 Geo. II, c. 30, § 28. *Easum v. Cato*, 5 Barn. & Ald. 861.

A purchaser of two parcels of goods deposited with the seller a bill of exchange exceeding the price of the first parcel, under an agreement by which the seller was to collect the bill, pay for such first parcel, and remit the balance to the buyer. Held, that after the buyer's bankruptcy the seller might set off the balance due the buyer against the price of the second parcel of goods; the two items constituting mutual credits. *Atkinson v. Elliott*, 7 Term R. 378, 380.

Where a seller delivered goods to the buyer, under an agreement that the buyer was to pay for the same at two months in cash, or by an acceptance at 70 days, if required, and thereafter the seller became a bankrupt, the price of the goods and a debt due from the seller to the buyer previous to the bankruptcy were "mutual credits." *Groom v. West*, 8 Adol. & E. 758.

When a known debt is due from a bankrupt, and the goods have been deposited with the creditor, not as a pledge for sale under such circumstances of dealing between the parties that the conversion into money is in the ordinary course of business or natural result of the transaction, such goods constitute a mutual credit given by the bankrupt to the other. *Goodrich v. Dobson* (U. S.) 30 Fed. Cas. 1081, 1085.

Mutual debts distinguished.

The term "mutual credits," in the bankrupt acts, to the effect that in all cases of mutual credits the account shall be stated and one debt set off against the other, is more comprehensive than the term "mutual debts," the term "credits" being synonymous with trust; and the trust or credit need not be of money, but if one party intrust the other with goods it will be a case of mutual credit. *Catlin v. Foster* (U. S.) 5 Fed. Cas. 303, 305.

The term "mutual credits" imports something more than that of "mutual debts." *In re Voetter* (U. S.) 4 Fed. 632, 634.

There is a wide difference between mutual debts and mutual credits; the latter embracing many cases not included in the former. Where a bank at the time of its failure was indebted to defendant in a sum then due, and defendant owed the bank another sum upon a note not then due, but which became due in a few days, there was a case of mutual credits, so that defendant was entitled to have a sufficient sum of the amount standing to his credit applied to the satisfaction of the note owing by him. *Jones v. Robinson* (N. Y.) 26 Barb. 310, 312.

The term "mutual credits" is peculiar to the bankrupt laws of England and the United States. It has a more extensive meaning than the term "mutual debts," as used in the statutes relating to set-off, and has received a liberal construction for the benefit of trade.

Where there is a debt on one side, and on the other a delivery of property, with directions to turn it into money, the property thus delivered constitutes a credit, and the case becomes one of mutual credit within the bankrupt laws. *Goodrich v. Dobson*, 43 Conn. 576, 577.

MUTUAL DEALINGS.

In discussing the term "mutual dealings," as used with reference to the law of set-off, the court says that the precise legal definition of the words does not seem to have been settled. *Receivers of People's Bank v. Patterson Gaslight Co.*, 23 N. J. Law (3 Zab.) 283, 304.

MUTUAL DEBTS.

"Mutual debts," which may be set off against each other, are those due to and from the same persons in the same capacity. *Murray v. Toland* (N. Y.) 3 Johns. Ch. 569, 574.

The term "mutual debts," in a statute of set-off, are not merely those which are owing, but those which are due and payable, on each of which the cause of action has accrued and exists at the same time. A debt not yet due and payable may not be set off against one presently suable. *Patterson v. Patterson*, 59 N. Y. 574, 579, 17 Am. Rep. 384.

Where an executor sues for rent for the occupation of premises of the testator, after the death of testator, under a lease given by the testator in his lifetime, a note given by testator to defendant is not a mutual debt, entitled to set off; the note not being in any sense a debt due from the testator, but merely from the whole corpus of the estate. *Nichols v. Dayton*, 34 Conn. 65, 66.

The word "mutual," as applied to debts which may be the subject of set-off, necessarily imports that there must be reciprocal obligations between the parties. Under this principle it is held that, in a suit by partners upon a partnership claim, a debt due the defendant from one of the partners individually is not a mutual debt, so as to entitle defendant to claim a set-off therefor. *Meeker v. Thompson*, 43 Conn. 77, 80.

A claim against a town, growing out of pauper laws, cannot be set off in an action of debt on a bond given to the town in a criminal cause. Such a debt is not a "mutual debt," within the meaning of the statute, because a criminal prosecution, though instituted by an officer elected by the town, is in the name of the state. The state acts through, and by means of, the town. *Town of Wallingford v. Hall*, 45 Conn. 350, 353.

In the statutes of set-off, the words "indebted to each other" and "dealing together" are considered as expressions of the same import as the words "mutual debts," in St. 2

Geo. II, c. 22, § 13. The general rule of the subject of set-off is that the demand of the plaintiff, as well as that of the defendant, must be specific and certain. There must be mutuality—that is, on each side a debt—to authorize a set off. There must exist in both plaintiff and defendant, at the time of the institution of the suit, a simultaneous right of action. *Pate v. Gray* (U. S.) 18 Fed. Cas. 1291, 1292.

Mutual credits distinguished.

See "Mutual Credits."

MUTUAL INSURANCE.

Every contract whereby a benefit may accrue to a party or parties therein named upon the death or physical disability of the person insured thereunder, or for the payment of any sums of money, dependent in any degree upon the collection of assessments or dues from persons holding similar contracts, shall be deemed a contract of mutual insurance upon the assessment plan. Such contracts must show that the liabilities of the insured thereunder are not limited to fixed premiums. *Comp. Laws Nev.* 1900, § 942.

MUTUAL INSURANCE COMPANY.

As benevolent association, see "Benevolent Association."

A mutual insurance company is one in which the members contribute either cash or assessable premium notes, or both, as the plan of transacting business may provide, to a common fund out of which each is entitled to indemnity in case of loss. *Union Ins. Co. v. Hoge*, 62 U. S. (21 How.) 35-64, 16 L. Ed. 61; *Spruance v. Farmers' & Merchants' Ins. Co.*, 10 Pac. 285, 287, 9 Colo. 73.

A mutual insurance company is simply a company whose funds for the payment of losses consists not of capital subscribed or furnished by outside parties, but of premiums mutually contributed by the parties insured. *Mygatt v. New York Protection Ins. Co.*, 21 N. Y. 52, 65; *Muller v. State Life Ins. Co.*, 60 N. E. 958, 960, 27 Ind. App. 45.

A mutual life insurance company is one in which the life of every member is insured by reason of his membership and compliance with the requirements of its constitution and by-laws, which establish a benefit fund by means of payments made by parties joining the order before being received into membership, and assessments levied upon them upon death of a member, should the fund at the time be insufficient to pay the death benefit, from which, on the satisfactory evidence of the death of a beneficial member of the order who has complied with all its lawful requirements, a sum is paid, not exceeding a certain amount, to the family, orphans, or dependents

as the member directs; thus insuring the life of each member immediately upon his entering the order, and making him one of the insurers of the lives of his fellow members to the amount required to be paid by him under the provisions of the by-laws. *Splawn v. Chew*, 60 Tex. 532, 535.

"Mutual companies," within the meaning of Act May 1, 1876, providing that insurance companies incorporated thereunder must be organized on the joint-stock or mutual plan, and that one company cannot insure on both plans, means companies in which the insured becomes a member of the incorporation by virtue of his policy, who is entitled to a share of its profits and is responsible for the loss to the extent of his premium paid or agreed to be paid. *Given v. Rettew*, 29 Atl. 703, 704, 162 Pa. 638.

MUTUAL MISTAKE.

The words "mutual mistake," in the rule that equity will reform contracts for mutual mistake, mean a mistake shared by both parties. *Green v. Stone*, 34 Atl. 1099, 1102, 54 N. J. Eq. 387, 55 Am. St. Rep. 577; *Bishop v. Clay Fire & Marine Ins. Co.*, 49 Conn. 167, 171.

A "mutual mistake," which furnishes a ground of relief in equity, is where both parties were in error regarding some material fact, and this error was an inducement, or one of the inducements, for the making of the contract. *German Sav. Bank v. Geneser*, 89 N. W. 201, 203, 116 Iowa, 119.

The phrase "mutual mistake," as used in equity, means a mistake common to all the parties to a written contract or instrument, and it usually relates to a mistake concerning the contents or the legal effect of the contract or instrument. *Page v. Higgins*, 22 N. E. 63, 64, 150 Mass. 27, 5 L. R. A. 152.

A mutual mistake, sufficient to authorize the reformation of an instrument, means a mistake reciprocal and common to both parties, in which each labored under the same misconception in respect to the terms of the written instrument. *Botsford v. McLean* (N. Y.) 45 Barb. 478, 481; *Wilson v. Wilson*, 45 Pac. 1009, 1010, 23 Nev. 267; *Hill v. Pettit* (Ky.) 66 S. W. 188, 190.

The doctrine of "mutual mistake" necessarily involves the proposition that one man may confide in the honor and integrity of another, and act upon his representations, without putting every act and word to the test of careful scrutiny. Mr. Pomeroy, in his work on Equity Jurisprudence (volume 2, § 856), expresses the doctrine in this language: "As a second requisite it has sometimes been said in very general terms that a mistake resulting from the complaining party's own negligence will never be relieved. This prop-

osition is not sustained by the authorities. It will be more accurate to say that where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of legal duty, a court of equity will not interpose its relief; but, even with this more guarded mode of statement, each instance of negligence must depend to a great extent upon its own circumstances." This text is well sustained by authority. *San Antonio Nat. Bank v. McLane*, 70 S. W. 201, 203, 96 Tex. 48.

MUTUAL POOLS.

"Mutual pools" is a method of gambling on horse races which is conducted as follows: A list of the horses in a certain race is placed on a blackboard in the plain view of the bidders, and to each horse, on the left of their names, is attached a number, and to the right of their names is left an open space to show the number of times the horse has been chosen. A person wishing to invest money on a certain horse purchases of the person having charge of the pool a card or receipt, commonly called a ticket, stating at the time the horse upon which he wishes to purchase the card or ticket, which ticket has on its face a number which corresponds with the number attached to the name on the blackboard. When the purchase has been made, the pool indicates the whole number of cards, receipts, or tickets sold or taken upon the said blackboard, placed in open view, and this is correctly marked from time to time as each ticket or card is purchased or taken. When the pool is closed, the total amount invested on the different horses is added together, and the total, less the commission of 5 per cent. to the person conducting the pool, is divided into equal sums and paid to the persons having selected, taken, or purchased cards or tickets on the winning horse. *James v. State*, 63 Md. 242, 248.

MUTUAL WILL.

The term "mutual will" is used to designate wills made by two or more persons, in which they make mutual testamentary provisions in favor of each other, whether they unite in one will or each executes a separate one. Their validity does not seem to be doubted after the death of the respective testators; but the extent of the power of revocation in the survivor after the death of one or more of the testators is a question still in controversy, and upon which different conclusions have been reached. In *re Cawley's Estate*, 20 Atl. 567, 568, 136 Pa. 628, 10 L. R. A. 93.

A will strictly mutual is in legal effect nothing but the individual will of that one of the testators who may die first. *State Bank v. Bliss*, 35 Atl. 255, 257, 67 Conn. 317.

MUTUALITY OF CONTRACT.

Mutuality of contract means that an obligation must rest upon each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound. *Laclede Const. Co. v. Tudor Iron Works*, 69 S. W. 384, 388, 169 Mo. 137.

"Mutuality," as used in the rule that a contract will not be specifically enforced in equity in the absence of mutuality, means that both parties must have by the agreement a right to compel a specific performance according to the advantage which it might be supposed they were to derive from it. *Spear v. Orendorf*, 28 Md. 37, 39.

The term "mutual," in a contract, is often used in the books in connection with "consideration." It is difficult, however, to find any distinction in their import. It would be difficult to find any case where a consideration exists in which there is no mutuality, or a case of mutual legal obligation without a consideration. The terms, when applied to this subject, are synonymous; the mutuality sometimes arising from a consideration, as in the case of the consideration executed, and the consideration sometimes consisting of mutual obligation, as in case of a contract on both sides executory. *Bryant v. Gale*, 5 Vt. 416, 420.

"Mutuality of a contract" means an obligation on each to do or permit to be done something in consideration of the act or promise of the other. It does not imply that every stipulation is absolute and unqualified. *Canton Co. v. Baltimore & O. R. Co.*, 29 Atl. 821, 822, 79 Md. 424; *Spear v. Orendorf*, 28 Md. 37, 48.

A contract for the employment of a ball player for the season, giving a contract for three succeeding seasons, and also empowering him to terminate the contract at any time on ten days' notice, was not subject to objection for want of mutuality. *Philadelphia Ball Club v. Lajole*, 51 Atl. 973, 974, 202 Pa. 210.

MUTUALLY.

Mutually acknowledged relation of parent and child, see "Acknowledgment—Acknowledgment."

Where a demand note was made payable when the payor and payee mutually agree, the expression "mutually agree" could not be construed as putting it into the power of the maker to entirely avoid payment; but the instrument is properly construed as meaning that it is payable when and after the maker ought reasonably to have agreed. *Page v. Cook*, 164 Mass. 116, 41 N. E. 115, 28 L. R. A. 759, 49 Am. St. Rep. 449.

A return reciting that appraisers were "mutually chosen and agreed on" by the parties showed a compliance with the statutory requirement that each party should select one appraiser, and that they should agree on the third; for, if a party agrees on an appraiser, he chooses him, so that each party interested or choosing one appraiser chooses two, and they agree on the third. *Aldis v. Burdick*, 8 Vt. 21, 24.

The term "mutually indebted," as used in St. 1880, providing that, if two or more persons be mutually indebted to each other by judgment, etc., one judgment may be set off against the other, is synonymous with "dealing together," as used in St. 1884, authorizing a set-off if two or more persons dealing together be indebted to each other upon bill, bond, etc. *Pate v. Gray* (U. S.) 18 Fed. Cas. 1291, 1292.

MUTUUM.

A "mutuum," in the civil law, is a loan for consumption; goods of like kind to be returned. *Downer v. Beech*, 6 Hill, 297, 299.

"Mutuum" is a contract whereby property passes to the mutuary or receiver, and is delivered to him for his own use or consumption, and where he is not bound to return the identical thing, or property of the same kind and value. *Rahilly v. Wilson* (U. S.) 20 Fed. Cas. 179, 181.

If money be lent without interest, or reward, or hire, it might be a bailment called a "mutuum"; but in that kind of a bailment the title and property of the thing lent passes to the borrower. *Adams v. Colonial & United States Mortg. Co.*, 34 South. 482, 525, 82 Miss. 263.

In the civil law the term "mutuum" designates a loan of property for consumption, which is to be returned in kind, without interest or compensation for the use. An "irregular deposit" differed from a "mutuum" in this: that the latter has principally in view the benefit of the receiver: the former, the benefit of the bailor. In case of mutuum the party borrowing was not held to pay interest, but in cases of irregular deposit interest was due by the depositary, both *ex nudo pacto* and *ex mora*; but this distinction between the two classes of deposit, as to interest, is not recognized by the common law, the depositary being liable in each case for interest in the event of breach of duty. *Payne v. Gardiner*, 29 N. Y. 146, 167.

MY.

Bequest or devise rendered specific.

The word "my," when used in a bequest of "my stock," is sufficient to render the bequest specific, and to show that testator in-

tended to devise the specific property, and not a quantity or species of the thing bequeathed. *Norris v. Thomson's Ex'rs*, 16 N. J. Eq. (1 C. E. Green) 218, 222.

The word "my," used with a bequest of a certain variety of bonds, is held to indicate an intention on the part of the testator to make a specific bequest. *Kunkel v. Macgill*, 56 Md. 120, 123.

In holding that the word "the" in a legacy of 10 shares of the stock of a certain railroad company did not make the legacy specific, the court say that, if the word "my" was used instead of the word "the," the legacy would be specific, and that the same principle applies, upon equally strong grounds, when a testator, after giving legacies of stock generally, gives the rest of the stock "standing in my name." *Harvard Unitarian Soc. v. Tufts*, 23 N. E. 1006, 1007, 151 Mass. 76, 7 L. R. A. 390.

The word "my," preceding the words "government securities, stock, or annuities," has been several times held sufficient to render a legacy thereof specific (*Sibley v. Sperry*, 7 Ves. 530), although a bequest of a sum of money or a sum in government securities must be taken as a legacy of quantity, and therefore a general legacy. In *re Hadden*, 1 Con. Sur. 306, 309, 9 N. Y. Supp. 453.

The words "my land," when used in a will, were held sufficient to carry the land which the testator then in fact owned; and the fact that he attempted to specifically describe the land, and failed, did not render the general description nugatory. *Black v. Richards*, 95 Ind. 184.

The words "my real estate," or "my land," or the like, can in no proper sense be considered as constituting a general description of the land for the purpose of a valid devise. *Eckford v. Eckford* (Iowa) 53 N. W. 345, 349.

The use of the word "my" in a will in which testator made certain specific devises, and then directed that I hereby devise and bequeath to A. all the rest and residue of "my" estate, real, personal, and mixed, etc., was construed not to make the devise specific. *England v. Vestry of Prince George's Parish*, 53 Md. 466, 470.

The words "my stocks and bonds," as used in a will in which the testator, who owned bonds and stocks in various corporations, bequeathed a certain amount of "my stocks and bonds" at their par value, not describing them particularly, are construed to create a general legacy. In *re Hadden*, 9 N. Y. Supp. 453, 454, 1 Con. Sur. 306.

Estate of inheritance created.

A devise of "my whole remainder" is sufficient to create an estate of inheritance.

White v. White, 52 Conn. 518, 521; **Mulvane v. Rude**, 45 N. E. 659, 660, 146 Ind. 476.

A devise of "my plantation" is sufficient to pass the fee to the beneficiary, though no words of perpetuities or inheritance are used. **Peyton v. Smith** (S. C.) 4 McCord, 476, 478, 17 Am. Dec. 758.

The use of the term "my sawmill," in a clause in a deed reserving to the grantor privileges heretofore enjoyed with regard to raising water for the "benefit of my sawmill where it now stands, or others, if erected in the same place," cannot be construed as limiting the reservation to the life of the grantor. **Burr v. Mills** (N. Y.) 21 Wend. 290, 294.

Life estate only conveyed.

Where a bequest in a will was of "my chambers at Albany, for which I gave 600 guineas," and it appeared that the testator had bought the fee simple to these chambers, of which he had died seised, for 600 guineas, and he had no other chambers in Albany, the phrase, nevertheless, could not be construed as granting all that interest for which the testator gave such sum, and the devisee took only a life estate. **Sewell v. Parratt**, 3 Barn. & Adol. 469.

Present ownership indicated.

"My," as used in a will devising my farm, signifies present ownership, and is not to be construed as denoting ownership at the time of testator's death. **Garrison v. Garrison**, 29 N. J. Law (5 Dutch.) 153, 157.

Construed as her.

"My," as used in a will as follows: "If my said daughter shall, at her decease, leave issue, then from and after her decease I give, devise, and bequeath the whole of said real and personal property to her children in equal proportions, share and share alike, if all her children then be living; or, in case any of them shall have died leaving issue at the time of 'my' death, then such issue to take the share or part of such property of the estate which the parent of such issue would have taken by this will, if living at the time of 'my' death"—is to be construed as "her" according to the evident intention of the testator, as expressed on the face of the will. **Horton v. Cantwell**, 15 N. E. 546, 554, 108 N. Y. 255.

Construed as the.

"My estate," as used in a will, may be used to show that the testator meant "the estate," not strictly his, but over which he had some power of disposition; but it must depend on the context. It cannot be laid down as a general rule of interpretation that "my" in a will is equivalent to "the." **Cook v. Cunliffe**, 17 Q. B. 245, 254.

My books.

The term "my books," in a will in which testator, who was the leading member of a firm and who kept no private books, directed that advancements evidenced by entries in my books of accounts be deducted from certain bequests, was construed to mean "firm books." **Lawrence v. Lindsay**, 68 N. Y. 108-110.

My children.

The words "her children," "our children," and "my children," used by a testator in making devises or bequests to his wife and his children, mean substantially the same, and constitute no ground for any distinction, or a different construction of the gift than the usual acceptance of the term "children." **Vaughan v. Vaughan's Ex'x**, 33 S. E. 603, 605, 97 Va. 322.

"My children," as used in a bequest, means all the children of the testator, legitimate and legitimated, whether by his present or a former wife, but does not include the children of his wife by a former husband. **Carroll v. Carroll**, 20 Tex. 731, 745.

My estate.

All my estate, see "All."

General words in a deed, as "my property," or "my estate," or "all the property I possess," do not pass or purport to pass anything which was not held by the grantor as his own property. They do not apply to the property of others in the occupancy of the grantor. **Jones v. Sasser**, 18 N. C. 452, 463.

The use of words, "my estate and property of every description," in a will, after devising certain legacies, will be understood to include all the property which the testatrix could dispose of by will, whether by reason of ownership, or by reason of authority from the owner; and this will carry a remainder expectant upon her life estate, which she has the power to dispose of. **Emery v. Haven**, 67 N. H. 503, 35 Atl. 940.

A will providing that the "foregoing bequests to my wife are made upon condition that she shall renounce all claims against my estate, except under this will," only includes that which the husband owned and could dispose of, and not the wife's share of the community property. In *re Mumford's Estate* (Cal.) 1 Myr. Prob. 133, 134.

The language "my estate," or "all my estate whatever," used in a will devising such property, does not necessarily import an intent in the testator to give more than his own interest, and therefore an intent to exclude the dower is not logically inferable from the fact that the gift is to the wife equally with other persons; but if an intention to give an immediate interest in the entire corpus of the land can be perceived, the intended equality

would be destroyed by letting in the dower. In re Durfee, 14 R. I. 47, 52 (citing Jarm. Wills).

A will giving the executor full control of "my estate," to manage for the best advantage for the benefit of testator's creditors, should be construed to include the entire community estate of the testator and his deceased wife; his creditors having the right to look to the whole of it for the satisfaction of their demands. *Carlton v. Goebler*, 58 S. W. 829, 830, 94 Tex. 93.

Testator gave his estate, both real and personal, to his wife for life, with the privilege of using the principal of the personal estate for her support. The will also provided: "But before her death I desire her to provide by will or otherwise for a distribution of whatever of my estate may remain in her hands among her and my children." Held, that the fee to the land vested in testator's heirs at his death, and the wife had no power to devise the land to one of the children; the words "my estate" not being sufficient to prevail against the other provisions of the will, in connection with the settled rules of law. *Crew v. Dixon*, 129 Ind. 85, 91, 27 N. E. 728.

The words "my estate," as used in a clause of a will providing that the debts of testator's mother should be paid out of "my estate," were insufficient to charge the debts of the mother on the real estate. *Lediger v. Canfield*, 79 N. Y. Supp. 758, 760, 78 App. Div. 596.

My farm.

All my farm, see "All."

My forty.

See "Forty."

My heirs.

All my heirs, see "All."

My interest.

All my interest, see "All."

My land.

All my landed estate, see "All."

A will in which the testator devised to his wife "all my land and mansion house," and provided that, "if she should marry, I wish her to have all the above-mentioned property that is devised to her, except the land," includes all the testator's land, both that on which the mansion house stood and other land which he owned in the neighborhood, but which was unimproved. *Mitchell v. Walker*, 56 Ky. (16 B. Mon.) 61, 73.

My other land.

A will, after giving a life estate in 240 acres of land to testator's wife and legacies

to the children of his two deceased sons, provided: "I further will in regard to my other lands that, if the heirs cannot agree on a satisfactory division of them, that they divide them to their own notion; and, if not, they can sell the lands and divide the proceeds equally amongst my children that are now living." Held, that the words "my other lands" should be construed to include the remainder in the land already devised to the widow for life. *Watson v. Watson*, 19 S. W. 543, 544, 110 Mo. 164.

My property.

All my property, see "All."

A devise of "all my property of any nature or kind whatsoever, which deeds, papers, and movables will show," can by no intendment nor construction be taken to indicate an intention in the testator to devise the land which belonged to his wife. *Mitchell v. Mitchell*, 23 N. C. 257, 258.

A will providing, "My property, after my debts are paid, I leave and bequeath to my beloved wife," construed to include all of testator's property. *Pearson v. Housel* (N. Y.) 17 Johns. 281, 283.

My right or title.

All my right or, see "All."

My whole estate.

A will bequeathed to testator's daughter "the interest of the equal undivided one-sixth interest, part, or portion of my whole estate." Held, that the expression "my whole estate," without any other words in the will modifying its meaning, signified the property belonging to the testator which shall be left for distribution after the payment of decedent's debts and expenses of administration. *Smith v. Terry*, 12 Atl. 204, 205, 43 N. J. Eq. (16 Stew.) 659.

My wife.

Where testator, having a lawful wife, R., whom he had deserted in Italy 40 years before his death, was married to M., and lived with her for 35 years, down to his death, holding her out to the world as his wife, and referred to her daughter in his will as his stepdaughter, and the will gave certain property to "my wife," etc., the words "my wife" will be construed to mean M., and not R., the lawful wife, though the will also states that the provisions within are made to "my wife" in lieu of her lawful rights. *Pastene v. Bonini*, 44 N. E. 246, 247, 166 Mass. 85.

MYSELF.

Where a note signed by two makers is made payable "to the order of myself," the word "myself" is equally applicable to either

of the makers, and parol evidence is admissible to show which of the makers was intended to be described by the use of such word. *Jenkins v. Bass*, 11 S. W. 293, 294, 88 Ky. 397, 21 Am. St. Rep. 344.

MYOPIA.

The term "myopia" is used to designate shortness of sight. *Harrell v. Norvill*, 50 N. C. 29, 31.

MYSTERY.

In the rule requiring an indictment to state a defendant's mystery, the term "mystery" means his trade, art, or occupation, such as mercer, tailor, painter, clerk, school-

master, husbandman, laborer, or the like. *State v. Bishop*, 15 Me. (3 Shep.) 122, 124.

Household service in a city, town, or village may perhaps be said to be a sort of "trade or mystery," which may require apprenticeship; for it will require time and attention to make an expert waiter, and one so instructed will receive wages ten times above that of an untaught servant. *Commonwealth v. Vanlear* (Pa.) 1 Serg. & R. 248, 252.

A covenant to teach an apprentice the "art and mystery of the tanning business" means that the covenantor is to make the apprentice as good a workman in the trade as those generally are who have regularly learned it. *Barger v. Caldwell*, 32 Ky. (2 Dana) 129, 131.

N

N.

The letter "N." in conveyances, maps, charts, and other instruments, is commonly used as an abbreviation for the word "north." *Burr v. Broadway Ins. Co.*, 16 N. Y. 267, 271.

N. P.

The entry "N. P.," made by agreement of counsel in a case, is admissible in evidence in a subsequent case on the same cause of action, as tending to show a settlement, even though the entry would not in all cases necessarily be a bar to another suit for the same cause. *Curtis v. Egan*, 53 N. H. 511, 512.

The characters "N. P." are an abbreviation of the term "notary public," and are in common use and are well understood, and as clearly indicate the office of notary public as do the characters "J. P." that of a justice of the peace, and when attached to an affidavit sufficiently show that the affidavit was made before a notary public. *Rowley v. Berrian*, 12 Ill. (2 Peck) 198, 200.

NAIL FACTORY.

In construing the mortgage of certain land, "together with, all and singular, the nail and other factories thereon," the court held that the term "nail factory" included the nail machines, bluing cylinder, grindstone, shears, scouring machines, nail bins, pulleys, and levers situated in the building and used as a part of the factory. *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 36 N. J. Eq. (9 Stew.) 452, 453.

NAKED.

See "Bare Naked Lie."

"Naked," as used in an indictment averring that the defendant unlawfully and scandalously printed and published certain obscene figures and descriptions, to wit, figures, pictures, and descriptions of naked girls, manifestly tending to the corruption of morals, means persons completely without clothing, and not those who are without clothing only to the waist. *Commonwealth v. De Jardin*, 126 Mass. 46, 47, 30 Am. Rep. 652.

NAKED DEPOSIT.

When chattels are delivered by one person to another, to keep for the use of the bailor, the depositary undertaking to keep it without reward or gratuitously, it is called a "naked deposit." *Civ. Code Ga.* 1895, § 2921.

NAKED POSSESSION.

"Naked possession" is the lowest and most imperfect degree of title. *Birdwell v. Burleson*, 72 S. W. 446, 449, 31 Tex. Civ. App. 31 (citing *Pendleton v. Hooper*, 87 Ga. 108, 13 S. E. 313, 27 Am. St. Rep. 227).

NAKED POSSIBILITY.

A deed by a son of "all interest in his father's estate, which he then had or might be entitled to on his father's death," was an attempted conveyance of a thing not in existence and in the proceeds of an expectancy which may never materialize. A conveyance of a naked possibility or expectancy is absolutely void. These words import a hope of succession, and not a certainty. It is axiomatic that in every valid grant there must be a grantor, grantee, and a thing to be granted. When there is no subject-matter, nothing in esse, about which a contract can be made, the essential thing to the validity of a contract is absent. *Rogers v. Felton*, 32 S. W. 406, 408, 98 Ky. 142.

NAKED POWER.

A naked power is a right or authority disconnected from any interest of the donee in the subject-matter, and it is a principle of the common law that, where a power given to several persons is a mere naked power uncoupled with an interest, it must be executed by all, and does not survive, but, when the power is coupled with an interest, it may be executed by the survivor. A power coupled with a trust survives equally with one coupled with an interest. *Clark v. Hornthal*, 47 Miss. 434, 534.

Naked power exists when authority is given to a stranger to dispose of an interest in which he had not before, nor has by the instrument creating the power, any estate whatever. *Atwater v. Perkins*, 51 Conn. 188, 198 (citing *Mansfield v. Mansfield*, 6 Conn. 559, 16 Am. Dec. 76).

A "naked power," or a power simply collateral and without interest, "is when to a mere stranger authority is given of disposing of an interest in which he had not before, nor hath by the instruments creating the power, any estate whatsoever." *Per Kent, J.*, in *Bergen v. Bennett* (N. Y.) 1 Caines' Cas. 1, 15.

Derivative powers, at common law, are of two classes: A power coupled with an interest, and a naked power. A power coupled with an interest is a right or authority to do some act, together with an interest in the subject on which the power is to be

exercised. A power of this class survives the person creating it. A naked power is a right or authority disconnected from any interest of the donee in the subject-matter, and it is a principle of the common law that where a power given to certain persons is a mere naked power, not coupled with an interest, it must be executed by all, and does not survive, but, when the power is coupled with an interest, it may be executed by the survivor. *Clark v. Hornthal*, 44 Miss. 434, 534.

A power of attorney given as collateral security for a debt is a mere naked power, which terminates with the death of the grantor. A power may well be a naked power, and yet be given as collateral security. Justice Kent lays down the distinction between a naked power and a power coupled with an interest, and says: "A power simply collateral and without interest, or a naked power, is when to a mere stranger authority is given to dispose of an interest in which he had not before, nor hath by the instrument creating the power, any estate whatever; but when power is given to a person who derives, under the instrument creating the power or otherwise, a present or future interest in the land, it is then a power relating to the land. A power, too, may be a naked power, and yet may be executed, or by its very terms must be executed, after the death of the party creating it. When it is said that a naked power is extinguished by the death of the person creating it, the language is meant to be confined to those cases in which the power is to be executed in the name and as the act of the grantor, and not of the grantee. It is not applied to naked powers generally, but only to naked powers of attorney." *Hunt v. Ennis* (U. S.) 12 Fed. Cas. 913, 915.

NAKED PROMISE.

A promise to renew a note to be given by a debtor in payment of a past-due debt is a naked promise, that involves no legal obligation, but rests entirely on the integrity and good faith of the one who made it, with no power of the courts to compel performance or award damages for nonperformance. As was well observed by one who wrote the first work on common law that is now existent, "A nude or naked promise is where a man promises another to give him a certain money such a day, or to build him a house, or to do him such certain service, and nothing is assigned for the money, or for the building, or for the service. These are called 'nude promises,' because there is nothing assigned why they should be made, and no action lies in this case if they be not performed." *Doct. & Stud. Dial.* 2, 624. Where the act performed was less than the legal duty already resting on the party doing the

act, a promise by the other party, based on such performance, was incapable of sustaining an action or maintaining a defense. *Arend v. Smith*, 45 N. E. 872, 873, 151 N. Y. 502.

NAME.

See "Christian Name"; "Commercial Mark or Name"; "Corporate Name"; "Family Name"; "Full Names"; "In the Name of."

In considering an application of a German to change his name to the English word having the same meaning as the German word, the court said: "The meaning of the word constituting the name of a person is of no importance; for, considered as a name, it derives its whole significance from the fact that it is the mark or indicium by which he is known. Many names have no specific meaning, apart from indicating the persons who bear them, and as designatio personæ it makes no difference, should the word or name performing that office, as is frequently the case, be also a word for expressing something else. As the proper or lawful names of persons is a subject to which legal writers have paid but little attention, it will be necessary to examine the state of the law respecting it. As I have said, a man's name is the mark or indicium by which he is distinguished from other men. By a practice now almost universal among civilized nations, it is composed of his Christian or given name and his surname. The one is the name given to him after birth, or at baptism; the other is the patronymic derived from the common name of his parents. In the case of illegitimates, they take the name or designation they have gained by reputation. *Rex v. Smith*, 6 Car. & P. 154; *Rex v. Clark*, Russ. & R. Cr. Cas. 358. The Christian or first name is, in the law, denominated the proper name; and a party can have but one, for middle or added names are not regarded. *State v. Martin*, 10 Mo. 391; *Edmundson v. State*, 17 Ala. 179, 52 Am. Dec. 169; *McKay v. Speak*, 8 Tex. 376; *Rex v. Newman*, 1 Ld. Raym. 562; *Franklin v. Talmadge* (N. Y.) 5 Johns. 64. Formerly the Christian name was the more important of the two. 'Special heed,' says Coke, 'is to be taken of the name of baptism, as a man cannot have two, though he may have divers surnames.' *Co. Litt.* 3a (m). Indeed, anciently in England there was but one name, for surnames did not come into use until the middle of the fourteenth century, and even down to the time of Elizabeth they were not considered of controlling importance. Thus Chief Justice Popham, in *Britton v. Wrightman*, Poph. 56, speaking of grants, declares that 'the law is not precise in the case of surnames, but for the Christian name,' he says,

'this ought always to be perfect.' And throughout the early reports the Christian name is uniformly referred to as the most certain mark of the identity of the individual in all deeds or instruments. Greater importance being attached to the Christian name arose from the fact that it was the designation conferred by the religious rite of baptism, while the surname was frequently a chance appellation, assumed by the individual himself, or given to him by others, for some marked characteristic, such as his mental, moral or bodily qualities, some peculiarity or defect, or for some act he had done, which attached to his descendants, while sometimes it did not. * * * The sufficiency of the Christian name to distinguish the particular individual, where there were many bearing the same name, led necessarily to the giving of surnames; and a man was distinguished, in addition to his Christian name, in the great majority of cases, by the name of his estate, or the place where he was born, or where he dwelt, or from whence he had come, as in the name of 'Washington,' originally 'Wessington,' which, as its component parts indicate, means a person dwelling on the meadow land, where a creek runs in from the sea, or else from his calling, as 'John the smith,' or 'William the tailor,' in time abridged to 'John Smith' and 'William Taylor.' And as the son usually followed the pursuit of the father, the occupation became the family surname, or the son was distinguished from the father by calling him 'John's son,' or 'William's son,' which, among the Welsh, was abridged to 's,' as 'Edwards,' 'Johns,' or 'Jones,' or 'Peters,' which, as familiar appellations, passed into surnames. The Normans added 'Fitz' to the father's Christian name to distinguish the son, as 'Fitzherbert' or 'Fitzgerald.' And among the Celtic inhabitants of Ireland and Scotland, where each separate clan or tribe bore a surname, to denote from what stock each family was descended, 'Mac' was added to distinguish the son, and 'O' to distinguish the grandson; and generally where names were taken from a place, the relation of the individual to that place was indicated by a word put before the name, like the Dutch 'Van' or French 'De,' or a termination added at the end, which additions were in time merged into and formed but one word, until from these various prefixes and suffixes numerous names were formed and became permanent. So, as suggested, something in the appearance, character, or history of the individual gave rise to the surname, such as his color, as 'black John,' 'brown John,' 'white John,' afterwards transposed to 'John Brown,' etc.; or it arose from his bulk, height or strength, as 'Little,' 'Long,' 'Hardy,' 'Strong'; or his mental or moral attributes, as 'Good,' 'Wiley,' 'Gay,' 'Moody,' or 'Wise'; or his qualities were poetically personified by applying to him the

name of some animal, plant, or bird, as 'Fox' or 'Wolf,' 'Rose' or 'Thorn,' 'Martin' or 'Swan'; and it was in this way that the bulk or our surnames, that are not of foreign extraction, originated and became permanent. They grew into general use, without any law commanding their adoption, or prescribing any course or mode respecting them." In re Snook (N. Y.) 2 Hilt. 566, 567-570.

Adoption of name.

A name is that by which a particular individual is distinguished. If a party in making a contract uses a name, he will not thereafter be permitted to say that it was not his. At common law a person might lawfully change his name; but he is bound by any contract into which he may enter in the adopted or imputed name, and by his recognized name he may sue or be sued. And a divorced woman may assume her maiden name and maintain an action in that name. Rich v. Mayer, 7 N. Y. Supp. 69, 70.

The name of a person is the designation by which he is known. Where the owner of stolen property was known by a certain name, that name was sufficient in legal proceedings, whether he had another name or not. As is said by the Supreme Court of Massachusetts: "The name which was given to a person at the time he was baptized is to be taken as originally and presumed to continue his name; but if, after his baptism, he adopts and uses another name, by which he is subsequently well known in the community where he resides prior to and at the time of the alleged sale, it is sufficient if he is described by that name in the complaint." People v. Leong Quong, 60 Cal. 107, 108 (citing Commonwealth v. Trainor, 123 Mass. 415).

Blood distinguished.

Where a testator required that the remainderman should be of my blood and of my name, a very obvious meaning attaches to the word "name," different from and consistent with that which belongs to the word "blood," and it must be understood as intended to exclude the female line of the stock or family. Leigh v. Leigh, 15 Ves. 92, 103.

As family.

A testator, after devising land to his son in tail, with direction that he should keep it in testator's family name, directed that, if the son should die without issue, the land should go "in like manner" to testator's daughter. It was held that the word "name" would be construed to mean "family" or "right line"; the court saying: "These words [in like manner] naturally meaning that the same estate in tail was given to both son and daughter, the word 'name,' in order to put both on the same footing, must be con-

strued to mean 'family' or 'right line.'" *Mortimer v. Hartley*, 6 Exch. 47, 60.

As full name.

Rev. St. § 338, requiring the title of a clause contained in the complaint to specify the names of the parties, meant the full names, and not merely the initials of the Christian names. *Bascom v. Toner*, 31 N. E. 856, 857, 5 Ind. App. 229.

Initials are not a name, and cannot be used for the Christian names of parties to actions, except in cases where parties inscribed by initial letters in bills of exchange, promissory notes, or other written instruments. *Elberson v. Richards*, 42 N. J. Law (13 Vroom) 69, 70.

St. 5 & 6 Wm. IV, c. 76, § 32, directing the mode of voting to be by delivering a paper previously "signed with the name of the burgess voting," did not require a writing of the full name, but a signature in the form in which the man usually signed was sufficient, and though it be only the surname with the initial of the Christian name, the statute was satisfied. *Reg. v. Avery*, 18 Q. B. 576, 586.

As name by which one is known.

Rev. St. c. 127, providing that no person shall be liable for killing any dog which shall be found without having about its neck a collar with the "name of the owner carved or engraved thereon," means the name by which the owner is usually known. *Morey v. Brown*, 42 N. H. 373, 374

As indicating identity.

Names are merely used as one method of indicating identity of persons. *Meyer v. Indiana Nat. Bank*, 61 N. E. 596, 27 Ind. App. 354 (citing *Vernon Ins. Co. v. Glenn*, 13 Ind. App. 340, 40 N. E. 759; *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608, 52 Am. St. Rep. 450; *Aultman, Miller & Co. v. Timm*, 93 Ind. 158, 159).

"The names of persons at this day are only sounds for distinction's sake, though it is probable they originally imported something more, as some natural qualities, features, or relations; but now there is no other use of them, but to mark out the individuals we speak of and distinguish them from all others, and therefore, in grants, which are to receive the most benign interpretation and most against the grantor, if there be sufficient shown to ascertain the grantor and grantee, and to distinguish them from all others, the grant will be good." *Friedman v. Goodwin* (U. S.) 9 Fed. Cas. 818, 820 (quoting *Bac. Abr. tit. "Grant," c*).

"A name I understand to be a discriminative appellation or designation of an individual. This is so understood universally, and the state canvassers, in the rules adop-

ted by them under a statute requiring that the ballot shall be a paper ticket containing the name of the person for clerk of a county, so understand it. They admit the letters 'Geo.' to represent 'George.' Why? Because by common consent they are admitted to represent that word. So they receive 'Hen.' for 'Henry,' not because the man's name is 'Hen.' but because 'Hen.' is universally admitted to represent 'Henry.' The state canvassers then do not confine themselves to names written or printed at full length, but they take abbreviations. Why do they receive abbreviations, when the act says the ballot shall contain the name? The answer must be, because the abbreviation is evidence of the intent of the voter." *People v. Ferguson* (N. Y.) 8 Cow. 102, 106 (cited in *People v. Board of Canvassers of Hamilton County*, 77 N. Y. Supp. 620, 622, 75 App. Div. 110).

A name is a word to designate a person or thing. That word by which a person is commonly designated in the community in which he lives is for all practical purposes his name. He can be indicted by it, and he can be sued by it and bound by the judgment. Where defendant was sued for a board bill as "Jane," and it was proved that she was usually known by that name, proof that her real name was "Jennie" was not ground for abatement. *Miller v. George*, 30 S. C. 526, 528, 9 S. E. 659, 660.

"A man's name is the designation by which he is distinctly known in the community. Custom gives him the family name of his father, and such prænomena as his parents chose to put before it; and appropriate circumstances may require 'Sr.' or 'Jr.' as a further constituent part." *Lafin & Rand Powder Co. v. Steylar*, 23 Atl. 215, 217, 146 Pa. 215, 14 L. R. A. 690.

Names are to designate persons, and where the identity is certain a variance in the name is immaterial. Thus, in docketing a judgment of the justice of the peace, transposing the initials of plaintiff from "R. M. P." to "M. R. P." is an error which may be corrected on motion, in the absence of dispute as to the identity of the moving party as owner of the judgment. *Patterson v. Walton*, 26 S. E. 43, 119 N. O. 500.

As indicating personality.

"Name" is a word of various meaning. A man's name is the synonym of his power and personality. It is often put metaphorically for the man himself. Thus, a man is said to bring honor or dishonor on his name when he performs a strikingly good or bad action. An agent is said to buy in the name of his principal when he buys for him, declaring his agency when he buys, and sells avowedly for himself. A man is said to hold his property in his own name, when he holds it manifestly as his own, though he may have no written insignia of ownership, as a

farmer holds the cattle of his own raising or the farm which he inherited from his ancestors. And so we think a man invests in his own name when he invests openly for himself, though he only receives the investment by a manual delivery. *Carpenter v. Carpenter*, 12 R. I. 544, 548, 34 Am. Rep. 638.

First name.

The first or Christian name of a party is an essential part of his name. *Gottlieb v. Alton Grain Co.*, 84 N. Y. Supp. 413, 417, 87 App. Div. 380.

Middle name or initial.

A name is one or more words used to distinguish a person, as "Socrates" or "Benjamin Franklin." Since the days of William the Conqueror, by the common law a name consists of a given name, called the "Christian name" because given in Christian baptism, and a surname, which is the family name or patronymic. A middle name or initial is, in law, no part of the name, though practically it is sometimes used as a means of identification, but it may be omitted from a document without prejudice to it. *Slingluff v. Gainer*, 37 S. E. 771, 772, 49 W. Va. 7.

A middle name or its initial is no part of a name. *Franklin v. Talmadge* (N. Y.) 5 Johns. 84. For purposes of identification, the middle name may be very important, as where the question is which one of two men of the same name, except that they have different middle names, or only one has a middle name, did a certain act, or was injured or sued, or the like. *Long v. Campbell*, 17 S. E. 197, 37 W. Va. 665.

In some purposes the Christian and sur names of a person constitute the whole name, and the initial of the middle name is no part of the name. Thus a mistake in a judgment docket by inserting the wrong initial for the middle name of the defendant does not prevent the judgment from being a lien as against a subsequent judgment creditor. *Geller v. Hoyt* (N. Y.) 7 How. Prac. 265, 267.

The middle initial of a person is no part of such person's name, so that where the plaintiff in an action of trespass declared by the name of William Robinson, and the deed under which he claimed title was to William T. Robinson, there was no material variance. The letter "T" was no part of the plaintiff's name, for the law recognizes but one Christian name; and the plaintiff might, if he thought proper, prove that he was as well known without as with the letter "T" in the middle of his name. *Franklin v. Talmadge* (N. Y.) 5 Johns. 84, 85.

"I do not find any case in which it has been decided that a middle letter is any necessary and essential part of the name. If one have two Christian names, and be

sued by the last one, it is bad. *Arboun v. Willoughby* (Eng.) 1 Marsh. 477. In this case the defendant's name was Hans William Wilby, and he was sued by the name of William only. A similar doctrine was held in *Commonwealth v. Perkins*, 18 Mass. (1 Pick.) 388. But in the English courts, so far as I have been able to learn—and I know it to be so in the courts of justice of the Canadian provinces—the middle letter of a name is never permitted to be put upon the record. Names, be there ever so many, are written out at length. In the case of *Reynolds v. Hankin*, 4 Barn. & Ald. 536, it is expressly decided that a special capias issued against one by his initials only, as F. W. Hankin, was irregular, and the bill taken in the case was ordered to be delivered up and canceled. The law is, I apprehend, well settled in England that mere initial letters are not to be regarded. Among the Romans, their names were so few and uniform that initial letters were well understood, but it is not so at the present day. These initial letters are assumed arbitrarily by many without representing any name, and, when they do, the name is known only to the person or his immediate family." Where the record of an advertisement of sale by a committee shows the committee's name to be Luther W. Brown, but the name of the person appointed as such committee was Luther H. Brown, it will be presumed that it was a mere mistake, and that the sale was made by the actual committee, as, in the absence of all proof that two persons bearing the same name and distinguished by those initial letters reside in the locality, it certainly does require a very great stretch of credulity to admit the construction that one man was appointed to the office, and that another intruded himself into his place and assumed the burden of his duties. *Isaacs v. Wiley*, 12 Vt. 674, 678.

The law knows only of one Christian name, and, where plaintiff was sued by the name of Margaret Kinney, proof that she was sometimes known by the name of Margaret N. or Margaret Ann Kinney does not present a case of variance. *Dilts v. Kinney*, 15 N. J. Law (3 J. S. Green) 130, 131.

A single letter intervening between the Christian and sur name is no part of either. *Hart v. Lindsey*, 17 N. H. 235, 240, 43 Am. Dec. 597.

Single letters.

Letters of the alphabet—consonants as well as vowels—may be names sufficient to distinguish between persons of the same surname. *State v. Cameron*, 29 Atl. 984, 985, 86 Me. 196.

NAMED.

The expression "not named or provided for," as used in Rev. Code 1845, § 11, provid-

ing that if any person make his will, and die leaving children not named or provided for in such will, such testator, so far as shall regard such children, shall be deemed to die intestate, includes only children unintentionally omitted by the testator. *Guitar v. Gordon*, 17 Mo. 408, 411.

Within the meaning of a statute providing that, if any testator dies leaving children not named or provided for in his will, as to such children he shall be deemed to have died intestate, a will by which testator gave all his property to his wife, and stated, "I leave it entirely to the will and judgment of my wife how and in what manner she thinks proper to dispose of the estate, as well with reference to our own child as with reference to" her son by a former marriage, they having but one child, a daughter, such child was sufficiently named in the will. *Beck v. Metz*, 25 Mo. 70-72.

As used in the charter of the city of Trenton, providing "that the common council at the regular meeting on the third Monday in April shall, by votes, appoint a city clerk" and certain other specified officers, "and shall from time to time appoint such other subordinate officers as they shall deem necessary," and providing that "the officers above named shall hold their offices for one year, unless sooner removed, and until their successors shall be appointed and qualified," the term "named" does not refer to or include the subordinate officers, but only such officers as were named by the title of the office. *McChesney v. City of Trenton*, 14 Atl. 578, 579, 50 N. J. Law (21 Vroom) 338.

A daughter is deemed to be "named" in her father's will, within the meaning of Rev. Code 1845, p. 1060, providing that if any person make his last will, and die leaving any child or children not named or provided in such will, the testator will be deemed intestate as to such child, if the will names the testator's son-in-law as a beneficiary. *Hockensmith v. Slusher*, 26 Mo. 237, 239.

NAPHTHA.

Naphtha, benzine, or benzol, and kerosene are all refined coal or earth oils, not differing in their nature, but only in the degree of inflammability; kerosene being much less inflammable than either of the others. *Morse v. Buffalo Fire & Marine Ins. Co.*, 30 Wis. 534, 536, 11 Am. Rep. 587.

NARROW-TIRED WAGON.

"Narrow-tired wagon," as used in St. 1889 (Acts 1889, p. 378; Burns' Rev. St. 1894, § 2047; Horner's Rev. St. 1897, § 6600), making it an offense to haul over turnpikes and gravel roads, in specified weather, loads of

more than 2,000 pounds in a narrow-tired wagon, is not a technical phrase, having a peculiar and appropriate meaning in law, but is to be taken in its plain or ordinary and usual sense, which means a wagon having wheels with tires which are narrow. If tires of particular widths be compared, it is easy to say which is comparatively narrow and which is comparatively broad; but, without any prescribed standard, it is impossible to say, as a matter of law, that a tire two inches wide is certainly either a narrow tire or a broad tire. The meanings of the separate words in the phrase "narrow-tired wagon" is plain, but the word "narrow" describes not certain, but uncertain, comparative widths; and, no standard of comparison being provided by the law, it renders the phrase in which it occurs uncertain and indefinite. A particular tire may be broad or narrow according to the width of another tire or other tires of different widths with which for the occasion it is being compared. *Cook v. State*, 59 N. E. 489, 491, 26 Ind. App. 278.

NATION.

See "Foreign Nation or State."
Cherokee Nation, see "Cherokee."

The word "nation," as ordinarily used, presupposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries, and the power to enter into negotiations with other nations. Tribes of North American Indians cannot be regarded as constituted nations, as that word is used by writers upon international law, although they are often so designated in treaties with them. *Montoya v. United States*, 21 Sup. Ct. 858, 180 U. S. 261, 45 L. Ed. 521.

A "nation," by the law of nations, is considered a moral being, and the principle which imposes moral restraints on the conduct of an individual applies with greater force to the actions of a nation. Charge to Grand Jury (U. S.) 30 Fed. Cas. 1021, 1022.

The term "nation," when applied to Indians, means a people distinct from all others. *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515, 539, 8 L. Ed. 483; *Langford v. Monteith*, 1 Idaho, 612, 617.

"Nations," as defined by Vattel, are bodies politic; societies of men united together for the purpose of promoting their mutual safety and advantage by the joint effort of their combined strength. *Republic of Honduras v. Soto* (Va.) 19 S. E. 845, 846; *Keith v. Clark*, 97 U. S. 454, 459, 24 L. Ed. 1071.

NATIONAL BANK.

A national bank is a body corporate, with power to make contracts, to sue and to

be sued, and to exercise all such incidental powers as shall be necessary to carry on the business of banking. *Weber v. Spokane Nat. Bank* (U. S.) 64 Fed. 208, 209, 12 C. C. A. 93.

A national bank is a quasi public institution. While it is the property of its stockholders, and its profits inure to their benefit, it is nevertheless intended by the law creating it that it should be for the public accommodation. *Appeal of Foll*, 91 Pa. 434, 436, 36 Am. Rep. 671; *Ryan v. McLane*, 46 Atl. 340, 343, 91 Md. 175, 50 L. R. A. 501, 80 Am. St. Rep. 438.

National banks are private corporations organized under general law of Congress by individual stockholders with their own capital for private gain, and managed by officers, agents, and employes of their own selection. They constitute no part of any branch of the government of the United States, and whatever public benefit they contribute to the country in return for grants and privileges conferred upon them by statute is of a general nature, arising from their business relations to the people through individual citizens, and not as direct representatives of the state, as a body politic, in exercising its legal and constitutional functions. In all contracts, the banks act for themselves alone, and have no authority to involve the government in liability except the statute liability for the final redemption of their circulating notes. *Branch v. United States* (U. S.) 12 Ct. Cl. 281, 286.

NATIONAL BANK BILLS.

The term "national bank bills" is used to designate "a kind or part of the national currency." *Ex parte Prince*, 9 South. 659, 660, 27 Fla. 196, 26 Am. St. Rep. 67.

NATIONAL BANK NOTES.

National bank notes are not money in which a sufficient tender can be made. *Chicago, I. & E. Ry. Co. v. Patterson*, 59 N. E. 688, 692, 26 Ind. App. 295.

The description in an indictment for larceny of the property stolen as "national bank notes, commonly called national currency notes," means notes of a national bank, and not national notes of a bank. The notes are bank notes, and not national notes, and they are so described in the indictment. *Hummel v. State*, 17 Ohio St. 628, 633.

NATIONAL BANKING SYSTEM.

"National banking system" is a term used to designate a system of banks authorized by Act Cong. June 3, 1864 (13 Stat. 99), and amended by 15 Stat. 34, 270, 16 Stat. 251, 17 Stat. 603. The leading features of

the system are (1) the security of the circulating notes of those banks by the pledge of government bonds in the hands of the Treasurer of the United States, and, in case of the failure of the bank to redeem its notes, then redemption of those notes for the government, for which it is to be reimbursed by the proceeds of the bonds deposited, and the first lien on all the assets of the bank; (2) the responsibility of the stockholders of the bank to the extent of the par value of the stock held by them, respectively, in addition to the amount invested in their shares; (3) the whole system to be under the surveillance of the comptroller of the currency, with full power to examine into the affairs of each bank, and, in cases of noncompliance with the provisions of the law, to appoint a receiver to administer and wind up their affairs. *In re Manufacturers' Nat. Bank* (U. S.) 16 Fed. Cas. 665, 667, 668.

NATIONAL BUILDING AND LOAN ASSOCIATION.

A building and loan association doing a general business under the statutes of Minnesota is known as a national, as distinguished from a local, building and loan association. *Maudlin v. American Savings & Loan Ass'n*, 65 N. W. 645, 63 Minn. 358.

NATIONAL CURRENCY.

"National currency," as used in an indictment for larceny, imports a particular species of money, or of currency circulating as money. The acts of Congress indicate that the issue of national banks is to be designated as national currency. In popular acceptance, probably the national currency embraces treasury notes, and the issue of national banks. Whether the popular acceptance or the meaning of the term as it is to be extracted from the acts of Congress is adopted, it designates notes or bills circulating by authority of the general government as money, and a description in an indictment as \$320 in national currency describes the kind or species of currency and is sufficient. *Grant v. State*, 55 Ala. 201, 209.

"National currency of the United States," as used in an indictment charging a larceny of notes of the national currency of the United States, is equivalent to United States currency. Currency of the United States is certainly the same thing as United States currency, and the addition of the word "national" can make no difference. If it has no meaning at all, it must be rejected as surplusage. If it has any meaning at all, it can only refer to the nation of the United States, and "currency of the nation of the United States," must mean currency of the United States. There are two kinds of United States currency, both of which

may properly be called national currency of the United States, one of which consists of treasury notes, and the other of national bank notes. Both of these kinds of currency are embraced in the denomination of United States currency, contained in an act expressly declaring that, to sustain a charge of larceny of United States currency, it shall be sufficient if the accused be proved guilty of larceny of national bank notes or United States treasury notes. *Dull v. Commonwealth* (Va.) 25 Grat. 965, 973.

National currency is that which is issued under the sanction of a nation. *State v. Gasting*, 23 La. Ann. 609, 610.

A certificate of receiving a certain amount "on deposit in national currency" means that the maker of the certificate had received a deposit in money, for the words "national currency" denote money, and contain, by implication of law, a promise to repay the depositor his money. *Long v. Straus*, 7 N. E. 763, 764, 107 Ind. 94, 57 Am. Rep. 87. .

NATIONAL DOMAIN.

The "national domain," properly speaking, comprehends all the landed estate and all the rights which belong to the nation, whether the latter is in the actual enjoyment of the same, or has only a right to re-enter on them. Civ. Code La 1900, art. 486.

NATIONAL ELECTIONS.

The term "national elections," as used in acts relating to ballots and manner of voting in counties of 50,000 inhabitants or more, applies to any elections held for the purpose of choosing a member of Congress, or electors for President and Vice President of the United States. *Shaunon's Code Tenn.* 1896, § 1231.

NATIONAL TRADE UNION.

The term "national trade union," within the meaning of an act to legalize the incorporation of national trade unions, signifies any association of working people having two or more branches in the states or territories of the United States for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages, and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled, or unemployed members, or the families of deceased members, or for such other object or objects for which working people may lawfully combine, having in

view their mutual protection or benefit. U. S. Comp. St. 1901, p. 3204.

NATIONALITY.

The nationality of a man means his natural allegiance. *United States v. Wong Kim Ark*, 18 Sup. Ct. 456, 459, 169 U. S. 649, 42 L. Ed. 890.

NATIVE.

Natives are all persons born within the jurisdiction and allegiance of the United States. This is the rule of the common law, without any regard or reference to the particular condition or allegiance of their parents, with the exception of the children of ambassadors, who are, in theory, born within the allegiance of the foreign power they represent. *Town of New Hartford v. Town of Canaan*, 5 Atl. 360, 362, 54 Conn. 39 (citing 2 Kent, Comm. [9th Ed.]).

Chancellor Kent, in his Commentaries, speaking of the general division of the inhabitants of every country, under the comprehensive title of "Aliens and Natives," says: "Natives are all persons born within the jurisdiction and allegiance of the United States. This is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are, in theory, born within the allegiance of the foreign power they represent. To create allegiance by birth, the party must be born not only within the territory, but within the allegiance, of the government. If a portion of the country be taken and held by conquest in war, the conqueror acquires the rights of the conquered as to its dominion and government, and children born in the armies of a state, while abroad and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to which the army belongs." *United States v. Wong Kim Ark*, 18 Sup. Ct. 456, 463, 169 U. S. 649, 42 L. Ed. 890.

NATIVE-BORN CITIZENS.

The term "native born citizens of the United States," as used in the Constitution, was assumed in *McCreery v. Somerville*, 22 U. S. (9 Wheat.) 354, 6 L. Ed. 109, to include children born in that state of an alien who was still living, and who had not been naturalized; and, without such assumption, the case would not have presented the question decided by the court. In *Dred Scott v. Sandford*, 60 U. S. (19 How.) 393, 15 L. Ed. 691, Mr. Justice Curtis said: "The first section of the second article of the Constitution uses the language, 'a natural born citizen.' It thus assumes that citizenship

may be acquired by birth. Undoubtedly this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth." In *United States v. Rhodes* (U. S.) 27 Fed. Cas. 785, Mr. Justice Swayne, sitting in the Circuit Court, said: "All persons born in the allegiance of the King are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Such is the rule of the common law, and it is the common law of this country, as well as of England." *United States v. Wong Kim Ark*, 18 Sup. Ct. 456, 462, 169 U. S. 649, 42 L. Ed. 890.

NATURAL.

Things or results which are only possible cannot be spoken of as either "probable or natural," for the latter are those things or events which are likely to happen, and which for that reason should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference. *Scott v. Allegheny Valley Ry. Co.*, 33 Atl. 712, 713, 172 Pa. 646 (citing *South Side Pass. Ry. Co. v. Trich*, 117 Pa. 390, 11 Atl. 627, 2 Am. St. Rep. 672).

NATURAL BORN.

The term "natural born," as sometimes used, means bastard; born out of wedlock. *Bouv. Law Dict.* On the other hand, it has been held that "natural," in a statute providing that adopted children shall have all the rights of natural children, means legitimate. *Barns v. Allen* (Ind.) 9 Am. Law Reg. (O. S.) 747. Under Rev. St. § 4425, as amended by Act 1881, giving a right of action for injuries occasioned by negligence and providing that, in case there be no husband or wife, or they fail to sue, the minor child or children of the deceased, whether such minor child be the natural born or adopted child of the deceased, shall have such right, etc., the words are simply used to show that adopted children and the adopting parents are to have the benefit of the act, the same as in case of children by procreation. *Marshall v. Wabash R. Co.*, 25 S. W. 179, 180, 120 Mo. 275.

NATURAL BORN CITIZEN.

Independently of the constitutional provision, it has always been the doctrine of this country, except as applied to Africans brought here and sold as slaves, and their descendants, that birth within the limits and

jurisdiction of the United States of itself creates citizenship. In the case of *Lynch v. Clarke* (N. Y.) 1 Sandf. Ch. 583, Assistant Vice Chancellor Sandford said that he entertained no doubt that every person born within the limits and allegiance of the United States, whatever the situation of his parents, was a natural born citizen, and added, that this was the general understanding of the legal profession. In *re Look Tin Sing* (U. S.) 21 Fed. 905, 909.

The term "natural born citizen of the United States" means all persons born in the allegiance of the United States. *United States v. Rhodes* (U. S.) 27 Fed. Cas. 785, 789.

The natural born subjects of a monarch comprise all persons born in the allegiance of the King. *United States v. Rhodes* (U. S.) 27 Fed. Cas. 785, 789.

Every person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen, within the sense of the Constitution, and entitled to all the rights and privileges pertaining to that capacity. *Town of New Hartford v. Town of Canaan*, 5 Atl. 360, 364, 54 Conn. 39 (citing *Rawle, Const. U. S. p. 86*). See also, *Lynch v. Clarke* (N. Y.) 1 Sandf. Ch. 584, 2 Kent, Comm. (9th Ed.); *McKay v. Campbell* (U. S.) 16 Fed. Cas. 157; *Field, Int. Code*, 132; *Morse, Citizenship*, § 203).

NATURAL BOUNDARY.

A river boundary is treated as a natural boundary, and the rights of the parties change with the change of its bed. *Peucker v. Canter*, 63 Pac. 617, 620, 62 Kan. 363.

"Natural boundaries," as used in *Pol. Code*, § 3461, which requires certain assessment lists to contain a description by local subdivisions, swamp-land surveys, or natural boundaries, is not construed to exclude all artificial boundaries or boundaries made by man. Any description which clearly identifies and marks out the land is sufficient. *Swamp Land Reclamation Dist. No. 407 v. Wilcox* (Cal.) 14 Pac. 843, 845.

A savanna which is a natural meadow may constitute a natural boundary of land, although it is not as well defined as some other natural objects. A clause in a deed to a point in the bottom of a savanna was held a sufficient description. *Stapleford v. Brinson*, 24 N. C. 311, 313.

Whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title in the land of which it has been made a part, as a house, a mill, a wharf, or the like, the

side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not, in its description or nature, include the earth as far down as the grantor owns, and yet has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stones, then the center of the thing so running over or standing on the land is the boundary of the land granted. *City of Boston v. Richardson*, 95 Mass. (13 Allen) 146, 154, 155.

Bluffs of rock and summits of a mountain may be so steep and rugged as to constitute a natural boundary of land. The law does not require a vain and useless thing to be done, and there would be no sense in a law which required the erection of a fence over a bluff of rocks so steep and rugged that neither man nor beast could travel over it. *Eureka Mining & Smelting Co. v. Way*, 11 Nev. 171, 177.

NATURAL BUTTER AND CHEESE.

For the purposes of the chapter relating to adulteration, the terms "natural butter and cheese," "natural butter or cheese, produced from pure, unadulterated milk or cream from the same," "butter and cheese made from unadulterated milk or cream," "butter or cheese, the product of the dairy," and "butter or cheese," shall be understood to mean the products usually known by the terms "butter and cheese," and which butter is manufactured exclusively from pure milk or cream, or both, with salt and rennet, and with or without any harmless coloring matter, and which cheese is manufactured exclusively from pure milk or cream, or both, with salt and rennet, and with or without any harmless coloring matter or sage. *Bates' Ann. St. Ohio 1904*, § 4200-14; *State v. Capital City Dairy Co.*, 57 N. E. 62, 64, 62 Ohio St. 350, 57 L. R. A. 181.

NATURAL CAPACITY TO CONTRACT.

There is a distinction between a minor's natural capacity to contract—i. e., the mental ability and discretion requisite to an intelligent assent—and his capacity to make such a contract as will bind his person and property. The one rests on a law of nature. The other is limited by municipal law. The latter capacity is inconsistent with the rights of parents. His services belong to them. It may be inconsistent with the completion of his education and preparation for the duties of citizenship. From the age of 14 he has discretion—is capable of contracting as truly, though not usually as wisely, as at any period of his life; and the law, in recog-

nition of this fact, permits him to contract. He can assume the obligation of the most important contract in life—that of marriage—and may dispose of his personal property by will. (By statute, a testator must be 13 years old.) An adult's promise to pay the rent of premises occupied by him while an infant over 14 years of age is binding, even if made in ignorance of his non-liability. *Bestor v. Hickey*, 41 Atl. 555, 556, 71 Conn. 181.

NATURAL CAUSES.

Act Cal. March 4, 1889, § 7, providing that the widow or children of a police officer who shall die from natural causes after having served 10 years shall be entitled to a pension, will not be held to include a death where a person is killed. *Slevin v. City and County of San Francisco*, 55 Pac. 785, 786, 123 Cal. 130, 44 L. R. A. 114.

There is an observable distinction between "natural" and "artificial" causes of injury; that is, those resulting in ordinary course from causes beyond human control, and those created by voluntary choice or agency. *Rowland v. Miller*, 15 N. Y. Supp. 701, 702.

NATURAL CHANNEL.

The term "natural channel" includes all channels through which, in the existing condition of the country, the water, whether a living stream or surface water, naturally flows; and where, by reason of the grading of the lots and streets, the waters flowing to a channel are different from what before the improvement of the city naturally flowed to the same point, and the channel itself is thereby changed, it is the duty of the city to protect the property of its citizens from the waters flowing through such new channel, through which, under natural laws, the surface waters are discharged, and which channel must then be regarded as a natural channel. *Larrabee v. Town of Cloverdale*, 63 Pac. 143, 145, 131 Cal. 96.

NATURAL CHILD.

"Natural child" is a phrase employed to designate children born out of lawful wedlock. *Marshall v. Wabash R. Co.* (U. S.) 46 Fed. 269, 273.

The law denominates as "natural children" illegitimate children who have been acknowledged by their father. *Civ. Code La.* § 202. *Succession of Vance*, 34 South. 767, 768, 110 La. 760.

NATURAL CONSEQUENCES.

Damages which are the natural consequences of an act, to be the basis of legal

redress, must not only be the natural sequence of the wrongful act or omission, but must flow directly from it in observance of some well understood and recognized material force. *Kuhn v. Jewett*, 32 N. J. Eq. (5 Stew.) 647, 649 (citing Whart. Neg. § 97).

The natural consequence of means used is the consequence which ordinarily follows from their use—the result which may be reasonably expected from their use, and which ought to be expected. *Western Commercial Travelers' Ass'n v. Smith* (U. S.) 85 Fed. 401, 405, 29 C. C. A. 223, 40 L. R. A. 653.

"Natural consequences," as applied to the damages arising from breach of contract, mean those which would result in the usual course of things, as distinguished from accidental or collateral injury, or such as would spring out of special circumstances, not usually depending upon such transaction. *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 170, 51 Am. Rep. 435.

The natural consequence of an act is the consequence which ordinarily follows from it—the result which may reasonably be anticipated from it. Where a drover traveling with cars loaded with stock stepped off of a car, intending to step on the caboose just as the caboose was shunted off the train and put on a side track, it could not have been anticipated by the railroad company, or those employed, that the drover would attempt to step from the stock car to the caboose just at that time, and the injury which he sustained was not the natural consequence of any act of the railroad company. *Chicago, St. P., M. & O. R. Co. v. Elliott* (U. S.) 55 Fed. 949, 953, 5 C. C. A. 347, 20 L. R. A. 582.

NATURAL COURSE OF DRAINAGE.

The meaning of the words "natural course of drainage," in a city charter requiring that sewers shall connect with the natural course of drainage, is a question of law, and whether any given connection of a sewer is with the natural course of drainage, in accordance with that meaning, is a question of fact, and both questions are for the determination of the courts, and not of the municipal legislature. "The natural course of drainage" means the natural course or passage of drainage with which sewers may be connected. *Bayha v. Taylor*, 36 Mo. App. 427, 435.

A city charter required that district sewers should connect with the public sewer, or else with the natural course of drainage. The ordinance of the city provided for the construction of a sewer whose only outlet was the bed of the creek, which had long been abandoned by a channel, and which, by the construction of streets, railroads, etc.,

across it, had been converted into a pond. Held, that this creek was no longer a natural course of drainage, so that the ordinance was void for non-conformation to the charter. *City of Kansas v. Swope*, 79 Mo. 446.

NATURAL DAY.

The expression "natural day," as used in Pub. Laws, c. 1004, providing that no employé of a street car company shall be required to work more than 10 hours within the 24 hours of the natural day, is defined by Bouvier to be the period of time elapsing between sunrise and sunset. In re Ten Hour Law for St. Ry. Corp., 54 Atl. 602, 609, 24 R. I. 603, 61 L. R. A. 612.

NATURAL DOMICILE.

Vattel says: "The natural or original domicile is that given us by birth, and we are considered as retaining it until we have abandoned it in order to choose another." *Johnson v. Twenty-One Bales* (U. S.) 13 Fed. Cas. 855, 863.

NATURAL EFFECT.

The rule of law requires that the damages chargeable to a wrongdoer must be shown to be the natural and proximate effects of his delinquency. The term "natural" imports that they are such as might reasonably have been foreseen—such as occur in an ordinary state of things. *Wiley v. West Jersey R. Co.*, 44 N. J. Law (15 Vroom) 247, 251 (citing *Cuff's Adm'r's v. Newark & N. Y. R. R.*, 35 N. J. Law [6 Vroom] 17, 10 Am. Rep. 205; *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. Law [10 Vroom] 299, 23 Am. Rep. 214); *Flynn v. Consolidated Traction Co.*, 52 Atl. 369, 67 N. J. Law, 546; *Newark & S. O. R. Co. v. McCann*, 34 Atl. 1052, 1053, 58 N. J. Law (29 Vroom) 642, 33 L. R. A. 127; *Pielke v. Chicago, M. & St. P. Ry. Co.*, 41 N. W. 669, 672, 5 Dak. 444; *Carter v. Cape Fear Lumber Co.*, 39 S. E. 828, 831, 129 N. C. 203.

NATURAL FLOW.

The term "natural flow," as used in statutes regulating the control of natural gas wells, necessarily means the entire volume of gas that will issue from the mouth of a well when retarded only by the atmospheric pressure. *Richmond Natural Gas Co. v. Enterprise Natural Gas Co.*, 66 N. E. 782, 786, 31 Ind. App. 222.

"Natural flow," as used in St. 1875, c. 217, authorizing a certain city to take water from a pond, provided that a dam shall be built where it flows into a particular river, sufficient in height to retain sufficient water

for one year's supply for the city, and that the natural flow of the pond into the river shall at all times be maintained, means the quantity of water ordinarily flowing in the stream at the times when its volume is not increased by unusual freshets or rains. *Nemasket Mills v. City of Taunton*, 44 N. E. 609, 166 Mass. 540.

NATURAL FOOL.

A natural fool is one who is such from his nativity. In *re Anderson*, 43 S. E. 649, 650, 132 N. C. 243.

NATURAL FRUITS.

Natural fruits are such as are the spontaneous product of the earth. The product and increase of cattle are likewise natural fruits. *Civ. Code La.* 1900, art. 545.

NATURAL GAS.

As article of commerce, see "Article."

As bitumen, see "Bitumen."

Gas is a mineral, but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights with much more careful consideration of the principles involved than of the mere decisions. *Ridgway Light & Heat Co. v. Elk County*, 43 Atl. 323, 324, 191 Pa. 465; *West Moreland & Cambria Nat. Gas Co. v. De Witt*, 18 Atl. 724, 727, 130 Pa. 235, 5 L. R. A. 731. Water, oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner. Their fugitive and wandering existence within the limits of a particular track was uncertain, as said by Chief Justice Agnew in *Brown v. Vandergrift*, 80 Pa. (30 P. F. Smith) 147, 148. They belong to the owner of the land, and are a part of it, so long as they are on or in it and are subject to his control; and when they escape and go into other land, or get into another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even a distant owner drills his own land and strikes the gas, so that it comes into his well and under his control, it is no longer yours, but his. *West Moreland & Cambria Nat. Gas Co. v. De Witt*, 18 Atl. 724, 727, 130 Pa. 235, 5 L. R. A. 731.

Gas is a mineral, so that while in its original situation it is a part of the land, and possession of the land is possession of the gas. It is, however, a mineral of peculiar attributes, so that precedents with regard

to ordinary minerals must be applied to the decision of questions relating to it with great care. *Ohio Oil Co. v. Indiana*, 20 Sup. Ct. 576, 582, 177 U. S. 190, 44 L. Ed. 729.

Natural gas is a fluid mineral substance, subterranean in its origin and location, possessing in a restricted degree the properties of underground waters, and resembling water in some of its habits. Unlike water, it is not generally distributed, and, so far as now understood, it can be used for but few purposes; the more important being that of fuel. *Manufacturers' Gas & Oil Co. v. Indiana Gas & Oil Co.*, 57 N. E. 912, 915, 155 Ind. 461, 50 L. R. A. 768.

Natural gas is a fuel—a substance which may be converted into heat by combustion with atmospheric air. It is not heat itself. *Emerson v. Commonwealth*, 108 Pa. 111, 126.

Natural gas is fuel, so that, just as a municipal corporation would have no right to confer a special privilege to supply the town or city with coal or wood, it likewise has no right to grant a natural gas company the exclusive privilege of using its streets for laying its mains and pipes. *Citizens' Gas & Mining Co. v. Town of Elwood*, 114 Ind. 332, 338, 16 N. E. 624.

Natural gas partakes more nearly of the character of the elements air and water than it does of those things which are the subject of absolute property. It is more volatile than the air, and when tapped in the earth it escapes more readily. When the supply is withdrawn from one place, it flows of its own accord from other points, and replaces that which has been withdrawn. What distance or from what source it comes is the subject of conjecture only. Like water percolating beneath the surface, it may, by sinking a well or otherwise, be appropriated for the use of one person on his farm, while the supply may come from an adjoining or many distant farms. It is only the subject of qualified property. *Wood County Petroleum Co. v. West Virginia Transp. Co.*, 28 W. Va. 210, 215, 57 Am. Rep. 659.

The title to natural gas vests in any private owner until it is reduced to actual possession, and hence a statute (*Burns' Rev. St.* 1894, § 7510) prohibiting any one operating a natural gas well from allowing the escape of gas into the open air is not unconstitutional, as an unwarranted interference with private property. *State v. Ohio Oil Co.*, 150 Ind. 21, 30, 49 N. E. 809, 812, 47 L. R. A. 627.

NATURAL GAS COMPANY.

The term "natural gas company," as used in the chapter relating to the listing of personal property for taxation, includes any person or persons, joint-stock associa-

tion, or corporation, wherever organized or incorporated, when engaged in the business of supplying natural gas for lighting, heating, or power purposes to consumers within this state. *Bates' Ann. St. Ohio 1904, § 2780-17.*

NATURAL GUARDIAN.

A "natural guardian," within section 1, c. 12, Acts 1798, providing that whenever land shall descend or be devised to a male under the age of 21 years, or a female under 16, not having a natural guardian, or guardian appointed by last will, the orphans' court should have power to appoint a guardian for such minors, is such a natural guardian as is entitled to the guardianship of the estate as well as of the person of the infant. By the common law the guardian by nature had only the custody of the person of his heir apparent, but after the death of the father the mother, if living, was the guardian by nature of her heir apparent. At common law there was no such natural guardian as is meant by the statute in question. *Mauro v. Ritchie (U. S.) 16 Fed. Cas. 1171, 1179.*

NATURAL HEIR.

Acts 1855, p. 122, provide that any person may adopt, and that the adopted child shall be entitled to and receive all the rights and interest in the estate of such adopted father or mother, by descent or otherwise, that such child would if the natural heir of such adopted father or mother. Held, that the word "natural" is here used in the sense of "legitimate," and not as including illegitimate. The word "natural" is nowhere used to designate illegitimate children, but the words "bastard" and "illegitimate" are employed for that purpose. *Barns v. Allen (Ind.) 9 Am. Law Reg. (O. S.) 747, 750.*

"Natural heir," as used in the statutes declaring that after adoption the adopted child shall be entitled to and receive all the rights and interests in the estate of such adopting father and mother, by descent or otherwise, that such child would have if the natural heir of such adopting father and mother, means natural child. *Markover v. Krauss, 31 N. E. 1047, 1050, 132 Ind. 294, 17 L. R. A. 806.*

A testator in 1869 executed in the city of New York a will whereby he devised his interest in a house and lot in said city to two cousins. Subsequently, in Switzerland, he executed in accordance with the laws of New York a second will, whereby, after giving certain legacies to his servant, he devised the remainder of his property, all situated or invested in America, to his natural heirs. Testator left, him surviving, a mother, a sister, and cousins, but no widow or children. Held, that by the term "natural heirs" the

testator meant his mother and sister. "We should say, to a man reared and educated in New York, the term 'natural heirs' would be understood and regarded as a mother and sister, rather than cousins in any degree. It results from these views that the devise is to his mother and sister as his natural heirs, or that the devisees are so indefinite as to invalidate it as a devise to any one." *Ludlum v. Otis (N. Y.) 15 Hun, 410, 414.*

The words "natural heirs" and "heirs of the body" in a will, and by way of executory devise, are considered as of the same legal import. *Smith v. Pendell, 19 Conn. 107, 112, 48 Am. Dec. 146.*

The term "natural heirs," in a will bequeathing property to a certain beneficiary, and providing that, if the latter die without "natural heirs," the property shall go, etc., may include all kinds of heirs. The common understanding would say at once that "natural heirs" meant children. Testator well understood that no one could have unnatural heirs, and, as the word "heirs" alone might include both lineal and collateral, we think she intended something less than the whole class, and that she meant children or issue. *Miller v. Churchill, 78 N. C. 372, 373.*

NATURAL IMPORT.

The natural import of words is that which their utterance promptly and uniformly suggests to the mind—that which common use has affixed to them. The technical is that which is suggested by their use in reference to a science or profession—that which particular use has affixed to them. And, when the natural and technical import unite upon a word, both these rules combine to control its construction, and no other signification than that which they suggest can be affixed to it, unless upon the most positive declaration that a different one was designed. *People v. Hallett, 1 Colo. 352, 359; People v. May, 3 Mich. 598, 605.*

NATURAL INCREASE.

The natural increase of property spoken of in Code, § 2259, enacting that the natural increase of property shall belong to the tenant for life, but that any extraordinary accumulation of the corpus, such as issue of new stock upon the shares of an incorporated or joint-stock company, attaches to the corpus, and goes with it to the remainderman, are used in antithesis to the subsequent words, "extraordinary accumulation," and they mean the ordinary accumulation of the property; that is, in case of stock, the ordinary increase of its value by larger dividends declared. Dividends are the ordinary, the natural, the only natural income or increase of this sort of property. *Millen v. Guerrard, 67 Ga. 284, 291, 44 Am. Rep. 720.*

NATURAL JUSTICE.

By "natural justice" we mean that which is founded in equity, in honesty, and right. Natural justice requires that a parent shall care for his children. *Kempsey v. Maginnis*, 2 Mich. N. P. 49, 55.

NATURAL LAW.

Natural law is the moral system framed by ethical writers, and, though the same as the divine law, the latter is more authentic, since the former is formed and declared by the assistance of human reason. *Mayer v. Frobe*, 22 S. E. 58, 61, 40 W. Va. 246.

Natural law, as defined by Burlamqui, "is a law which so necessarily agrees with the nature and state of man that without observing its maxims the peace and happiness of society can never be preserved," and is so called "because a knowledge of them may be attained merely by the light of reason, from the fact of their essential agreeableness with the constitution of human nature." *Borden v. State*, 11 Ark. (6 Eng.) 519, 527, 44 Am. Dec. 217.

NATURAL LIFE.

See "During Natural Life."

"Natural," as used in the sentence of a prisoner for his natural life, is surplusage, and does not restrict or limit the word "life," nor affect the meaning implied by How. Ann. St. § 9075, providing that, on conviction of murder in the first degree, the person shall be punished by solitary confinement at hard labor in the State Prison for life. *People v. Wright*, 50 N. W. 792, 799, 89 Mich. 70.

NATURAL OBJECT.

"Natural object," as used in Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], requiring that all records and mining claims shall contain such a description of the claim or claims, located by reference to some natural object or permanent monument, as will identify the claim, may include either a large boulder, or a well-known patented claim. *Gamer v. Glenn*, 20 Pac. 654, 658, 8 Mont. 371.

Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], requires that the record of a mining claim shall contain such a description of the claim, located by reference to some "natural object or permanent monument," as to identify the claim. Held, that the natural object referred to may consist of any fixed natural object, and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground, and a location of a mining claim, referring to cer-

tain mountain peaks, without naming or describing them, and describing the claim along a river near a certain city, and of a shaft on a certain creek, was a sufficient compliance with the statute; the certificate showing the state, county, and district where located. *Jackson v. Dines*, 21 Pac. 918, 919, 13 Colo. 90.

"Natural objects," as used in the Revised Statutes of the United States, requiring that all records of mining claims shall contain a description of the claim or claims, located by reference to some natural objects or permanent monuments that will identify the claims, means such objects as will enable a person endeavoring to locate a claim to correctly make a survey of it by means of the reference made to such natural objects or permanent monuments. *Baxter Mountain Gold Min. Co. v. Patterson*, 3 Pac. 741, 743, 3 N. M. (Johns.) 179.

In Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], requiring that the record of a mining claim shall contain such a description by reference to some natural object or permanent monument that will identify the claim, "natural object" is a general term, susceptible of different shades of meaning; depending largely on its application. What might be regarded as a natural object for one purpose might not be so considered with reference to a different purpose. Natural objects abound everywhere, but their characteristics vary greatly; some being unstable and ephemeral, and others fixed and durable; and, since only those possessing the latter qualities are suitable for landmarks, it is evident that such only were intended by the terms employed in the statute. A tree is a fixed natural object, and, as a monument, is as firmly planted in the ground and as durable as a post or stake. It should be marked in some manner so as to be readily identified, unless it possesses peculiarities so different from trees in general that a description thereof is sufficient to identify it. Thus marked naturally or artificially, there would be less room to question the sufficiency of a tree as a natural object or permanent monument, within the meaning of the law, than the sufficiency of a shaft sunk in the ground. Mr. Wade, in his *American Mining Law*, 113, enumerates the following objects as satisfying the requirements, to wit: Stone monuments; blazed trees; the confluence of streams; the point of intersection of well-known gulches, ravines, or roads; prominent buttes, hills, etc. *Quimby v. Boyd*, 6 Pac. 462, 466, 8 Colo. 194.

"Natural object," as used in the federal and territorial laws requiring the location of a mining claim to be made with reference to some natural object, is any permanent feature in the landscape. A cañon is as much a natural object in the landscape as

be sued, and to exercise all such incidental powers as shall be necessary to carry on the business of banking. *Weber v. Spokane Nat. Bank* (U. S.) 64 Fed. 208, 209, 12 C. C. A. 93.

A national bank is a quasi public institution. While it is the property of its stockholders, and its profits inure to their benefit, it is nevertheless intended by the law creating it that it should be for the public accommodation. *Appeal of Foll*, 91 Pa. 434, 436, 36 Am. Rep. 671; *Ryan v. McLane*, 46 Atl. 340, 343, 91 Md. 175, 50 L. R. A. 501, 80 Am. St. Rep. 438.

National banks are private corporations organized under general law of Congress by individual stockholders with their own capital for private gain, and managed by officers, agents, and employes of their own selection. They constitute no part of any branch of the government of the United States, and whatever public benefit they contribute to the country in return for grants and privileges conferred upon them by statute is of a general nature, arising from their business relations to the people through individual citizens, and not as direct representatives of the state, as a body politic, in exercising its legal and constitutional functions. In all contracts, the banks act for themselves alone, and have no authority to involve the government in liability except the statute liability for the final redemption of their circulating notes. *Branch v. United States* (U. S.) 12 Ct. Cl. 281, 286.

NATIONAL BANK BILLS.

The term "national bank bills" is used to designate "a kind or part of the national currency." *Ex parte Prince*, 9 South. 659, 660, 27 Fla. 196, 26 Am. St. Rep. 67.

NATIONAL BANK NOTES.

National bank notes are not money in which a sufficient tender can be made. *Chicago, I. & E. Ry. Co. v. Patterson*, 59 N. E. 688, 692, 26 Ind. App. 295.

The description in an indictment for larceny of the property stolen as "national bank notes, commonly called national currency notes," means notes of a national bank, and not national notes of a bank. The notes are bank notes, and not national notes, and they are so described in the indictment. *Hummel v. State*, 17 Ohio St. 628, 633.

NATIONAL BANKING SYSTEM.

"National banking system" is a term used to designate a system of banks authorized by Act Cong. June 3, 1864 (13 Stat. 99), and amended by 15 Stat. 34, 270, 16 Stat. 251, 17 Stat. 603. The leading features of

the system are (1) the security of the circulating notes of those banks by the pledge of government bonds in the hands of the Treasurer of the United States, and, in case of the failure of the bank to redeem its notes, then redemption of those notes for the government, for which it is to be reimbursed by the proceeds of the bonds deposited, and the first lien on all the assets of the bank; (2) the responsibility of the stockholders of the bank to the extent of the par value of the stock held by them, respectively, in addition to the amount invested in their shares; (3) the whole system to be under the surveillance of the comptroller of the currency, with full power to examine into the affairs of each bank, and, in cases of noncompliance with the provisions of the law, to appoint a receiver to administer and wind up their affairs. *In re Manufacturers' Nat. Bank* (U. S.) 16 Fed. Cas. 665, 667, 668.

NATIONAL BUILDING AND LOAN ASSOCIATION.

A building and loan association doing a general business under the statutes of Minnesota is known as a national, as distinguished from a local, building and loan association. *Maudlin v. American Savings & Loan Ass'n*, 65 N. W. 645, 63 Minn. 358.

NATIONAL CURRENCY.

"National currency," as used in an indictment for larceny, imports a particular species of money, or of currency circulating as money. The acts of Congress indicate that the issue of national banks is to be designated as national currency. In popular acceptance, probably the national currency embraces treasury notes, and the issue of national banks. Whether the popular acceptance or the meaning of the term as it is to be extracted from the acts of Congress is adopted, it designates notes or bills circulating by authority of the general government as money, and a description in an indictment as \$320 in national currency describes the kind or species of currency and is sufficient. *Grant v. State*, 55 Ala. 201, 209.

"National currency of the United States," as used in an indictment charging a larceny of notes of the national currency of the United States, is equivalent to United States currency. Currency of the United States is certainly the same thing as United States currency, and the addition of the word "national" can make no difference. If it has no meaning at all, it must be rejected as surplusage. If it has any meaning at all, it can only refer to the nation of the United States, and "currency of the nation of the United States," must mean currency of the United States. There are two kinds of United States currency, both of which

may properly be called national currency of the United States, one of which consists of treasury notes, and the other of national bank notes. Both of these kinds of currency are embraced in the denomination of United States currency, contained in an act expressly declaring that, to sustain a charge of larceny of United States currency, it shall be sufficient if the accused be proved guilty of larceny of national bank notes or United States treasury notes. *Dull v. Commonwealth* (Va.) 25 Grat. 965, 973.

National currency is that which is issued under the sanction of a nation. *State v. Gasting*, 23 La. Ann. 609, 610.

A certificate of receiving a certain amount "on deposit in national currency" means that the maker of the certificate had received a deposit in money, for the words "national currency" denote money, and contain, by implication of law, a promise to repay the depositor his money. *Long v. Straus*, 7 N. E. 763, 764, 107 Ind. 94, 57 Am. Rep. 87. .

NATIONAL DOMAIN.

The "national domain," properly speaking, comprehends all the landed estate and all the rights which belong to the nation, whether the latter is in the actual enjoyment of the same, or has only a right to re-enter on them. *Civ. Code La* 1900, art. 486.

NATIONAL ELECTIONS.

The term "national elections," as used in acts relating to ballots and manner of voting in counties of 50,000 inhabitants or more, applies to any elections held for the purpose of choosing a member of Congress, or electors for President and Vice President of the United States. *Shaunon's Code Tenn.* 1896, § 123'.

NATIONAL TRADE UNION.

The term "national trade union," within the meaning of an act to legalize the incorporation of national trade unions, signifies any association of working people having two or more branches in the states or territories of the United States for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages, and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled, or unemployed members, or the families of deceased members, or for such other object or objects for which working people may lawfully combine, having in

view their mutual protection or benefit. *U. S. Comp. St.* 1901, p. 3204.

NATIONALITY.

The nationality of a man means his natural allegiance. *United States v. Wong Kim Ark*, 18 Sup. Ct. 456, 459, 169 U. S. 649, 42 L. Ed. 890.

NATIVE.

Natives are all persons born within the jurisdiction and allegiance of the United States. This is the rule of the common law, without any regard or reference to the particular condition or allegiance of their parents, with the exception of the children of ambassadors, who are, in theory, born within the allegiance of the foreign power they represent. *Town of New Hartford v. Town of Canaan*, 5 Atl. 360, 362, 54 Conn. 39 (citing 2 Kent, Comm. [9th Ed.]).

Chancellor Kent, in his Commentaries, speaking of the general division of the inhabitants of every country, under the comprehensive title of "Aliens and Natives," says: "Natives are all persons born within the jurisdiction and allegiance of the United States. This is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are, in theory, born within the allegiance of the foreign power they represent. To create allegiance by birth, the party must be born not only within the territory, but within the allegiance, of the government. If a portion of the country be taken and held by conquest in war, the conqueror acquires the rights of the conquered as to its dominion and government, and children born in the armies of a state, while abroad and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to which the army belongs." *United States v. Wong Kim Ark*, 18 Sup. Ct. 456, 463, 169 U. S. 649, 42 L. Ed. 890.

NATIVE-BORN CITIZENS.

The term "native born citizens of the United States," as used in the Constitution, was assumed in *McCreery v. Somerville*, 22 U. S. (9 Wheat.) 354, 6 L. Ed. 109, to include children born in that state of an alien who was still living, and who had not been naturalized; and, without such assumption, the case would not have presented the question decided by the court. In *Dred Scott v. Sandford*, 60 U. S. (19 How.) 393, 15 L. Ed. 691, Mr. Justice Curtis said: "The first section of the second article of the Constitution uses the language, 'a natural born citizen.' It thus assumes that citizenship

may be acquired by birth. Undoubtedly this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth." In *United States v. Rhodes* (U. S.) 27 Fed. Cas. 785, Mr. Justice Swayne, sitting in the Circuit Court, said: "All persons born in the allegiance of the King are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Such is the rule of the common law, and it is the common law of this country, as well as of England." *United States v. Wong Kim Ark*, 18 Sup. Ct. 456, 462, 169 U. S. 649, 42 L. Ed. 890.

NATURAL.

Things or results which are only possible cannot be spoken of as either "probable or natural," for the latter are those things or events which are likely to happen, and which for that reason should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference. *Scott v. Allegheny Valley Ry. Co.*, 33 Atl. 712, 713, 172 Pa. 646 (citing *South Side Pass. Ry. Co. v. Trich*, 117 Pa. 390, 11 Atl. 627, 2 Am. St. Rep. 672).

NATURAL BORN.

The term "natural born," as sometimes used, means bastard; born out of wedlock. *Bouv. Law Dict.* On the other hand, it has been held that "natural," in a statute providing that adopted children shall have all the rights of natural children, means legitimate. *Barns v. Allen* (Ind.) 9 Am. Law Reg. (O. S.) 747. Under Rev. St. § 4425, as amended by Act 1881, giving a right of action for injuries occasioned by negligence and providing that, in case there be no husband or wife, or they fail to sue, the minor child or children of the deceased, whether such minor child be the natural born or adopted child of the deceased, shall have such right, etc., the words are simply used to show that adopted children and the adopting parents are to have the benefit of the act, the same as in case of children by procreation. *Marshall v. Wabash R. Co.*, 25 S. W. 179, 180, 120 Mo. 275.

NATURAL BORN CITIZEN.

Independently of the constitutional provision, it has always been the doctrine of this country, except as applied to Africans brought here and sold as slaves, and their descendants, that birth within the limits and

jurisdiction of the United States of itself creates citizenship. In the case of *Lynch v. Clarke* (N. Y.) 1 Sandf. Ch. 583, Assistant Vice Chancellor Sandford said that he entertained no doubt that every person born within the limits and allegiance of the United States, whatever the situation of his parents, was a natural born citizen, and added, that this was the general understanding of the legal profession. In *re Look Tin Sing* (U. S.) 21 Fed. 905, 909.

The term "natural born citizen of the United States" means all persons born in the allegiance of the United States. *United States v. Rhodes* (U. S.) 27 Fed. Cas. 785, 789.

The natural born subjects of a monarch comprise all persons born in the allegiance of the King. *United States v. Rhodes* (U. S.) 27 Fed. Cas. 785, 789.

Every person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen, within the sense of the Constitution, and entitled to all the rights and privileges pertaining to that capacity. *Town of New Hartford v. Town of Canaan*, 5 Atl. 360, 364, 54 Conn. 39 (citing *Rawle*, Const. U. S. p. 86). See also, *Lynch v. Clarke* (N. Y.) 1 Sandf. Ch. 584, 2 Kent, Comm. (9th Ed.); *McKay v. Campbell* (U. S.) 16 Fed. Cas. 157; *rfield*, Int. Code, 132; *Morse*, Citizenship, § 203).

NATURAL BOUNDARY.

A river boundary is treated as a natural boundary, and the rights of the parties change with the change of its bed. *Peucker v. Canter*, 63 Pac. 617, 620, 62 Kan. 363.

"Natural boundaries," as used in Pol. Code, § 3461, which requires certain assessment lists to contain a description by local subdivisions, swamp-land surveys, or natural boundaries, is not construed to exclude all artificial boundaries or boundaries made by man. Any description which clearly identifies and marks out the land is sufficient. *Swamp Land Reclamation Dist. No. 407 v. Wilcox* (Cal.) 14 Pac. 843, 845.

A savanna which is a natural meadow may constitute a natural boundary of land, although it is not as well defined as some other natural objects. A clause in a deed to a point in the bottom of a savanna was held a sufficient description. *Stapleford v. Brinson*, 24 N. C. 311, 313.

Whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title in the land of which it has been made a part, as a house, a mill, a wharf, or the like, the

side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not, in its description or nature, include the earth as far down as the grantor owns, and yet has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stones, then the center of the thing so running over or standing on the land is the boundary of the land granted. *City of Boston v. Richardson*, 95 Mass. (13 Allen) 146, 154, 155.

Bluffs of rock and summits of a mountain may be so steep and rugged as to constitute a natural boundary of land. The law does not require a vain and useless thing to be done, and there would be no sense in a law which required the erection of a fence over a bluff of rocks so steep and rugged that neither man nor beast could travel over it. *Eureka Mining & Smelting Co. v. Way*, 11 Nev. 171, 177.

NATURAL BUTTER AND CHEESE.

For the purposes of the chapter relating to adulteration, the terms "natural butter and cheese," "natural butter or cheese, produced from pure, unadulterated milk or cream from the same," "butter and cheese made from unadulterated milk or cream," "butter or cheese, the product of the dairy," and "butter or cheese," shall be understood to mean the products usually known by the terms "butter and cheese," and which butter is manufactured exclusively from pure milk or cream, or both, with salt and rennet, and with or without any harmless coloring matter, and which cheese is manufactured exclusively from pure milk or cream, or both, with salt and rennet, and with or without any harmless coloring matter or sage. *Bates' Ann. St. Ohio 1904*, § 4200-14; *State v. Capital City Dairy Co.*, 57 N. E. 62, 64, 62 Ohio St. 350, 57 L. R. A. 181.

NATURAL CAPACITY TO CONTRACT.

There is a distinction between a minor's natural capacity to contract—i. e., the mental ability and discretion requisite to an intelligent assent—and his capacity to make such a contract as will bind his person and property. The one rests on a law of nature. The other is limited by municipal law. The latter capacity is inconsistent with the rights of parents. His services belong to them. It may be inconsistent with the completion of his education and preparation for the duties of citizenship. From the age of 14 he has discretion—is capable of contracting as truly, though not usually as wisely, as at any period of his life; and the law, in recog-

nition of this fact, permits him to contract. He can assume the obligation of the most important contract in life—that of marriage—and may dispose of his personal property by will. (By statute, a testator must be 19 years old.) An adult's promise to pay the rent of premises occupied by him while an infant over 14 years of age is binding, even if made in ignorance of his non-liability. *Bestor v. Hickey*, 41 Atl. 555, 556, 71 Conn. 181.

NATURAL CAUSES.

Act Cal. March 4, 1889, § 7, providing that the widow or children of a police officer who shall die from natural causes after having served 10 years shall be entitled to a pension, will not be held to include a death where a person is killed. *Slevin v. City and County of San Francisco*, 55 Pac. 785, 786, 123 Cal. 130, 44 L. R. A. 114.

There is an observable distinction between "natural" and "artificial" causes of injury; that is, those resulting in ordinary course from causes beyond human control, and those created by voluntary choice or agency. *Rowland v. Miller*, 15 N. Y. Supp. 701, 702.

NATURAL CHANNEL.

The term "natural channel" includes all channels through which, in the existing condition of the country, the water, whether a living stream or surface water, naturally flows; and where, by reason of the grading of the lots and streets, the waters flowing to a channel are different from what before the improvement of the city naturally flowed to the same point, and the channel itself is thereby changed, it is the duty of the city to protect the property of its citizens from the waters flowing through such new channel, through which, under natural laws, the surface waters are discharged, and which channel must then be regarded as a natural channel. *Larrabee v. Town of Cloverdale*, 63 Pac. 143, 145, 131 Cal. 96.

NATURAL CHILD.

"Natural child" is a phrase employed to designate children born out of lawful wedlock. *Marshall v. Wabash R. Co.* (U. S.) 46 Fed. 269, 273.

The law denominates as "natural children" illegitimate children who have been acknowledged by their father. *Civ. Code La.* § 202. *Succession of Vance*, 34 South. 767, 768, 110 La. 760.

NATURAL CONSEQUENCES.

Damages which are the natural consequences of an act, to be the basis of legal

redress, must not only be the natural sequence of the wrongful act or omission, but must flow directly from it in observance of some well understood and recognized material force. *Kuhn v. Jewett*, 32 N. J. Eq. (5 Stew.) 647, 649 (citing Whart. Neg. § 97).

The natural consequence of means used is the consequence which ordinarily follows from their use—the result which may be reasonably expected from their use, and which ought to be expected. *Western Commercial Travelers' Ass'n v. Smith* (U. S.) 85 Fed. 401, 405, 29 C. O. A. 223, 40 L. R. A. 653.

"Natural consequences," as applied to the damages arising from breach of contract, mean those which would result in the usual course of things, as distinguished from accidental or collateral injury, or such as would spring out of special circumstances, not usually depending upon such transaction. *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 170, 51 Am. Rep. 435.

The natural consequence of an act is the consequence which ordinarily follows from it—the result which may reasonably be anticipated from it. Where a drover traveling with cars loaded with stock stepped off of a car, intending to step on the caboose just as the caboose was shunted off the train and put on a side track, it could not have been anticipated by the railroad company, or those employed, that the drover would attempt to step from the stock car to the caboose just at that time, and the injury which he sustained was not the natural consequence of any act of the railroad company. *Chicago, St. P., M. & O. R. Co. v. Elliott* (U. S.) 55 Fed. 949, 953, 5 C. O. A. 347, 20 L. R. A. 582.

NATURAL COURSE OF DRAINAGE.

The meaning of the words "natural course of drainage," in a city charter requiring that sewers shall connect with the natural course of drainage, is a question of law, and whether any given connection of a sewer is with the natural course of drainage, in accordance with that meaning, is a question of fact, and both questions are for the determination of the courts, and not of the municipal legislature. "The natural course of drainage" means the natural course or passage of drainage with which sewers may be connected. *Bayha v. Taylor*, 36 Mo. App. 427, 435.

A city charter required that district sewers should connect with the public sewer, or else with the natural course of drainage. The ordinance of the city provided for the construction of a sewer whose only outlet was the bed of the creek, which had long been abandoned by a channel, and which, by the construction of streets, railroads, etc.,

across it, had been converted into a pond. Held, that this creek was no longer a natural course of drainage, so that the ordinance was void for non-conformation to the charter. *City of Kansas v. Swope*, 79 Mo. 446.

NATURAL DAY.

The expression "natural day," as used in Pub. Laws, c. 1004, providing that no employé of a street car company shall be required to work more than 10 hours within the 24 hours of the natural day, is defined by Bouvier to be the period of time elapsing between sunrise and sunset. In re Ten Hour Law for St. Ry. Corp., 54 Atl. 602, 609, 24 R. I. 603, 61 L. R. A. 612.

NATURAL DOMICILE.

Vattel says: "The natural or original domicile is that given us by birth, and we are considered as retaining it until we have abandoned it in order to choose another." *Johnson v. Twenty-One Bales* (U. S.) 13 Fed. Cas. 855, 863.

NATURAL EFFECT.

The rule of law requires that the damages chargeable to a wrongdoer must be shown to be the natural and proximate effects of his delinquency. The term "natural" imports that they are such as might reasonably have been foreseen—such as occur in an ordinary state of things. *Wiley v. West Jersey R. Co.*, 44 N. J. Law (15 Vroom) 247, 251 (citing Cuff's Adm'rs v. Newark & N. Y. R. R., 35 N. J. Law [6 Vroom] 17, 10 Am. Rep. 205; *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. Law [10 Vroom] 299, 23 Am. Rep. 214); *Flynn v. Consolidated Traction Co.*, 52 Atl. 369, 67 N. J. Law, 546; *Newark & S. O. R. Co. v. McCann*, 34 Atl. 1052, 1053, 58 N. J. Law (29 Vroom) 642, 33 L. R. A. 127; *Pielke v. Chicago, M. & St. P. Ry. Co.*, 41 N. W. 669, 672, 5 Dak. 444; *Carter v. Cape Fear Lumber Co.*, 39 S. E. 828, 831, 129 N. C. 203.

NATURAL FLOW.

The term "natural flow," as used in statutes regulating the control of natural gas wells, necessarily means the entire volume of gas that will issue from the mouth of a well when retarded only by the atmospheric pressure. *Richmond Natural Gas Co. v. Enterprise Natural Gas Co.*, 66 N. E. 782, 786, 31 Ind. App. 222.

"Natural flow," as used in St. 1875, c. 217, authorizing a certain city to take water from a pond, provided that a dam shall be built where it flows into a particular river, sufficient in height to retain sufficient water

for one year's supply for the city, and that the natural flow of the pond into the river shall at all times be maintained, means the quantity of water ordinarily flowing in the stream at the times when its volume is not increased by unusual freshets or rains. *Nemasket Mills v. City of Taunton*, 44 N. E. 609, 166 Mass. 540.

NATURAL FOOL.

A natural fool is one who is such from his nativity. In *re Anderson*, 43 S. E. 649, 650, 132 N. C. 243.

NATURAL FRUITS.

Natural fruits are such as are the spontaneous product of the earth. The product and increase of cattle are likewise natural fruits. *Civ. Code La.* 1900, art. 545.

NATURAL GAS.

As article of commerce, see "Article."

As bitumen, see "Bitumen."

Gas is a mineral, but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights with much more careful consideration of the principles involved than of the mere decisions. *Ridgway Light & Heat Co. v. Elk County*, 43 Atl. 323, 324, 191 Pa. 465; *West Moreland & Cambria Nat. Gas Co. v. De Witt*, 18 Atl. 724, 727, 130 Pa. 235, 5 L. R. A. 731. Water, oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner. Their fugitive and wandering existence within the limits of a particular track was uncertain, as said by Chief Justice Agnew in *Brown v. Vandergrift*, 80 Pa. (30 P. F. Smith) 147, 148. They belong to the owner of the land, and are a part of it, so long as they are on or in it and are subject to his control; and when they escape and go into other land, or get into another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even a distant owner drills his own land and strikes the gas, so that it comes into his well and under his control, it is no longer yours, but his. *West Moreland & Cambria Nat. Gas Co. v. De Witt*, 18 Atl. 724, 727, 130 Pa. 235, 5 L. R. A. 731.

Gas is a mineral, so that while in its original situation it is a part of the land, and possession of the land is possession of the gas. It is, however, a mineral of peculiar attributes, so that precedents with regard

to ordinary minerals must be applied to the decision of questions relating to it with great care. *Ohio Oil Co. v. Indiana*, 20 Sup. Ct. 576, 582, 177 U. S. 190, 44 L. Ed. 729.

Natural gas is a fluid mineral substance, subterranean in its origin and location, possessing in a restricted degree the properties of underground waters, and resembling water in some of its habits. Unlike water, it is not generally distributed, and, so far as now understood, it can be used for but few purposes; the more important being that of fuel. *Manufacturers' Gas & Oil Co. v. Indiana Gas & Oil Co.*, 57 N. E. 912, 915, 155 Ind. 461, 50 L. R. A. 768.

Natural gas is a fuel—a substance which may be converted into heat by combustion with atmospheric air. It is not heat itself. *Emerson v. Commonwealth*, 108 Pa. 111, 126.

Natural gas is fuel, so that, just as a municipal corporation would have no right to confer a special privilege to supply the town or city with coal or wood, it likewise has no right to grant a natural gas company the exclusive privilege of using its streets for laying its mains and pipes. *Citizens' Gas & Mining Co. v. Town of Elwood*, 114 Ind. 332, 338, 16 N. E. 624.

Natural gas partakes more nearly of the character of the elements air and water than it does of those things which are the subject of absolute property. It is more volatile than the air, and when tapped in the earth it escapes more readily. When the supply is withdrawn from one place, it flows of its own accord from other points, and replaces that which has been withdrawn. What distance or from what source it comes is the subject of conjecture only. Like water percolating beneath the surface, it may, by sinking a well or otherwise, be appropriated for the use of one person on his farm, while the supply may come from an adjoining or many distant farms. It is only the subject of qualified property. *Wood County Petroleum Co. v. West Virginia Transp. Co.*, 28 W. Va. 210, 215, 57 Am. Rep. 659.

The title to natural gas vests in any private owner until it is reduced to actual possession, and hence a statute (*Burns' Rev. St.* 1894, § 7510) prohibiting any one operating a natural gas well from allowing the escape of gas into the open air is not unconstitutional, as an unwarranted interference with private property. *State v. Ohio Oil Co.*, 150 Ind. 21, 30, 49 N. E. 809, 812, 47 L. R. A. 627.

NATURAL GAS COMPANY.

The term "natural gas company," as used in the chapter relating to the listing of personal property for taxation, includes any person or persons, joint-stock associa-

tion, or corporation, wherever organized or incorporated, when engaged in the business of supplying natural gas for lighting, heating, or power purposes to consumers within this state. Bates' Ann. St. Ohio 1904, § 2780-17.

NATURAL GUARDIAN.

A "natural guardian," within section 1, c. 12, Acts 1798, providing that whenever land shall descend or be devised to a male under the age of 21 years, or a female under 16, not having a natural guardian, or guardian appointed by last will, the orphans' court should have power to appoint a guardian for such minors, is such a natural guardian as is entitled to the guardianship of the estate as well as of the person of the infant. By the common law the guardian by nature had only the custody of the person of his heir apparent, but after the death of the father the mother, if living, was the guardian by nature of her heir apparent. At common law there was no such natural guardian as is meant by the statute in question. *Mauro v. Ritchie* (U. S.) 16 Fed. Cas. 1171, 1179.

NATURAL HEIR.

Acts 1855, p. 122, provide that any person may adopt, and that the adopted child shall be entitled to and receive all the rights and interest in the estate of such adopted father or mother, by descent or otherwise, that such child would if the natural heir of such adopted father or mother. Held, that the word "natural" is here used in the sense of "legitimate," and not as including illegitimate. The word "natural" is nowhere used to designate illegitimate children, but the words "bastard" and "illegitimate" are employed for that purpose. *Barns v. Allen* (Ind.) 9 Am. Law Reg. (O. S.) 747, 750.

"Natural heir," as used in the statutes declaring that after adoption the adopted child shall be entitled to and receive all the rights and interests in the estate of such adopting father and mother, by descent or otherwise, that such child would have if the natural heir of such adopting father and mother, means natural child. *Markover v. Krauss*, 31 N. E. 1047, 1050, 132 Ind. 294, 17 L. R. A. 806.

A testator in 1869 executed in the city of New York a will whereby he devised his interest in a house and lot in said city to two cousins. Subsequently, in Switzerland, he executed in accordance with the laws of New York a second will, whereby, after giving certain legacies to his servant, he devised the remainder of his property, all situated or invested in America, to his natural heirs. Testator left, him surviving, a mother, a sister, and cousins, but no widow or children. Held, that by the term "natural heirs" the

testator meant his mother and sister. "We should say, to a man reared and educated in New York, the term 'natural heirs' would be understood and regarded as a mother and sister, rather than cousins in any degree. It results from these views that the devise is to his mother and sister as his natural heirs, or that the devisees are so indefinite as to invalidate it as a devise to any one." *Ludlum v. Otis* (N. Y.) 15 Hun, 410, 414.

The words "natural heirs" and "heirs of the body" in a will, and by way of executory devise, are considered as of the same legal import. *Smith v. Pendell*, 19 Conn. 107, 112, 48 Am. Dec. 146.

The term "natural heirs," in a will bequeathing property to a certain beneficiary, and providing that, if the latter die without "natural heirs," the property shall go, etc., may include all kinds of heirs. The common understanding would say at once that "natural heirs" meant children. Testator well understood that no one could have unnatural heirs, and, as the word "heirs" alone might include both lineal and collateral, we think she intended something less than the whole class, and that she meant children or issue. *Miller v. Churchill*, 78 N. C. 372, 373.

NATURAL IMPORT.

The natural import of words is that which their utterance promptly and uniformly suggests to the mind—that which common use has affixed to them. The technical is that which is suggested by their use in reference to a science or profession—that which particular use has affixed to them. And, when the natural and technical import unite upon a word, both these rules combine to control its construction, and no other signification than that which they suggest can be affixed to it, unless upon the most positive declaration that a different one was designed. *People v. Hallett*, 1 Colo. 352, 359; *People v. May*, 3 Mich. 598, 605.

NATURAL INCREASE.

The natural increase of property spoken of in Code, § 2259, enacting that the natural increase of property shall belong to the tenant for life, but that any extraordinary accumulation of the corpus, such as issue of new stock upon the shares of an incorporated or joint-stock company, attaches to the corpus, and goes with it to the remainderman, are used in antithesis to the subsequent words, "extraordinary accumulation," and they mean the ordinary accumulation of the property; that is, in case of stock, the ordinary increase of its value by larger dividends declared. Dividends are the ordinary, the natural, the only natural income or increase of this sort of property. *Millen v. Guerrard*, 67 Ga. 284, 291, 44 Am. Rep. 720.

NATURAL JUSTICE.

By "natural justice" we mean that which is founded in equity, in honesty, and right. Natural justice requires that a parent shall care for his children. *Kempsey v. Maginnis*, 2 Mich. N. P. 49, 55.

NATURAL LAW.

Natural law is the moral system framed by ethical writers, and, though the same as the divine law, the latter is more authentic, since the former is formed and declared by the assistance of human reason. *Mayer v. Frobe*, 22 S. E. 58, 61, 40 W. Va. 246.

Natural law, as defined by Burlamqui, "is a law which so necessarily agrees with the nature and state of man that without observing its maxims the peace and happiness of society can never be preserved," and is so called "because a knowledge of them may be attained merely by the light of reason, from the fact of their essential agreeableness with the constitution of human nature." *Borden v. State*, 11 Ark. (8 Eng.) 519, 527, 44 Am. Dec. 217.

NATURAL LIFE.

See "During Natural Life."

"Natural," as used in the sentence of a prisoner for his natural life, is surplusage, and does not restrict or limit the word "life," nor affect the meaning implied by How. Ann. St. § 9075, providing that, on conviction of murder in the first degree, the person shall be punished by solitary confinement at hard labor in the State Prison for life. *People v. Wright*, 50 N. W. 792, 799, 89 Mich. 70.

NATURAL OBJECT.

"Natural object," as used in Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], requiring that all records and mining claims shall contain such a description of the claim or claims, located by reference to some natural object or permanent monument, as will identify the claim, may include either a large boulder, or a well-known patented claim. *Gamer v. Glenn*, 20 Pac. 654, 658, 8 Mont. 371.

Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], requires that the record of a mining claim shall contain such a description of the claim, located by reference to some "natural object or permanent monument," as to identify the claim. Held, that the natural object referred to may consist of any fixed natural object, and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground, and a location of a mining claim, referring to cer-

tain mountain peaks, without naming or describing them, and describing the claim along a river near a certain city, and of a shaft on a certain creek, was a sufficient compliance with the statute; the certificate showing the state, county, and district where located. *Jackson v. Dines*, 21 Pac. 918, 919, 13 Colo. 90.

"Natural objects," as used in the Revised Statutes of the United States, requiring that all records of mining claims shall contain a description of the claim or claims, located by reference to some natural objects or permanent monuments that will identify the claims, means such objects as will enable a person endeavoring to locate a claim to correctly make a survey of it by means of the reference made to such natural objects or permanent monuments. *Baxter Mountain Gold Min. Co. v. Patterson*, 3 Pac. 741, 743, 3 N. M. (Johns.) 179.

In Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], requiring that the record of a mining claim shall contain such a description by reference to some natural object or permanent monument that will identify the claim, "natural object" is a general term, susceptible of different shades of meaning; depending largely on its application. What might be regarded as a natural object for one purpose might not be so considered with reference to a different purpose. Natural objects abound everywhere, but their characteristics vary greatly; some being unstable and ephemeral, and others fixed and durable; and, since only those possessing the latter qualities are suitable for landmarks, it is evident that such only were intended by the terms employed in the statute. A tree is a fixed natural object, and, as a monument, is as firmly planted in the ground and as durable as a post or stake. It should be marked in some manner so as to be readily identified, unless it possesses peculiarities so different from trees in general that a description thereof is sufficient to identify it. Thus marked naturally or artificially, there would be less room to question the sufficiency of a tree as a natural object or permanent monument, within the meaning of the law, than the sufficiency of a shaft sunk in the ground. Mr. Wade, in his *American Mining Law*, 113, enumerates the following objects as satisfying the requirements, to wit: Stone monuments; blazed trees; the confluence of streams; the point of intersection of well-known gulches, ravines, or roads; prominent buttes, hills, etc. *Quimby v. Boyd*, 6 Pac. 462, 466, 8 Colo. 194.

"Natural object," as used in the federal and territorial laws requiring the location of a mining claim to be made with reference to some natural object, is any permanent feature in the landscape. A cañon is as much a natural object in the landscape as

the mountains which lie on either side of it, or a river or a plain. *Flavin v. Mattingly*, 19 Pac. 384, 385, 8 Mont. 242.

Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], requires the certificate of location of mining claims to contain a description of the claim by reference to some natural object or permanent monument as will identify it. Stone monuments, blazed trees, the confluence of streams, the point of intersection of well-known gulches, permanent hills, mining shafts, etc., are enumerated as satisfying the requirements of the law. The permanent monuments of a mining claim are also regarded as sufficient. The intention of the provision is to give one seeking the location of a recorded claim something in the nature of an inner point from which to start, and, following the course of distance given, to define with reasonable certainty the claim located. A description of a claim as being so many feet north of a certain lode is insufficient. *Drummond v. Long*, 13 Pac. 543, 545, 9 Colo. 538.

NATURAL OBLIGATION.

A natural obligation is one which cannot be enforced by action, but which is binding on the party who makes it, in conscience and according to natural justice. Civ. Code La. 1900, art. 1757.

The provision of the federal Constitution which prohibits states from passing any law impairing the obligation of contracts relates to the legal obligation of the contract, and not to the natural obligation arising from conscience. The latter is but an imperfect obligation. It is called "obligation," says Pothier, "in an improper sense, for it rather influences than obliges; and even its influence operates with various degrees upon different individuals," whereas the legal obligation is a perfect obligation. It is the chain of the law which binds equally all men, and compels them, by real necessity, to perform their duties, and it is that necessity which constitutes the true character of an obligation. *Blair v. Williams*, 14 Ky. (4 Litt.) 34, 41.

A civil obligation is a legal title which gives the person in whose favor it is contracted a right of judicially enforcing it. A natural obligation is that which obliges the person in honor and conscience. Obligations are commonly both natural and civil. There are some, however, which are merely civil, and which the debtor may be judicially compelled to perform without being under any obligation to do so in point of conscience. *Blair v. Williams*, 14 Ky. (4 Litt.) 34, 39; *Lapsley v. Brashears*, Id. 47, 55.

Under a statute providing that "he who has received what is not due to him, whether he receives it through error or knowing-

ly, obliges himself to restore it to him from whom he has unduly received it, if the thing paid was not due in any manner, either civilly or naturally," it was held that money paid for a tax levied under a law which was unconstitutional could be recovered back, as there could not be a natural obligation to pay an unconstitutional tax. *Factors' & Traders' Ins. Co. v. City of New Orleans*, 25 La. Ann. 454, 456.

NATURAL PERSON.

See "Corporation."

NATURAL POSSESSION.

Natural possession is that by which a man detains a thing corporeally, as by occupying a house, cultivating ground, or retaining a movable in possession. Natural possession is also defined to be the corporeal detention of a thing which we possess as belonging to us, without any title to that possession, or with a title which is void. Civ. Code La. 1900, arts. 3428, 3430. See, also, *Vicksburg, S. & P. R. Co. v. Le Rosen*, 26 South. 854, 956, 52 La. Ann. 192; *Sunol v. Hepburn*, 1 Cal. 254, 262.

NATURAL PRESUMPTION.

A natural presumption is where a fact is proved, wherefrom, by reason of the connection founded on experience, the existence of another fact is directly inferred. *Gulick v. Loder*, 13 N. J. Law (1 J. S. Green) 68, 72, 23 Am. Dec. 711.

A natural presumption arises only from a violent probability, because it is a conclusion drawn by experience from the usual current of things; but no violent probability of death arises from a peril which, though possible, is remote. There is no mode of conveyance which has not its perils, and, if the mere departure of a person not heard of during a period of legal presumption were enough to warrant a natural presumption of his death within a more contracted one, the legal presumption, stripped of its deficiency to dispose of the uncertainty it was introduced to remedy, would be deprived of the greater part of its value. *Burr v. Sim* (Pa.) 4 Whart. 150, 172, 33 Am. Dec. 50.

"Natural presumptions are nothing else than deductions from general experience, and they therefore belong to the class of circumstantial evidence. They are founded in an assumption of the fact, from its consistency with known principles of human conduct, such as that a man * * * is aware of the natural consequences of his actions, with many others that are put as instances, to which I add the very natural presumption that he is always ready to take those measures which are obviously necessary to the

protection of his property or interests. The presumption that he is endowed with a competent share of sagacity to perceive those measures is a reasonable one, and that he is so true to the instinct of his nature as to pursue them, being perceived, is as much so. These are premises from which a lawyer might argue, and a jury draw a conclusion of the fact. As a general rule, then, it may be assumed that a man has sagacity to perceive, and energy to execute, every measure which the preservation of his property may dictate." *Huntress v. Boston & M. R. Co.*, 34 Atl. 154, 155, 66 N. H. 185, 49 Am. St. Rep. 600.

NATURAL RIGHTS.

Natural rights are such as appertain originally and essentially to man—such as are inherent in his nature, and which he enjoys as a man, independent of any particular effort on his side, as, for example, the right of providing for one's own preservation. *Borden v. State*, 11 Ark. (8 Eng.) 519, 527, 44 Am. Dec. 217.

NATURAL SLATE.

Natural slate is a metamorphic clay rock. In the quarry and in masses it has cleavage planes, so that it can be readily divided into thin plates or slabs, which are very solid and fine-grained, and which may be easily worked and smoothed; and it is therefore useful as a top covering, where such covering is required to be thin, smooth, and water tight. It is especially valuable for roofing, and in the manufacturing of mantles, billiard tables, and other similar objects. Whetslate has a fine grain, and makes hones. A tough kind (hornblende slate) is used for flagging and sidewalks. A soft kind, containing carbon (drawing slate or graphic slate), is used for pencils. Polishing slate has a peculiarly fine grain, and is found in Bohemia. It is used in slips and in powder. Slate is also made into tablets for use in schools, and wherever it is convenient for writings and drawings intended to be expunged. *Plastic Fireproof Const. Co. v. City & County of San Francisco* (U. S.) 97 Fed. 620, 623.

NATURAL STATE OF STREAM.

The natural state of stream is that in which the stream is under the ordinary operation of the physical laws which affect it. This may be different at different seasons of the year, and yet be ordinary by the recurrence of the same condition about the same season every year. It may ordinarily be high a portion of the season, and low at another portion, and at another it may be at a medium stage; yet, as these are ordi-

nary, by reason of their annual or frequent occurrences, so that a variance therefrom is an exception, they are the natural condition of the stream. *Dorman v. Ames*, 12 Minn. 451, 464 (Gil. 347, 363).

NATURAL STREAM.

A natural stream properly signifies a river flowing from its source to the ocean, or an outlet between one interior sea or lake and another, such as the rivers Mississippi, St. Clair and the Detroit. *Scott v. The Young America* (U. S.) 21 Fed. Cas. 851, 853.

NATURAL SUCCESSION.

The term "natural succession" means the succession taking place between natural persons, of which we have an example in descent on the death of the ancestors. *Thomas v. Dakin* (N. Y.) 22 Wend. 9, 100.

NATURAL SUPPORT.

See "Easement of Natural Support."

NATURAL USE AND ENJOYMENT.

The natural use and enjoyment of his own property which every man has while lawfully in such use and enjoyment means such development of its resources, and such customary and appropriate employment of the property itself, as are needful for its complete utilization, according to its inherent qualities or contents and its surroundings, and does not include, in any other case, the bringing upon it artificially of substances not naturally found there. *Evans v. Reading Chemical Fertilizing Co.*, 28 Atl. 702, 705, 160 Pa. 209.

NATURAL WANT.

Artificial wants distinguished, see "Artificial Wants."

It may be that, under the physical conditions existing in some portions of the state, irrigation is not theoretically a "natural want," in the sense that living creatures cannot exist without it; but its importance as a means of producing food from the soil makes it less necessary, in a scarcely appreciable degree, from the use of water by drinking it. *Lux v. Haggin*, 10 Pac. 674, 700, 69 Cal. 255.

NATURAL WATER COURSE.

A natural water course is a natural stream flowing in a defined bed or channel, having permanent sources of supply. It is not essential, to constitute a water course, that the flowing should be uniform or uninterrupted. The other elements existing, a

stream does not lose the character of a natural water course because in time of drought the flow may be diminished or temporarily suspended. It is sufficient if it is usually a stream of running water. *Bloodgood v. Ayers* (N. Y.) 37 Hun, 356, 359 (citing *Barkley v. Wilcox*, 86 N. Y. 140, 143, 40 Am. Rep. 519).

A water course is a channel or canal for conveyance of water, particularly in draining lands. It may be natural, as when it is made by the natural flow of the water, caused by the general superficies of the surrounding land from which the water is collected into one channel, or it may be artificial, as in case of a ditch or other artificial means used to divert the water from its natural channel, or to carry it from lowlands, from which it will not flow in consequence of the nature of the surface of the surrounding land. *Hawley v. Sheldon*, 64 Vt. 491, 493, 24 Atl. 717, 33 Am. St. Rep. 941.

A channel or other depression in the ground forming the bank of a river, through which water escapes and flows from the river only at times of high water in the river, does not constitute a natural water course. Waters which have overflowed the banks of a stream during a freshet, in consequence of the insufficiency of a channel to hold and carry them off, are surface waters, to be treated as a common enemy, against which any landowner may protect himself. *Singleton v. Atchison, T. & S. F. Ry. Co.*, 72 Pac. 786, 787, 67 Kan. 284 (citing *Missouri Pac. Ry. Co. v. Keys*, 55 Kan. 205, 40 Pac. 275, 49 Am. St. Rep. 249).

In order to constitute a natural water course, there must be a bed, and evidences of a permanent stream of running water. The term does not include ravines through which surface waters occasionally flow. *Rice v. City of Evansville*, 9 N. E. 139, 142, 108 Ind. 7, 58 Am. Rep. 22.

A water course consists of beds, banks, and water, and a natural water course has such characteristics while in a state of nature, and without artificial construction. Natural water courses are such as rivers, creeks, and branches. A canal can never come under such a designation, unless it is a mere enlargement of a natural water course. *Porter v. Armstrong*, 39 S. E. 799, 801, 129 N. C. 101.

A pond is not a natural water course, within the provisions of an act authorizing the road supervisors to open a water course from a road to a natural water course. *McLaughlin v. Sandusky*, 22 N. W. 241, 242, 17 Neb. 110.

A water course does not cease to be a "natural water course" by reason of the fact that its channel is artificially deepened for

the purpose of drainage. *Cleveland, C., C. & St. L. Ry. Co. v. Huddleston*, 52 N. E. 1008, 1011, 21 Ind. App. 621, 69 Am. St. Rep. 385.

NATURAL WEAR AND TEAR.

"Natural wear and tear," as used in an article of agreement for the sale of real estate, by which the vendor stipulated to deliver possession of the premises at a future day in as good repair as they were at the time of the execution of the contract, "natural and reasonable wear and tear excepted," means such decay or depreciation in value of the property as may arise from ordinary and reasonable use, and does not include an injury to the property by a freshet. The word "reasonable" was inserted in the agreement to meet the case of a destruction of the property by the freshet, and to qualify the exception to such wear and tear as might be reasonably supposed to arise from ordinary causes and the action of the elements. *Green v. Kelly*, 20 N. J. Law (Spencer) 544, 549.

Where a lessee covenanted to keep premises "without damages of any kind, except the natural wear of the same," and a part of the premises was destroyed by the negligent act of a third party, held, that the lessee was responsible for the damage. *Cook v. Champlain Transp. Co.* (N. Y.) 1 Denio, 91.

NATURALLY.

"Naturally," as used in an instruction authorizing the recovery of "such damages as have resulted naturally from the breach" of the warranty, is but the equivalent of "legitimately," "normally," or, in other words, embraces such damages as are the natural—that is to say, the legitimate, normal—result consequent upon the breach of the warranty. *Reese v. Bates*, 26 S. E. 865-870, 94 Va. 321.

"Naturally," as used in a conveyance of wells supplied by percolating water, and the property on which they are located, in which the grantor quitclaimed all right and title which he might have in and to what water would naturally flow into the wells, covers the water which the wells will receive when nothing is done to intercept its passage. The natural movement of water is that which will occur if no action is taken to obstruct or divert it. *Minard v. Currier*, 32 Atl. 472, 473, 67 Vt. 489.

In an action for breach of contract of agency, the defendant became liable for the full amount of damages which resulted naturally—that is, in the usual course of things—and proximately from the breach. *Parke v. Frank*, 75 Cal. 364, 370, 17 Pac. 427, 429.

As used in reference to the damages recoverable for a breach of contract, the word

"naturally" means in the usual course of things, or such as may reasonably be supposed to have been contemplated by the parties, when making the contract, as the probable result of the breach. *Mitchell v. Clarke*, 71 Cal. 164, 11 Pac. 882, 883, 60 Am. Rep. 529.

"Naturally," as used in an instruction in an action for injuries caused by falling on an icy sidewalk, due to water from a defective pipe on defendant's premises, that, to entitle plaintiff to recover, there must have been a nuisance on the walk, due to defendant's neglect, which must have been caused by some defect in the pipe, so that water would not naturally be carried off, imports that the result must be one which manifestly would come to pass, according to common experience, if the defect was allowed to remain. A defect in an outside gutter or spout which naturally would produce a nuisance necessarily would be of a certain magnitude, and would be visible on inspection. *Davis v. Rich*, 62 N. E. 375, 376, 180 Mass. 235.

NATURALLY IMPOTENT.

See, also, "Barren."

The term "naturally impotent," as used in Rev. St. c. 40, § 1, providing that when a marriage has been contracted, and it shall be adjudged, in the manner provided, that either party at the time of the marriage was and continued to be naturally impotent, the injured party may obtain a divorce, etc., means incurably impotent, whether the impotency results from a defect caused by nature, or from accident or the acts of the party. *Griffeth v. Griffeth*, 44 N. E. 820, 821, 162 Ill. 368.

The term "naturally impotent," as a cause for divorce, as used in Rev. St. c. 40, § 1, is to be construed as meaning incurably impotent, and not as referring to congenital incapacity. *Jorden v. Jorden*, 93 Ill. App. 633, 636.

NATURALIZATION.

See "Collective Naturalization."

"Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen. Congress, in the exercise of the power to establish a uniform rule of naturalization, has enacted general laws in which individuals may be naturalized, but the instances of collective naturalization by treaty or statute are numerous. Manifestly, the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former

nationality by removal or otherwise, as may be provided. All white persons, or persons of European descent, who were born in any of the colonies, or resided or had been adopted there before 1776, and had adhered to the cause of Independence up to July 4, 1776, were by the Declaration invested with the privileges of citizenship." *Boyd v. Nebraska*, 12 Sup. Ct. 375, 382, 143 U. S. 135, 36 L. Ed. 103.

The power to establish a uniform rule of naturalization given to Congress by the federal Constitution "is, by the well-understood meaning of the word, confined to persons born in a foreign country, and under a foreign government. It is not a power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage, and by the laws of the country, belongs to an inferior and subordinate class." *Scott v. Sandford*, 60 U. S. (19 How.) 393, 417, 15 L. Ed. 691.

NATURE.

Of accusation.

The word "nature" means the sum of qualities and attributes which make a thing what it is, as distinguished from others. The word "nature" is used in this sense in the usual constitutional provision that a person accused of crime is entitled to demand the nature and cause of the accusation against him; it being held that the attributes and elements of the accusation or crime, whenever it is possible to do so, should be set out in the indictment. *State v. Dougherty*, 4 Or. 200, 203.

The nature and cause of a criminal prosecution, as used in Declaration of Rights, § 9, declaring that, in all criminal prosecutions, accused has the right to demand the nature and cause of the accusation against him, is sufficiently averred by charging the crime alleged to be done; and it is not necessary to charge the mode or manner, which latter refers to the instrument with which the crime was committed, or the specific agency used to accomplish the result. *Goersen v. Commonwealth*, 99 Pa. 388, 398.

The nature and cause of the accusation which an indictment must exhibit, as required by Act March 31, 1860, § 20, means the crime laid to the charge of the accused; but the mode in which the crime was committed, the instrument with which the murder was effected, whether it was held in the right hand or the left, and whether the wound was inflicted upon the head or the body, are entirely apart from the nature and cause of the accusation. *Cathcart v. Commonwealth*, 37 Pa. 108, 114; *Campbell v. Commonwealth*, 84 Pa. 187, 199.

A constitutional requirement that a person accused of crime shall enjoy the right

to be "informed of the nature and cause of the accusation" against him means, by a long line of precedents, resting on principle, that in a prosecution for the commission of a statutory offense the words of the statute, or others of fully equivalent import, should be employed. *State v. Judge of Criminal Dist. Ct. for Parish of Orleans*, 21 South. 690, 691, 49 La. Ann. 231.

"Nature" is defined as meaning sort, kind, character, or species, and is so used in a statute requiring a recognizance in a criminal case to state the nature of the offense of which the principal is charged. *State v. Murphy*, 48 Pac. 623, 629, 23 Nev. 390.

The word "nature," in a statute requiring a recognizance in a criminal case to briefly state the nature of the offense, is held to mean the sort, kind, character, or species. *State v. Birchim*, 9 Nev. 95, 100.

Of case.

The words "form of action" cannot be construed to be the meaning of the words "nature of the case," in a statute providing that it shall not be deemed necessary, in any declaration or other pleading, to lay the venue in the county in which the action is brought, nor to set forth in any manner the place in which an act is alleged to have been done, unless when, from the nature of the case, the place may be material or traversable. "What is your form of action?" would not be answered by saying, "A tortious taking of a horse," any more than the injury, "What is the nature of your case?" would be responded to by saying, "Replevin." The form in which a suit is brought, and the subject-matter of it, or its cause of action, or the nature of its case, are totally distinct subjects. *Truax v. Parvis*, 32 Atl. 227, 228, 7 Houst. (Del.) 330.

Of demand.

Under St. 1862, p. 398, § 2, which provides that the contractor for a street improvement shall call upon the persons assessed for such improvement, and make demands for sums assessed against them, and make a return showing the "nature and character of the demand," it is necessary that the returns shall show a demand on the person assessed, or a satisfactory reason why it was not done. *Guerin v. Reese*, 33 Cal. 292, 298.

"Nature of demand," as used in the Revised Statutes, requiring that the publication of a citation in an action should state the nature of the plaintiff's demand, meant the character or controlling characteristics, and did require a statement of the cause of action. *Pipkin v. Kaufman*, 62 Tex. 545, 548.

Where the only description of the nature of plaintiff's demand contained in the cita-

tion was, "Suit, trespass to try title and remove cloud from title, cancel deed, and for damages," the motion to quash the citation should be granted. The citation merely gives the class to which the suit belongs, but does not distinguish it from any other suit for land or to cancel deed, and hence does not disclose the nature of the particular demand made. The dictionary defines "nature" to be the sum of qualities and attributes which make a thing what it is, as distinct from others, while it defines "class" to be an order or division of animate or inanimate objects grouped together on account of their common characteristics. *Ford v. Baker (Tex.)* 33 S. W. 1036, 1037.

Of obligation.

"Nature," as used in regard to the nature of an obligation, means those qualities which inhere in and pertain to it—such as whether it is joint, or joint and several. *Schultz v. Howard*, 65 N. W. 363, 63 Minn. 196, 56 Am. St. Rep. 470.

NAUSEOUS OR OFFENSIVE TRADE.

A deed to a city lot, prohibiting the grantee from maintaining any "nauseous or offensive trade" on the lot, will not be construed to include a grocery or provision store. *Tobey v. Moore*, 130 Mass. 448, 451.

NAVAL FORCES.

A naval paymaster's clerk, actually on duty, is a "person in the naval forces of the United States," as used in Act Cong. March 2, 1863, providing that any person in the naval forces of the United States who shall embezzle money of the United States shall be deemed guilty of a criminal offense. Such clerk is an officer of the same class as the paymaster himself, the surgeons, engineers, etc., viz., a staff officer; and he ranks with midshipmen, who are line officers. His duties bring him into immediate connection with the administration of the funds of the navy. Such an officer is certainly as necessary a part of, or appendage to, an organized and efficient navy, as a seaman, gunner, or any combatant. In re Bogart (U. S.) 3 Fed. Cas. 796, 800. See, also, *Ex parte Reed*, 100 U. S. 13, 21, 25 L. Ed. 538; *United States v. Hendee*, 8 Sup. Ct. 507, 508, 124 U. S. 309, 31 L. Ed. 465.

NAVAL SERVICE.

"Naval service of the United States," within the meaning of Rev. St. § 1624, arts. 4, 14, which extend the jurisdiction of a court-martial in certain cases to all "persons in the naval service of the United States," would include the regularly appointed clerk of a paymaster in the navy. *Ex parte Reed*,

100 U. S. 13, 21, 25 L. Ed. 538. See, also, *In re Bogart* (U. S.) 3 Fed. Cas. 796, 800; *United States v. Hendee*, 8 Sup. Ct. 507, 508, 124 U. S. 309, 31 L. Ed. 465.

NAVIGABLE

See "Not Navigable."

Make navigable, see "Make."

Navigable river as highway, see "Highway."

In the common-law sense of the term, a navigable river is one where the tide ebbs and flows. *Ex parte Jennings* (N. Y.) 6 Cow. 518, 528, 16 Am. Dec. 447; *Society for Establishing Useful Manufactures v. Morris Canal & Banking Co.*, 1 N. J. Eq. (Saxt.) 157, 158, 21 Am. Dec. 41; *Scott v. Willson*, 3 N. H. 421; *Ward v. Creswell*, 3 Willa. 265 (citing 3 Kent, Comm. 412); *Veazie v. Dwinel*, 50 Me. 479, 483, 484; *Bucki v. Cone*, 6 South. 160, 161, 25 Fla. 1. The distinction between rivers navigable and not navigable—that is, where the sea does or does not ebb and flow—is very ancient, *Adams v. Pease*, 2 Conn. 481, 484; and was early approved and adopted as the law of New York, Connecticut, and Massachusetts. *Commonwealth v. Chapin* (22 Mass.) 5 Pick. 199, 201, 16 Am. Dec. 386. This definition is not applicable to rivers in North Carolina. They are in fact navigable, for all purposes of public convenience, in many places beyond the influence of the tide. *Ingram v. Threadgill*, 14 N. C. 59, 61; *Hodges v. Williams*, 95 N. C. 331, 333, 59 Am. Rep. 242. This rule did not depend upon the navigability or non-navigability in fact of a stream, but upon the criterion afforded by the influx and reflux of the tide. *Wright v. Seymour*, 10 Pac. 323, 324, 69 Cal. 122; *Gaston v. Mace*, 10 S. E. 60, 62, 33 W. Va. 14, 5 L. R. A. 392, 25 Am. St. Rep. 848; *Allison v. Davidson* (Tenn.) 39 S. W. 905, 907. The streams of England are all, of necessity, springing from the limited extent of the country, short, and are not, in fact, as a rule, navigable, until tide water is reached. With these facts borne in mind, the reason of the common-law rule is apparent. *Wright v. Seymour*, 10 Pac. 323, 324, 69 Cal. 122.

The definition of a navigable river as one in which there is a flow or reflux of the tide may be very proper in England, where there is no river of considerable importance as to navigation which has not a flow of the tide; but it would be highly unreasonable when applied to our large rivers, such as the Ohio, Allegheny, Schuylkill, or Susquehanna and its branches. *Carson v. Blazer* (Pa.) 2 Bin. 475, 478, 4 Am. Dec. 463.

It is true that the flow and ebb of the tide is not regarded in this country as the usual or any real test of navigability, and only operates to impress prima facie the character of being public and navigable, and to

place the onus of proof on the party affirming the contrary. *Sullivan v. Spotswood*, 2 South. 716, 717, 82 Ala. 163.

By the term "navigable river," the law does not mean such as are navigable in common parlance. The smallest creek may be so to a certain extent, as well as the largest river, without being legally a natural stream. The term has in common law a technical meaning, and applies to all streams, rivers or arms of the sea where the tide ebbs and flows. *People v. Canal Appraisers*, 33 N. Y. 461, 478; *People v. Jessup*, 54 N. E. 682, 685, 160 N. Y. 249; *People v. Tibbetts*, 19 N. Y. 523; *Ex parte Jennings* (N. Y.) 6 Cow. 518, 16 Am. Dec. 447.

Streams above tide water, although navigable at all times, or in freshets, were not termed navigable in law. *Grand Rapids & I. R. Co. v. Butler*, 15 Sup. Ct. 991, 993, 159 U. S. 87, 40 L. Ed. 85; *Berry v. Carle*, 3 Me. (3 Greenl.) 269; *Commonwealth v. Chapin*, 5 Pick. 199; *Spring v. Russell*, 7 Me. (7 Greenl.) 273; *Veazie v. Dwinel*, 50 Me. 479, 483, 484; *Morgan v. Reading*, 11 Miss. (3 Smedes & M.) 366, 402 (citing Angell, *Water Courses*, 204, 205); *Poynter v. Chipman*, 32 Pac. 690, 692, 8 Utah, 442.

A river is considered as an arm of the sea, and, as such, navigable as far as the circulation is at all subjected to the influence of the oceanic tides—that is, ordinarily, and not solely when the waters are carried to an unusual height by storms or by semi-monthly lunar changes. *People v. Tibbitts*, 19 N. Y. 523, 526.

Technically, those rivers are not navigable where the sea does not ebb and flow, though they may be very serviceable for navigation with boats and rafts, and even for larger vessels moved by sails or steam. Such are the Connecticut, the Merrimac, and many others above the ebb and flow of the tide. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 99.

"Navigable waters," as commonly used in the law, has several distinct meanings. First, as synonymous with tide waters, being waters, whether salt or fresh, wherever the ebb and flow of the tide of the sea are felt; second, as limited to tide waters which are capable of being navigated for some useful purpose. *Commonwealth v. Vincent*, 108 Mass. 441, 447.

The ebb and flow of the tide in a river was, in common law, the most usual test of its navigability, but it was not a conclusive test. *St. Louis, I. M. & S. Ry. Co. v. Ramsey*, 13 S. W. 931, 53 Ark. 314, 8 L. R. A. 559, 22 Am. St. Rep. 195.

"The common law of England considers a river in which the tide ebbs and flows an arm of the sea, and as navigable and devoted to the public use for all purposes—as well

for navigation as for fishing. It also considers other rivers in which the tide does not ebb and flow as navigable, but not so far belonging to the public as to divest the owners of the adjacent banks of their exclusive rights to the fisheries therein." *Hooker v. Cummings* (N. Y.) 20 Johns. 90, 100, 11 Am. Dec. 249; *Enfield Toll-Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 59, 42 Am. Dec. 716.

Comp. Laws, § 5944, provides that "if any such mortal wound shall be given * * * on the high seas or on any other navigable waters, or on land, either within or without the limits of this state, by means whereof death shall ensue in any county thereof, such offense may be prosecuted and punished in the county where such death may happen." It was insisted by the prisoner's counsel that the words "navigable waters," as used in connection with "the high seas," should be understood as meaning such rivers or waters only as are navigable from the sea, and in which the tide ebbs and flows, or, in other words, tide waters. The court said: "We do not feel warranted in giving to them so restricted a meaning. * * * We doubt whether they were ever used in the Laws of Michigan in the restricted sense imputed to them, as there is nothing within the limits of the state, or adjacent thereto, in which they could in that sense be made to apply; but there are large lakes and rivers, lying partly within her limits and partly within a foreign state, to which we think they do apply." *Tyler v. People*, 8 Mich. 320, 323.

Actual navigability.

In the United States the term "navigable river" is not restricted in its meaning to waters which are influenced by the tides of the sea, but extends to all rivers which are capable of being navigated in fact. *Jones v. Soulard*, 65 U. S. (24 How.) 41, 60, 16 L. Ed. 604; *Packer v. Bird*, 11 Sup. Ct. 210, 212, 137 U. S. 661, 34 L. Ed. 819; *Hickok v. Hine*, 23 Ohio St. 523, 527, 13 Am. Rep. 255. See, also, *Miller v. City of New York*, 109 U. S. 385, 3 Sup. Ct. 228, 234, 27 L. Ed. 971; *State v. Baum*, 38 S. E. 900, 901, 128 N. C. 600.

In England the words "navigable waters" are confined to tide waters. "In England, undoubtedly, the writers upon the subject and the decisions in its courts of admiralty always speak of the jurisdiction as being confined to tide water; and this definition, in England, was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide, nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, 'tide water' and 'navigable water' are synonymous terms, and 'tide water' with a few small and unimportant exceptions,

meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England that the admiralty jurisdiction is confined to the ebb and flow of the tide—in other words, is confined to public navigable waters. At the time the Constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen states the far greater part of the navigable waters are tide waters, and in the states which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide water to the head of navigation. The courts of the United States therefore naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide water. It is evident that a definition in this country that would at this day limit public rivers to tide water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers, in which there is no tide. The jurisdiction is here made to depend upon the navigable character of the water, and not on the ebb and flow of the tide. *The Genesee Chief v. Fitzhugh*, 53 U. S. (12 How.) 443, 455, 13 L. Ed. 1058; *Lamprey v. State*, 53 N. W. 1139, 1143, 52 Minn. 181, 18 L. R. A. 670, 38 Am. St. Rep. 541; *Diedrich v. Northwestern Union Ry. Co.*, 42 Wis. 248, 263, 24 Am. Rep. 399. While in England the ebb and flow of the tide is the most certain and usual test of rivers, as the tide in fact does ebb and flow in all the navigable rivers, it is wholly inapplicable where there are large fresh water rivers, thousands of miles long, flowing almost across the entire continent, bearing upon their bosom the commerce of the outside world, in part, as well as of the continent." *St. Louis, I. M. & S. Ry. Co. v. Ramsey*, 13 S. W. 931, 932, 53 Ark. 314; 8 L. R. A. 559, 22 Am. St. Rep. 195.

By the common law in England the test of navigability of a stream of water was the ebb and flow of the tides, but that rule never prevailed in this country, because it was inapplicable to its conditions. We have rivers navigable for thousands of miles, and capable of floating the commerce of the world, which are tideless. By the Roman civil law, rivers in which the flow of water is perennial belong to the public, and they were navigable if they were capable of being navigated in the common sense meaning of that term. According to the Digest, a navigable river is "statio iturve navigio." The Code Napoleon speaks of navigable riv

ers as "flottables"; that is, rivers admitting floats. The rule of the civil law has ever prevailed in the United States, and is another instance of our great obligation to that splendid system of jurisprudence which was developed by the Roman people. *Ten Eyk v. Town of Warwick*, 27 N. Y. Supp. 536, 538, 75 Hun. 562; *Ingraham v. Wilkinson*, 21 Mass. (4 Pick.) 268, 271, 16 Am. Dec. 342; *Stuart v. Clark's Lessee*, 32 Tenn. (2 Swan) 9, 13, 58 Am. Dec. 49.

The criterion of holding all rivers which are navigable in fact to be public rivers, and those which are not navigable in fact to be private rivers, is wanting in that accuracy and certainty at which the law aims. It can only be made certain by the addition of some arbitrary rule, such as depth of water, quantity of tonnage, or the like, and even then is still open to the objection that no man can tell whether he is exercising a public right, or trespassing on a private right, without entering on an investigation, while the tidal test (i. e., the ebb and flow of the tide), as distinguishing waters in which the property is in the sovereign from those in which it is in private individuals, has the merits of uniformity and certainty, and is easy of application. *Cobb v. Davenport*, 32 N. J. Law (3 Vroom) 369, 378, 379.

In this country the tides have no relevancy to navigability. It was otherwise in England, whence the common law and its terminology came. There "tide waters" and "navigable waters" were convertible terms. Here, if the water course is navigable, it is so because the depth and width of it are sufficient to float useful commerce. If the depth and width of a stream are augmented by a periodical increase of water, called "tide," that fact may make a stream navigable at those points in it where it is so in fact, to wit, in its channel, but not navigable where it is not so in fact, to wit, out of the channel, in the marshes. *Alston v. Limehouse*, 39 S. E. 188, 190, 60 S. E. 559.

The real test to determine whether a stream is a public highway is not the fact that it has been meandered and returned as navigable, but whether it is navigable in fact—capable of being used and actually used for floating logs, lumber, and other products of the country to the mill or market. If it is, it is then a public highway. *Falls Mfg. Co. v. Oconto River Imp. Co.*, 58 N. W. 257, 261, 87 Wis. 134.

As commonly used, the term "navigable waters," in one of its meanings, includes all waters, whether within or beyond the ebb and flow of the tide, which can be used for navigation. *Commonwealth v. Vincent*, 108 Mass. 441, 447.

The term "navigable waters," in England, is synonymous with "tide waters," but

in this country it is not confined to tide waters, but includes any waters on which commerce is carried on. Hence it includes the large rivers of the country, and also the Great Lakes. *Illinois Cent. Ry. Co. v. State*, 13 Sup. Ct. 110, 111, 146 U. S. 387, 36 L. Ed. 1018.

To be navigable in law, water must be navigable in fact; that is, capable of being used by the public as a highway for the transportation of commerce. *Baldwin v. Erie Shooting Club*, 87 N. W. 59, 60, 127 Mich. 659.

In this country all rivers, without regard to the ebb and flow of the tide, are generally regarded as navigable as far as they may be conveniently used at seasons of the year by vessels, boats, barges, or other water craft for purposes of commerce. Further than this, what constitutes a navigable river free to the public, is a question of fact to be determined by the natural conditions in each case. *Bucki v. Cone*, 6 South. 160, 161, 25 Fla. 1; *Gaston v. Mace*, 10 S. E. 60, 62, 33 W. Va. 14, 5 L. R. A. 392, 25 Am. St. Rep. 848; *Allison v. Davidson* (Tenn.) 39 S. W. 905, 907; *Munson v. Hungerford* (N. Y.) 6 Barb. 265, 270; *Broadnax v. Baker*, 94 N. C. 675, 681, 55 Am. Rep. 633; *American River Water Co. v. Amsden*, 6 Cal. 443, 446; *Veazie v. Dwinel*, 50 Me. 479, 483, 484; *Brown v. Chadbourne*, 31 Me. 9, 21, 1 Am. Rep. 641; *Moore v. Sanborne*, 2 Mich. 519, 527, 59 Am. Dec. 209.

Capacity for navigation.

The doctrine of the common law that the navigability of a stream is to be determined by the ebb and flow of the tide was repudiated in South Carolina in the case of *State v. Pacific Guano Co.*, 22 S. C. 50. Judge Wallace, in his circuit decree, which was affirmed in such case, says: "If a channel, therefore, in which the tide ebbs and flows, and, in the language of the civil law, is floatable, can be used for the purpose of trade and commerce, it is a navigable stream. Neither the character of the craft, nor the relative ease or difficulty of the navigation, are tests of navigability. A stream may not be useful for commerce at one time, and yet circumstances may make it so. There are certain navigable streams in the state which are very valuable on account of their phosphatic deposits. If the question of their navigability had come before the courts for adjudication before the rock in them was discovered, and the test laid down by the circuit judge that a stream should have sufficient depth and width to float useful commerce, it would have resulted in the state being deprived of those valuable sources of revenue because they were not actually used at that time. The test of navigability is navigable capacity, without regard to the character of the craft, the business done, the ease of navigation, the

surroundings of the stream, or whether it connects with another stream or highway, or flows up into a private estate." *Heyward v. Farmers' Min. Co.*, 19 S. E. 963, 970, 42 S. C. 138, 28 L. R. A. 42, 46 Am. St. Rep. 702.

A stream of sufficient capacity and volume of water to float to market the products of the country will answer the conditions of navigability, and is a public highway open to all persons for the business of floatage to which it is adapted, whatever the character of the product or the kind of floatage suited to its condition. *Buckl v. Cone*, 6 South. 160, 161, 25 Fla. 1.

Although in England, in the common-law sense of the term, those streams only are navigable in which the tide ebbs and flows, yet all rivers and streams above the ebb and flow of the tide which are of sufficient capacity for useful navigation are public rivers, and subject to the same general rights which the public exercises in highways by land, and which they possess in navigable waters. *Lorman v. Benson*, 8 Mich. 18, 22, 77 Am. Dec. 435.

The true test in determining whether a river is navigable or not is whether it is capable of being used for the purpose of commerce, for the floating of vessels, boats, rafts, or logs. Where a stream possesses such a character, it is navigable. *Moore v. Sanborne*, 2 Mich. 519, 527, 59 Am. Dec. 209; *Brown v. Chadbourne*, 31 Me. 9, 21, 1 Am. Rep. 641. It may be said, generally, any stream, though above tide water, is a navigable water, if "of sufficient capacity to float the products of the mines, the forests, or the tillage of the country through which they flow to market." *Lewis v. Coffee County*, 77 Ala. 190, 192, 54 Am. Rep. 55; *Hickok v. Hine*, 23 Ohio St. 523, 527, 13 Am. Rep. 255; *Sullivan v. Spotswood*, 2 South. 716, 717, 82 Ala. 163; *Burke County Com'rs v. Catawba Lumber Co.*, 21 S. E. 941, 942, 116 N. C. 731, 47 Am. St. Rep. 829; *Little Rock, M. R. & T. R. Co. v. Brooks*, 39 Ark. 403, 408, 43 Am. Rep. 277.

The doctrine of the civil law has been carried to its utmost limit in the United States, and the rule to be deduced from the authorities is that all streams are deemed navigable which are capable, in their natural state, and in their ordinary volume of water, to transport to market the products of the fields, forests, and mines. *Ten Eyck v. Town of Warwick*, 27 N. Y. Supp. 536, 538, 75 Hun. 562.

The test of the navigability of a river is, as stated by the Supreme Court of the United States, whether it can be used in its ordinary condition as a highway for commerce, conducted in the customary mode of trade and travel on water. *The Daniel Ball*, 77 U. S. (10 Wall.) 557, 19 L. Ed. 999; *New*

England Trout & Salmon Club v. Mather, 35 Atl. 323, 325, 68 Vt. 338, 33 L. R. A. 569; *Bayzer v. McMillan Mill Co.*, 16 South. 923, 924, 105 Ala. 395, 53 Am. St. Rep. 133.

The test of a navigable stream is whether, in the ordinary state of the water, it has capacity and suitability for the usual purposes of navigation. *Webster v. Harris* (Tenn.) 69 S. W. 782, 783.

The test of navigability of a stream is its adaptability to the process of navigation. *Walker v. Allen*, 72 Ala. 456, 457.

In the United States the legal meaning of the word navigable has been much extended, and it is not limited to streams which are capable of bearing ships on their bosoms, but includes, generally, all waters practically available for floating commerce by any method—whether by rafts or boats. *Falls Mfg. Co. v. Oconto River Imp. Co.*, 58 N. W. 257, 261, 87 Wis. 134; *Ten Eyck v. Town of Warwick*, 27 N. Y. Supp. 536, 538, 75 Hun. 562; *Lamprey v. State*, 53 N. W. 1139, 1143, 52 Minn. 181, 18 L. R. A. 670, 38 Am. St. Rep. 541; *Buckl v. Cone*, 6 South. 160, 161, 25 Fla. 1; as the servitude of public interests depends rather on the purpose for which the public requires the use of the stream than any particular mode of use, *Moore v. Sanborne*, 2 Mich. 519, 524, 527, 59 Am. Dec. 209.

A stream or water course from 75 to 200 feet in width and 14 feet in depth at a point where a bridge is placed across it, and in which the tide rises and falls 38½ feet, and which is open so as to allow free passage to all water craft running thereon, is a navigable river, so as to give the public a right to free navigation thereon. *Charlestown & S. Ry. v. Johnson*, 73 Ga. 306, 308.

A river in which a tide ebbs and flows from 3½ to 6 feet, which is navigated by boats or scows, on which there is a landing place above the proposed site of a bridge, and some freight is carried to such landing, is a navigable stream, the right to the use of which is a right common to all the people of the state, which may only be disposed of for the common benefit in such way as the people may see fit through the Legislature of the state, which is the rightful representative of the people. *Attorney General v. Stevens*, 1 N. J. Eq. (1 Saxt.) 369, 380, 22 Am. Dec. 526.

Whenever a water course has a capacity to float freight and passenger boats, whereby they become highways or channels of commerce, the right to use them as such becomes paramount to any rights of a riparian proprietor, or even the owner of the soil over which the waters flow. *Hodges v. Williams*, 95 N. C. 331, 333, 59 Am. Rep. 242.

"Navigable waters," as used in Ordinance 1787, providing that the navigable wa-

ters leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways and forever free, does not include every little rill or brook whose waters finally reach these great highways. It was intended to, and did, apply only to such streams as were then common highways for canoes or bateaux in the commerce between the northwest wilderness and the settled portions of the United States and foreign countries, and as to such rivers not then in use as would by law be embraced in the definition of navigable waters. *Burroughs v. Whitman*, 26 N. W. 491, 492, 59 Mich. 279.

All those inlets of the sea which are capable of sustaining vessels of any description, with their loading, for purposes really useful to trade or agriculture, are navigable, and hence public property across which a road cannot be laid by order of the court of sessions. Such an inlet, being used for boats, scows, and lighters with heavy loads of wood, etc., is navigable. *Commonwealth v. Inhabitants of Charlestown*, 18 Mass. (1 Pick.) 180, 187, 11 Am. Dec. 161.

A more appropriate criterion of a navigable river is not the flow and reflow of the tide, but simply the fact whether the river, in its ordinary state of water, is capable of, and suited to, the usual purposes of navigation by sea vessels, such as are employed in the ordinary purposes of commerce, whether foreign or inland, and whether steam or sail. *Sigler v. State*, 66 Tenn. (7 Baxt.) 493, 496; *State v. Glen*, 52 N. C. 323; *Burke County Com'rs v. Catawba Lumber Co.*, 21 S. E. 941, 942, 116 N. C. 731, 47 Am. St. Rep. 829; *Collins v. Benbury*, 25 N. C. 277, 281, 38 Am. Dec. 722; *Wilson v. Forbes*, 13 N. C. 30, 34; *Stuart v. Clark's Lessee*, 32 Tenn. (2 Swan) 9, 13, 58 Am. Dec. 49; *Hodges v. Williams*, 95 N. C. 331, 333, 59 Am. Rep. 242. A distinction is taken by the common law between streams which, in the common acceptance of the term, are suited to some purposes of navigation, and small, shallow streams, which are not so. In respect to the former,—which though not navigable in the sense of the law, are yet of sufficient depth naturally for valuable floatage, as for rafts, flatboats, and perhaps small vessels of lighter draught than ordinary,—while it is settled that the right of property in the bed of a stream is vested in the riparian proprietor, still it is equally well settled that the public have the right to a free enjoyment of such stream for the purposes of navigation to which it is naturally adapted. *Webster v. Harris* (Tenn.) 69 S. W. 782, 783, 59 L. R. A. 324.

A "navigable" river, at common law, was one where the tide flowed and ebbed, but in America, and in popular speech, "navigable" rivers means those which may be navigated by ships or boats. *State v. Pacific Guano Co.*, 22 S. C. 50, 75.

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When the term "navigable" is used by common-law writers, it has reference to the right which all nations have of navigating the ocean and its arms as common highways of mutual intercourse and commerce, over which no people or nation has exclusive control, and in which no nation has a right of property. It has no reference to capacity for navigation, so that, while many of our rivers lying in the interior and wholly within the jurisdiction of the state are capable of navigation, they are not navigable for all the world except by the permission of the sovereign having jurisdiction over them. *The Magnolia v. Marshall*, 39 Miss. 109, 117.

A bayou susceptible of navigation by small steamboats, flats, and other craft is a navigable stream. *Goodwill v. Police Jury*, 38 La. Ann. 752, 772.

Same—Artificial obstructions.

A stream is still "navigable" notwithstanding a partial change in the mode of its navigation by the erection of a bridge through and under which scows, gondolas, and boats and vessels without masts, or with falling or movable masts, may advantageously pass and repass, loaded or empty; and hence the laying out of a highway over such river was not within the jurisdiction of the county commissioners. *Inhabitants of Charleston v. Middlesex County Com'rs*, 44 Mass. (3 Metc.) 202, 205.

Same—Natural obstructions.

Goldwithe, J., says to make a "navigable" stream three circumstances must concur: (1) The stream must have sufficient width, (2) sufficient depth, and (3) a freedom from insurmountable obstructions. *State v. Bell* (Ala.) 5 Port. 365.

Rivers having capacity to float boats used as instruments of commerce do not lose their navigability because intercepted by falls, when above and below them the waters can be thus used for the purpose of commerce for long distances. Under such circumstances they remain highways for common use. *Broadnax v. Baker*, 94 N. C. 675, 681, 55 Am. Rep. 633.

A river may be said to be "navigable" when only its lower portion is such, and thus *Laws 1898, c. 469*, requiring the restoration of navigable streams injured by a diversion of waters, applies to a stream navigable at its mouth, though it does not appear to be navigable at the place of diversion. *Town of Hempstead v. City of New York*, 65 N. Y. Supp. 14, 18, 52 App. Div. 182.

While the English rule that no river is navigable except where the tide ebbs and flows is not applicable to this country, as we have many rivers which are navigable several hundred miles above the flowing of the tide, a stream whose natural obstruction pre-

vents the passage of boats of any description whatever cannot be considered to be navigable. *Cates' Ex'rs v. Wadlington* (S. C.) 1 McCord, 580, 582, 10 Am. Dec. 699; *Society for Establishing Useful Manufactures, etc., v. Morris Canal & Banking Co.*, 1 N. J. Eq. (Saxt.) 157, 158, 21 Am. Dec. 41.

Public usefulness.

A stream, to be "navigable" within the authorities (*People v. Platt* [N. Y.] 17 Johns. 209, 210, 211), must furnish a "common passage for the King's people," and must be of "common or public use for carriage of boats and lighters." *Munson v. Hungerford* (N. Y.) 6 Barb. 265, 270.

The division of waters into navigable and nonnavigable, is merely a method of dividing them into public and private, which is the more natural classification, and the definition or test of navigability to be applied to inland lakes must be sufficiently broad and liberal to include all the public uses, including boating for pleasure, for which such waters are adapted. So long as they continue capable of being put to any beneficial use, they are public or navigable waters. *Lamfrey v. State*, 52 Minn. 181, 199, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541.

Not every small creek in which a fishing skiff or gunning canoe can be made to float is deemed navigable, but in order to have this character it must be navigable for some general purpose useful to trade or business. *Town of Groton v. Hurlburt*, 22 Conn. 178, 186.

"Capability of being used for useful purposes of navigation, of trade, and travel, in the usual and ordinary modes, and not the extent and manner of the use, is the measure of navigability, in the sense in which the term 'navigable waters' is employed in the act of Congress for the admission of Alabama into the Union; and, in the Constitution and statutes of this state,—waters which at that time were navigable in fact, though in unsettled or sparsely inhabited portions of the state. The distinguishing test is whether the stream is susceptible or not of use as a common passage for the public." *Sullivan v. Spotswood*, 2 South. 716, 717, 82 Ala. 163.

The character of the river as such highway is not so much determined by the frequency of the use for that purpose, as by its capacity for being used by the public for the purpose of transportation and commerce. *Hickok v. Hine*, 23 Ohio St. 523, 527, 13 Am. Rep. 255.

Whether a fresh water stream is navigable or not does not depend on the mode by which commerce is or may be conducted on such stream, nor the difficulties attending navigation thereon. *The Montello*, 87 U. S. (20 Wall.) 430, 441, 22 L. Ed. 391; *Goodwill*

v. Police Jury of Bossier Parish, 38 La. Ann. 752.

"Navigable streams" are streams of sufficient width and depth for valuable floatage. *Tuscaloosa County v. Foster*, 31 South. 587, 589, 132 Ala. 392.

Whether rivers are navigable or not depends upon their capacity for substantial use. *State v. Narrows Island Club*, 5 S. E. 411, 413, 100 N. C. 477, 6 Am. St. Rep. 618.

A stream cannot be said to be "navigable," in the legal sense of that term, unless it be of such character as to be useful to the public as a channel of trade or commerce. *Neadrhouser v. State*, 28 Ind. 257, 270.

"Navigable waters" include all those which afford a channel for useful commerce. *Farmers' Co-operative Mfg. Co. v. Albemarle & R. R. Co.*, 23 S. E. 43, 44, 117 N. C. 579, 29 L. R. A. 700, 53 Am. St. Rep. 606.

The term "navigable waters," within the meaning of Act Cong. Sept. 19, 1890, c. 907, 26 Stat. 454, making it a misdemeanor to obstruct a navigable water of the United States, has reference to commerce of a substantial character to be conducted thereon, and does not include a shallow pass or crevasse, caused by overflow of water from the Mississippi river, through which small boats sometimes passed, but which was never used for passengers or freight. *Leovy v. United States*, 20 Sup. Ct. 797, 177 U. S. 621, 44 L. Ed. 914.

A bay or arm of one of the Great Lakes, some 4,000 acres in extent, which was patented to the state as swamp land, and which, though of sufficient depth for navigation where it opens into the lake, is not throughout the remainder of its extent of an average depth of more than two feet, and rarely more than three feet, and is covered through the summer with grass and rushes, is not "navigable water," but merely a marsh, and subject to private ownership. To be navigable in law it must be navigable in fact; that is, capable of being used by the public as a highway for the transportation of commerce. The body of water in question was the natural feeding pond of the duck and other water fowls. In their pursuit by canoe and flat-bottomed ducking boats the water might be navigated. But that was not commerce, and proves nothing. The same test would convert every pond and swamp capable of floating a boat into a navigable stream or lake. At common law the term "navigable" had a technical meaning, and was applied to all streams or bodies of water in which the tide ebbed and flowed. All such waters were public. That definition is not applicable in this country, and all waters are held navigable in law and subject to public use which are by their character capable of use as highways for purposes useful

to trade or agriculture. It is the capability of being navigated for useful purposes which is the test. *Baldwin v. Erie Shooting Club*, 87 N. W. 59, 60, 127 Mich. 659; *Toledo Liberal Shooting Co. v. Erie Shooting Club*, 90 Fed. 680, 682, 33 C. C. A. 233.

A "navigable stream," when applied to tide water, is not every ditch in which the salt water ebbs and flows through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes. Nor is it every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable. But in order to have this character, it must be navigable to some purpose useful to trade or agriculture. *Rowe v. Granite Bridge Corp.*, 38 Mass. (21 Pick.) 344, 347; *Wethersfield v. Humphrey*, 20 Conn. 218, 228.

A mere creek or rivulet in which the tide ebbs and flows, and which may be navigated at certain tides by small boats for individual convenience, cannot be dignified with the appellation of a "navigable river," so as to be beyond the jurisdiction or control of the Legislature except as a public highway. *Glover v. Powell*, 10 N. J. Eq. (2 Stockt.) 211, 223.

The rule now most generally adopted, and that which seems best fitted to our own domestic conditions, is that all water courses are regarded as navigable in law which are navigable in fact; that is, that the public have the right to the unobstructed navigation, as a public highway for all purposes of pleasure or profit, of all water courses, whether tidal or inland, that are in their natural condition capable of such use. A branch of a sound which was from 2 to 4 feet deep, and from 140 to 300 yards wide, and was used by the public for passing in boats from one part of the sound to the other, which shortened the distance, and was safer in rough weather, constituted a navigable stream. *State v. Baum*, 38 S. E. 900, 901, 128 N. C. 600.

Most of the definitions of "navigability" in the decided cases seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses other than mere commercial "navigation," in its ordinary sense, we fail to see why they ought not to be held to be public waters, or "navigable" waters if the old nomenclature is preferred. Certainly we do not see why boating or sailing for pleasure should not be considered navigation as well as boating for mere pecuniary profits. Many, if not the most, of the meandered lakes of this state are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used, and, as population increases and towns and cities are built up

in their vicinity, will be still more used, by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot perhaps be now even anticipated. *Lamprey v. State*, 53 N. W. 1139, 1143, 52 Minn. 181, 18 L. R. A. 670, 38 Am. St. Rep. 541.

Where a stream within tide water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purpose of trade or agriculture. In determining whether a stream is navigable, the purpose of the navigation is not the subject of the inquiry, but the fact of the capacity of the water for use in navigation. *Attorney General v. Woods*, 108 Mass. 436, 440, 11 Am. Rep. 380.

Same—Flotage of logs.

A river which is not within the ebb and flow of the tides may be, notwithstanding, navigable, when it is of sufficient depth and width to float rafts of lumber. To go beyond this and attribute navigable properties to a stream which can only float a log is carrying the doctrine too far. Dams for the erection of mills, manufactories, canals for the purpose of irrigation, supplying mines, or even to subserve navigation itself, would have to give way to the mere claim of the right to float a saw log, and, if a log, why not a plank or a fishing rod? The idea of "navigation" certainly never contemplated such a definition or such results. *American River Water Co. v. Amsden*, 6 Cal. 443, 446.

Every definition of a "navigable freshwater stream" must be necessarily general, modified to some extent by the peculiar conditions of its locality and the special wants of the inhabitants. In sections where the transportation of lumber is an important or controlling business, circumstances and the necessities of trade have impressed the character of navigability, which fail in other conditions where no such pressing necessities exist, and there are other interests equally or more important to subserve. *Lewis v. Coffee County*, 77 Ala. 190, 192, 54 Am. Rep. 55.

While still adhering to "navigability" as the criterion whether waters are public or private, we have extended the meaning of that term so as to declare all waters public highways which afford a channel for any useful commerce, including the small streams, merely floatable for logs at certain seasons of the year. *Lamprey v. State*, 53 N. W. 1139, 1143, 52 Minn. 181, 18 L. R. A. 670, 38 Am. St. Rep. 541; *Olson v. Merrill*, 42 Wis. 203, 212; *Gaston v. Mace*, 10 S. E. 60, 62, 33 W.

Va. 14, 5 L. R. A. 392, 25 Am. St. Rep. 848; *Allison v. Davidson* (Tenn.) 39 S. W. 905, 907.

Though a stream is only fit for floating logs or rafts, yet if required for such use, and there is sufficient business, present or prospective, to render the easement a matter of public concern, it will be regarded as a public stream for that purpose. *Bucki v. Cone*, 6 South. 160, 161, 25 Fla. 1.

The rivers of the state of Wisconsin which are capable of floating the products of the country (such as logs and rafts of lumber) to mill or market are, by the common law, "navigable streams," and public highways by water. *Whisler v. Wilkinson*, 22 Wis. 572, 576. See, also, *Burke County Com'rs v. Catawba Lumber Co.*, 21 S. E. 941, 942, 116 N. C. 731, 47 Am. St. Rep. 829; *Moore v. Sanborne*, 2 Mich. 519, 527, 59 Am. Dec. 209; *Brown v. Chadbourne*, 31 Me. 9, 21, 1 Am. Rep. 641; *Veazie v. Dwinel*, 50 Me. 479, 483, 484; *Peters v. New Orleans, M. & C. R. Co.*, 56 Ala. 528, 529, 533; *Falls Mfg. Co. v. Oconto River Imp. Co.*, 58 N. W. 257, 261, 87 Wis. 134.

A "navigable stream" is one capable of bearing upon its bosom, either for the whole or a part of the year, boats loaded with freight in regular course of trade. The mere rafting of timber, or transporting of wood in small boats, does not make a stream navigable. *Civ. Code Ga.* 1895, § 3059.

A stream capable of floating logs and timbers to market is a navigable stream. *Hallock v. Suitor*, 60 Pac. 384, 385, 37 Or. 9.

Actual use.

The fact that a floatable stream has not been used by the public, or has only been used by persons following a particular occupation, cannot deprive such stream of its public character. *Moore v. Sanborne*, 2 Mich. 519, 520, 524, 527, 59 Am. Dec. 209. See, also, *Bucki v. Cone*, 6 South. 160, 161, 25 Fla. 1.

An inlet of the sea, capable of sustaining vessels of any description, with their loading, for purposes really useful to trade or agriculture, are navigable, though not in actual use for such purpose, for such a qualification of the principle at common law would go to allow the occupation by individuals or corporations of many of the most important public privileges in the early settlement of the country before parts and places of deposit should become valuable. Such an inlet, being used for boats, scows, and lighters, with heavy loads of wood, etc., is navigable. *Commonwealth v. Inhabitants of Charlestown*, 18 Mass. (1 Pick.) 180, 187, 11 Am. Dec. 161.

Continual navigability.

A stream capable of being used for purposes of commerce is "navigable," even though it may not be adapted to such use

continuously throughout all the seasons. *Brown v. Chadbourne*, 31 Me. 9, 21, 1 Am. Rep. 641; *Bucki v. Cone*, 6 South. 160, 161, 25 Fla. 1; provided it is sufficient and actually used for navigation during a material portion of the year. *Diedrich v. North Western Union Ry. Co.*, 42 Wis. 248, 263, 24 Am. Rep. 399; it is a valuable and not a continual capacity of use which determines the right. *Moore v. Sanborne*, 2 Mich. 519, 520, 524, 527, 59 Am. Dec. 209; but their capacity for navigation must recur with regularity. *Farmers' Co-operative Mfg. Co. v. Albe-marle & R. R. Co.*, 23 S. E. 43, 44, 117 N. C. 579, 29 L. R. A. 700, 53 Am. St. Rep. 606; or tolerable regularity. *Little Rock, M. R. & T. R. Co. v. Brooks*, 39 Ark. 403, 408, 43 Am. Rep. 277. "If it is ordinarily subject to periodical fluctuations, attributable to natural causes, recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to public easement." *Olson v. Merrill*, 42 Wis. 203, 212; *Ten Eyck v. Town of Warwick*, 27 N. Y. Supp. 536, 538, 75 Hun. 562. It is sufficient if it appear that business men may calculate that, with a tolerable regularity as to seasons, the water will rise to and remain at such height as to make it profitable as a highway for transporting logs to mills and markets lower down. *Commissioners of Burke County v. Catawba Lumber Co.*, 21 S. E. 941, 942, 116 N. C. 731, 47 Am. St. Rep. 829. See, also, *East Branch Sturgeon River Imp. Co. v. White & Triant Lumber Co.*, 37 N. W. 192, 194, 69 Mich. 207.

It is not enough that a stream is capable (during a period in the aggregate of from two to four weeks in the year when it is swollen by the spring and autumn freshets) of carrying down its rapid course whatever may have been thrown upon its angry waters to be borne at random over every impediment in the shape of dams or bridges which the hand of man has erected. To call such a stream "navigable" in any sense, it seems to us is a palpable misapplication of the term. *Munson v. Hungerford* (N. Y.) 6 Barb. 265, 270.

Where the evidence shows that a stream is only capable of being used for the floating of logs for a short period during the spring and winter freshets, and there is no evidence concerning the character of the forests adjacent thereto, or the number of people engaged in the logging business, or that boats had ever navigated its waters, or that it was exempt from the government survey as a public stream, the stream, as a matter of law, is not a public stream. *Bayzer v. McMillan Mill Co.*, 16 South. 923, 924, 105 Ala. 395, 53 Am. St. Rep. 133.

It is not a mere possibility of being used under some circumstances, as at ex-

traordinary high tides, which will give a river the character of a navigable stream, but it must be generally and commonly useful to some purpose of trade or agriculture. *Rowe v. Granite Bridge Corp.*, 38 Mass. (21 Pick.) 344, 347; *Glover v. Powell*, 10 N. J. Eq. (2 Stockt.) 211, 223.

A series of California statutes declaring certain streams to be navigable, and prohibiting the construction of bridges across "navigable streams" without draws, or so as to obstruct the navigation, etc., will not be construed to include any stream other than such as have been declared navigable by the Legislature, or such as are generally navigable in fact; that is, during ordinary stages of water. The words "navigable streams," as so used, did not include streams that can be navigated only in times of high water. *Cardwell v. Sacramento County*, 21 Pac. 763, 79 Cal. 347.

A stream need not be navigable at all seasons of the year in order to be considered a navigable stream, but a stream, navigable only during periodical stages of high water, is to be considered a navigable stream at those seasons. *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184.

A stream capable of floating logs and timbers to market is not deprived of its navigable character by the fact that for a portion of the year it cannot be used for that purpose. *Hallock v. Suitor*, 60 Pac. 384, 385, 87 Or. 9.

Current unnecessary.

Where a stream is in fact navigable, the fact that there is no current therein does not defeat its characteristic of navigability. *Turner v. Holland*, 33 N. W. 283, 289, 65 Mich. 453.

Natural navigability.

The true test of navigability is whether a stream is capable in its natural state of being used for the purpose of commerce, no matter in what mode the commerce may be conducted. *The Montello*, 87 U. S. (Wall.) 430, 431, 22 L. Ed. 391.

If in its natural state, without artificial improvements, a stream may be prudently relied upon and used as a means of carrying off the products of the fields or forest of the population on its banks, or bringing them articles of merchandise, in the American sense, it is navigable. *Little Rock, M. R. & T. R. Co. v. Brooks*, 39 Ark. 403, 408, 43 Am. Rep. 277.

A stream which can only be made floatable by artificial means can in no sense be deemed a navigable stream and public highway. *Moore v. Sanborne*, 2 Mich. 520, 524, 527, 59 Am. Dec. 209.

An artificial waterway or canal opened by a state to public use for purposes of commerce, and while, in fact, used as a highway of commerce between the states of the Union and between foreign countries and the United States, is "navigable water of the United States," within the meaning of that term as used to define and limit the jurisdiction of the admiralty court. *Malony v. City of Milwaukee* (U. S.) 1 Fed. 611, 612.

"Navigable waters," within the meaning of Act Cong. Feb. 26, 1845, giving the District Court jurisdiction over contracts and torts pertaining to vessels navigating between different ports in different states and ports upon the lakes and navigable waters connecting said lakes, is not to be understood in the same sense as "natural waters," but includes an artificial communication between lakes, such as the Welland Canal. *Scott v. The Young America* (U. S.) 21 Fed. Cas. 851, 853.

A small stream which in its natural state was not navigable does not become navigable water by the fact that, by the construction of a dam at the lower end of the lake into which such stream flows, the waters of such stream arose where it became a portion of the lake, where it appeared that the dam was built by a private corporation which paid for the land submerged, and such corporation could at pleasure remove the dam and thereby reduce the stream to its natural state. *Ten Eyck v. Town of Warwick*, 27 N. Y. Supp. 536, 538, 75 Hun, 562.

The term "navigable stream" does not include a stream which is only navigable for the running of logs at any season of the year by reason of dams built therein and improvements made, when without such improvements the running of logs therein would be impracticable at all times, and only possible for a few days in the spring at the highest stage of freshet water. *East Branch Sturgeon River Imp. Co. v. White & Friant Lumber Co.*, 37 N. W. 192, 194, 69 Mich. 207.

Navigability both ways necessary.

A stream is "navigable," in a legal sense, when it is capable, in the ordinary stage of the water, of being navigated, both ascending and descending, by such vessels as are usually employed for purposes of commerce. A river not "navigable" in a legal sense may yet be "navigable" in the common acceptance of the term as where, in certain stages of the water, it may have sufficient depth for flatboats, rafts, or small vessels of light draft. *Holbert v. Edens*, 73 Tenn. (5 Lea) 204, 207, 40 Am. Rep. 28.

As some streams are not navigable against their currents, if they are float-

ble in their natural state, so as to be of public use with the current, their public character is liberally supported. *Ten Eyck v. Town of Warwick*, 27 N. Y. Supp. 536, 538, 75 Hun, 562.

Public terminus necessary.

The test of whether or not a stream is to be regarded as a public navigable stream is not the bare fact that the tide ebbs and flows therein. Nor does the question depend upon its depth or width. It may have the capacity to float logs only, and yet may be a navigable stream. Nor does it depend upon an uninterrupted course, nor upon a channel free from obstruction, if these can be removed. Nor is it necessary that it shall at all times be passable. The test is whether the stream is capable of becoming a public highway; that is, a means open to the public of passing from one place where they have a right to be, to another place where they have the same right to be. In other words, there must be a public terminus at each end, and hence partially navigable creeks which open upon a bay, but lead merely into private lands, are not public navigable waters. *Chisholm v. Caines* (U. S.) 67 Fed. 285, 292.

In order to make a stream navigable by the public, it is not enough that it is floatable; that is, capable of floating vessels or other craft. It must be a public highway. To be a public highway it must have a terminus a quo the public can enter it, and a terminus ad quem they can leave it. *Manigault v. S. M. Ward & Co.* (U. S.) 123 Fed. 707, 713.

NAVIGABLE WATERS OF THE UNITED STATES.

The admiralty rule, as now generally recognized, is thus stated in Gould, *Waters* (3d Ed.) § 67: "If rivers in their ordinary condition, by themselves, or by uniting with other waters, form a continuous highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water, they are 'navigable waters of the United States,' within the meaning of the acts of Congress in which that phrase is employed." 5 Stat. 726; *State v. Baum*, 38 S. E. 900, 901, 128 N. C. 600.

Navigable waters of the United States, such as are under the control of Congress, are such waters as are navigable in fact, and which, by themselves or their connection with other waters, form a continuous channel for commerce with foreign countries or among the states. *Miller v. City of New York*, 3 Sup. Ct. 228, 234, 109 U. S. 385, 27 L. Ed. 971.

The inland lakes lying wholly within the limits of a state are not "navigable

waters of the United States," and suits to enforce a lien for supplies, etc., against boats and vessels thereon, are not within the admiralty jurisdiction of the District Courts of the United States. *Stapp v. The Clyde*, 45 N. W. 430, 43 Minn. 192.

The term "navigable waters," within the meaning of the statute of the United States regulating the coasting trade, or the federal Constitution, does not include state canals, and Congress has no power to regulate navigation upon such canals or upon inland lakes and rivers. The authority of Congress to regulate navigation is confined to our coasts, bays, and navigable rivers. *North River Steamboat Co. v. Livingston* (N. Y.) 3 Cow. 713, 748.

State waters distinguished.

Rivers constitute "navigable waters of the United States," within the meaning of the acts of Congress, in contradistinction from the "navigable waters of the states," when they form in their ordinary condition, by themselves or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water. *The Daniel Ball*, 77 U. S. (10 Wall.) 557, 562, 19 L. Ed. 999. If, however, they do not thus form such contiguous highways, but are navigable only between places in the same state, they are not navigable waters of the United States, but only of the state. *New England Trout & Salmon Club v. Mather*, 35 Atl. 323, 325, 68 Vt. 338, 33 L. R. A. 569; *The Montello*, 78 U. S. (11 Wall.) 411, 415, 20 L. Ed. 191.

In Indiana there are two classes of streams which are called "navigable streams" or "public highways." One is only navigable for certain kinds of vessels certain distances within the state, and is not visited by vessels coming from and going to navigable waters of other states by continuous voyages. The other consists of those which are navigable in fact for vessels coming out or returning into the navigable waters of another state by continuous voyages. *Depew v. Board of Trustees of Wabash & E. Canal*, 5 Ind. 8, 9. See, also, *Malony v. City of Milwaukee* (U. S.) 1 Fed. 611, 612.

NAVIGATE.

Accustomed to navigate, see "Accustomed."

In construing U. S. Rev. St. § 4251 [U. S. Comp. St. 1901, p. 2929], providing that "no canal boat shall be subject to be libeled in any of the United States courts for the wages of any person who may be employed on board thereof, or in navigating the same," the court said: "'Navigating' does not mean

towing. 'Navigate' means to steer, direct, or manage a vessel, and implies that the act is done by those on board of the vessel itself. *Webst. Dict.*; *Falc. Marine Dict.* "Towing" means to drag a vessel forward in the water by means of a rope attached to another vessel, and implies that the act is done by those on board of the latter"—and held that such statute did not deprive the United States District Court of jurisdiction of an action to libel a canal boat for an amount due to a corporation for towing such boat with a tug. *Ryan v. Hook* (N. Y.) 84 Hun, 185, 191.

A vessel which, though touching bottom, forces her way by her own screw through the soft mud, is "navigating." *Western Union Tel. Co. v. Inman & I. S. S. Co.* (U. S.) 59 Fed. 365, 367, 8 C. C. A. 152 (citing *Borough of Colchester v. Brooke*, 7 Q. B. 339).

NAVIGATION.

See "Accidents of Navigation"; "Actual Purposes of Navigation"; "Easement of Navigation"; "Free Navigation"; "Inland Navigation."

"Navigation," as used in an insurance policy exempting from risk the dangers and accidents of the seas and navigation, of whatsoever kind, means all that is necessary to carry the goods to the land in the ordinary course of the shipowner's duty. *Laurie v. Douglass*, 15 Mees. & W. 746, 753.

Navigation is the science or art of conducting a ship from one place to another, and the science or art of ascertaining the position and directing the course of vessels, especially at sea, by astronomical operations or calculations; a nautical science or art; shipping. *Pollock v. Cleveland Shipbuilding Co.*, 47 N. E. 582, 583, 56 Ohio St. 655.

"Navigation," within Rev. St. § 4499 [U. S. Comp. St. 1901, p. 3060], which provides that, if any vessel propelled in whole or in part by steam be navigated without having her hull and boiler inspected, the owner shall be liable to the United States in a penalty of \$500, etc., does not include moving a vessel from one place to another in an unfinished state for the purpose of completing such vessel, but it would include any moving of the vessel which was for the purpose of profit. Any moving of the vessel, although not completed, for the purpose of profit, would come within the meaning of the term as used in the section above quoted. *The Joshua Levi-ness* (U. S.) 13 Fed. Cas. 1155, 1158.

"Navigation of the canals," as used in Act 1870, providing that claims may be filed against the state for damages from canals, from their use and management, or arising from the neglect of an officer in charge, or from any accident or other matter connected

therewith, and providing that the provisions of the act should not extend to claims arising from damages arising from the "navigation of the canals," means "the passage of boats along and upon the waters of the canal." "Damages might result from the careless management of locks, or their imperfect maintenance or construction, and the teams drawing the boats, or those in charge of them, from collisions due to overcrowding or insufficient room, sudden breaks chargeable upon unskillful or careless construction; and these are embraced within the term 'navigation of the canals,' but it can have no just application to accidents or injuries befalling one not at the time engaged in navigation of the canals, and which did not result from that navigation. Where one for a time had abandoned his canal boat, leaving it to be navigated by another, intending to resume its navigation, and was walking along the bank with that view, and was injured from a defect in the construction of an approach to the canal, he was not engaged in the 'navigation of the canals,' and could not be until he reached and rejoined his boat." *Rexford v. State*, 11 N. E. 514, 515, 105 N. Y. 229.

Control of vessel's equipment.

The words "navigation and management of a vessel," within the meaning of the third section of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2046]), providing that if the owner of a vessel transporting merchandise, etc., exercise due diligence to make the vessel seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, includes the control during the voyage of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas, and if there is any neglect in closing the iron covers of the ports it is a fault or error in "navigation or in the management of the ship." This view accords with the result of the English decision upon the meaning of the words. *The Silvia*, 19 Sup. Ct. 7, 8, 171 U. S. 462, 43 L. Ed. 241 (citing *Good v. London Steamship Owners' Mut. Protecting Ass'n*, L. R. 6 C. P. 563; *The Warkworth*, 9 Prob. Div. 20, 145; *Carmichael v. Liverpool Sailing Shipowners' Mut. Indemnity Ass'n*, 19 Q. B. Div. 242; *Canada Shipping Co. v. British Shipowners' Mut. Protection Ass'n*, 23 Q. B. Div. 342; *The Ferro* [1893] Prob. Div. 38; *The Glenochil* [1896] Prob. Div. 10).

Dismantled steamboat used as hotel.

The term "navigation," within the meaning of the rule that in order to authorize salvage there must be a service rendered to

a vessel, etc., engaged in commerce or navigation, does not apply to a dismantled steamboat which has been fitted up as a saloon and hotel, and therefore salvage cannot be recovered for services in assisting the boat from the shore, where she had grounded while she was being towed from one place to another. *The Hendrick Hudson* (U. S.) 11 Fed. Cas. 1085, 1086.

Time at anchor.

"Navigation," for some purposes, includes a period when a ship is not in motion, as, for instance, when she is at anchor. *Citing Hayn v. Culliford*, 3 C. P. Div. 417. And a boat, while tied to another boat along the wharf at its destination, and awaiting an opportunity to unload, was destroyed while engaged in "navigation," within the meaning of Laws 1870, c. 321, § 1, providing that damages resulting from navigation of the canals cannot be enforced against the state. *Zorn v. State*, 60 N. Y. Supp. 1037, 1039, 45 App. Div. 163.

Running of saw logs.

The word "navigation," in all the statutes of the United States, and in the Constitution and all the treaties, does not mean the running of sawlogs down a river. *Duluth Lumber Co. v. St. Louis Boom & Improvement Co.* (U. S.) 17 Fed. 419, 424.

Use of water for depositing matter.

"Navigation," as applied to waters which are used as highways, denotes the transportation of ships or materials from place to place under intelligent direction or guidance, and not the use of such waters as a mere receptacle of filth, or as a place for the deposit of worthless materials. *Gerrish v. Brown*, 51 Me. 256, 262, 81 Am. Dec. 569.

NAVY.

As included in army, see "Army."

Under the joint resolutions of Congress providing for the annexation of Texas and the transfer of its navy to the United States, the officers of the navy of Texas did not pass into the naval service of the United States, the word "navy" relating exclusively to the ships of war and their ornaments and equipments. *Brashear v. Mason*, 47 U. S. (6 How.) 92, 100, 12 L. Ed. 857.

5 Stat. 153, relating to the service of any "person enlisted for the navy," should be construed to include marines, though they are not in some senses seamen, and though their duties are in some respects different, for they are while employed on board public vessels persons in the naval service subject to the orders of naval officers under the government of the Naval Code as to punishment and amenable to the Navy Depart-

ment. *Wilkes v. Dinsman*, 48 U. S. (7 How.) 89, 124, 12 L. Ed. 618; *United States v. Dunn*, 7 Sup. Ct. 507, 509, 120 U. S. 249, 30 L. Ed. 667.

NAVY OFFICER.

"Officer," as used in Act March 3, 1883, c. 97, 22 Stat. 473 [U. S. Comp. St. 1901, p. 1071], authorizing an increase of pay to officers of the navy, and providing that all officers of the navy shall be credited with the actual time they have served as officers or enlisted men, does not necessarily mean an officer nominated and appointed by the President or by the head of a department, but means all persons regularly appointed as officers, and, as construed in this sense, includes a paymaster's clerk. *United States v. Hendee*, 8 Sup. Ct. 507, 508, 124 U. S. 309, 31 L. Ed. 465. See, also, *In re Bogart* (U. S.) 3 Fed. Cas. 798, 800; *Ex parte Reed*, 100 U. S. 13, 21, 25 L. Ed. 538.

NAVY VESSEL.

See "Vessel of the Navy."

NAVY YARD.

By certain acts the commonwealth of Virginia ceded to the United States the territory and jurisdiction over certain public lands for the purpose of a navy yard. By "navy yard" is meant not merely the land on which the government does work connected with the ships of the navy, but the waters contiguous, necessary to float vessels of the navy while at the navy yard. *Ex parte Tatem* (U. S.) 23 Fed. Cas. 708.

N. E.

"N. E." is an abbreviation of "northeast" in constant and universal use. *Sexton v. Appleyard*, 84 Wis. 235, 240.

NE EXEAT.

The writ of ne exeat is a writ "to prevent a person from going out of the state until he shall give security for his appearance." *Dean v. Smith*, 23 Wis. 483, 486, 99 Am. Dec. 193.

The writ of ne exeat, as at present used in this country, is a mesne process issuing from the court of chancery to hold a party to equitable bail, that he may not depart from the realm or the jurisdiction of the court, but be present with his body to answer any decree which the court of chancery may make in the case against him, and commanding the arrest and imprisonment of the defendant if he or she fails to furnish such bail. It can be properly issued by the court only in those cases where the person

of the defendant can be touched by a decree either by attachment or on execution. *Adams v. Whitcomb*, 46 Vt. 708, 712.

In Ohio the writ of ne exeat, under the practice prior to the adoption of the Code of Civil Procedure, was a process in chancery and in aid of the chancery jurisdiction of the court, issued upon cause shown, to restrain a party from leaving the state until bail was given to perform the decree of the court. It was limited in equity to suits to recover an equitable debt or money demand. *Cable v. Alvord*, 27 Ohio St. 654, 664.

NEAP TIDE.

The "neap tides" are those tides which happen between the full and change of the moon twice in every 24 hours. *Teschemacher v. Thompson*, 18 Cal. 11, 21, 79 Am. Dec. 151.

NEAR.

See "As Near As May be"; "At or Near."

In common parlance the word "near" means either close to or at no great distance. *Ward v. Wilmington & W. R. Co.*, 13 S. E. 926, 928, 109 N. C. 358.

"Near" is a relative term, and its precise import can only be determined by surrounding facts and circumstances. *Barrett v. Schuyler County Court*, 44 Mo. 197, 202.

"Near," as used in *Shankland's St. 108*, providing that no liquor shop shall be kept open on election day, nor shall any person give or sell intoxicating liquors at or near an election ground, means not distant or remote, but of reasonably easy or convenient access, so that a selling within a mile and a quarter of such election ground is prohibited. *Manis v. State*, 50 Tenn. (3 Heisk.) 315, 316.

Defendants were indicted, charged with having unlawfully kept open their liquor shop, which is situated within one-half mile of the election ground, on election day. The Code provided that no liquor shop shall be kept open on election day at or near an election ground, and it was claimed that the indictment was insufficient, and did not charge the offense created by this section. The court held that, while it must be shown to have been "at or near," the objection to the indictment was not well taken, as it cannot be held as a matter of law that one-half mile from the voting place would be too far to incur the penalty of the statute. *State v. Powell*, 71 Tenn. (3 Lea) 164, 166.

The words "at or near," in a statute prohibiting the disturbance of a religious assembly by acts at or near the place of wor-

ship, are for the purpose of providing for a punishment of cases of disturbance by the offender who may be near the scene of the disturbance, as well as those committed in the very presence of the assembled worshippers. In what precise locality the offender may be is not an essential element of the offense, and it may be shown by proof, and need not be averred after presentment. *Warren v. State*, 50 Tenn. (3 Heisk.) 269, 271.

In construing a deed conveying all the interest of the grantor in his father's estate of land near St. Louis, it was said "that, to construe such deed as conveying a lot in the town of C. merely because the latter is distant not more than five or six miles from the former, would be a very liberal interpretation of the deed, and could only be authorized upon proof that the grantor had no land coming more nearly within the language of the deed." *Menkens v. Blumenthal*, 27 Mo. 198, 204. See, also, *Holcomb v. Town of Danby*, 51 Vt. 428, 433, 434.

Under a statute requiring the Court of King's Bench to award execution of death against one accused of smuggling who should not surrender himself after a surrender was commanded at two market towns in the county and "near" the place of the offense, where one of the proclamations of surrender was made within 6 miles, and, of two others, one at 33 and the other 42 miles distant, whereas there were four or five market towns within 8 or 9 miles, it was held that the directions of the act had not been strictly pursued; not that by "near" must be understood "next," but there must be a reasonable vicinity, of which the court will judge. *Rex v. Harvey*, 1 W. Bl. 20 (cited in the *People v. Collins* [N. Y.] 19 Wend. 56, 60, in which case commissioners were appointed by act to lay out a road commencing "at or near the said village." The court say the word "near," as here used, is a relative term, and the precise points were purposely left to be determined by the commissioners); *Inhabitants of Morris Tp. v. Carey*, 27 N. J. Law (3 Dutch.) 377, 401.

A new York statute provided that the most eastwardly turnpike gate on a certain turnpike should be at a certain city near the Massachusetts line, at such place as the president and directors should direct. Held, that it was undoubtedly intended by the Legislature to vest in the officers of the company some discretion in fixing the easterly gate, but it was to be "near" the Massachusetts line. This is a relative term, and regard must be had, in construing the act, to the length of the road, which is about 20 miles. We are clearly of the opinion that, considering the extent of the road, a gate two miles and three-fourths from the Massachusetts line is not placed "near" that line, within the meaning of the word as here

used. *Griffin v. House* (N. Y.) 18 Johns. 397, 398.

Under a charter fixing the terminus of a railroad at or near a certain point, a large discretion is conferred upon the railroad company, and a location starting at a point about 2,500 feet from the point designated is authorized, the word "near" having no positive or precise meaning, but depending for its signification on the subject-matter in relation to which it is used, and circumstances applicable to the surrounding conditions. The word expresses a different measure of distance according as it is applied to different objects, and, when used to designate and describe the location of a railroad, it cannot be interpreted as having any narrow or restricted meaning. *Fall River Iron Works v. Old Colony & F. R. Co.*, 87 Mass. (5 Allen) 221, 227.

"Near" is a relative term, whose import can only be determined by surrounding facts and circumstances, and it will be difficult for the court to determine, as a matter of law, or as an inference from conceded facts, that a point within $2\frac{1}{2}$ miles of a town was not "near" to that place, within the conditions of a stock subscription to a proposed railroad. *Barrett v. Schuyler County Court*, 44 Mo. 197, 202.

The word "near" is relative in its signification, and, as used in a statute authorizing townships to subscribe for the capital stock of any railroad company building or proposing to build a railroad into, through, or "near" such county, may apply to a railroad nine miles distant from the town. *Kirkbride v. Lafayette County*, 2 Sup. Ct. 501, 502, 108 U. S. 208, 27 L. Ed. 705.

The construction of a railroad from a point a mile and a half from P. was held a sufficient compliance with its act of incorporation, requiring it to construct the road from a point "at or near" P.—*Appeal of Parke*, 64 Pa. (14 P. F. Smith) 137, 141.

"Near," as used in the articles of association of a plank road company to construct the road on or near a certain highway, is a relative term and a deviation of the site of a plank road from the road prescribed in the articles of association is allowable under a fair interpretation of such word. *Hamilton & D. Plank Road Co. v. Rice* (N. Y.) 7 Barb. 157, 168.

"Near" is a vague term, and, where a railroad was required to construct its lines "through or near" certain towns, it was not required to pass through those towns, and, where it ran within about 200 rods of the northwesterly corner of one of the towns, it passed "through or near" the westerly part of such town. *Boston & P. R. Corp. v. Midland R. Co.*, 67 Mass. (1 Gray) 340, 367.

As an indefinite term.

The report of the surveyors of a private road adjudging part of the road as applied for necessary, and proceeding to lay it out, beginning "at or near" the northwest corner of a certain person's lands, and thence, etc., does not indicate with sufficient certainty the place where the road begins, for "near" may mean one foot, one chain, or any other distance from the corner, and on any side. *Griscom v. Gilmore*, 16 N. J. Law (1 Har.) 105, 106.

In an application to the court for the assessment of damages for land taken by a railroad company in crossing plaintiff's farm, the land was described as a railroad embankment "extending diagonally through said tract of land from a point 'near' the northeast corner to a point 'near' the southwest corner." The court held that this description was too indefinite, and said: "'Near' is an indefinite word at all times, and is used in this description without any other qualifying word. It is impossible to locate therefrom with any degree of precision the beginning of the embankment; such beginning point might be either west or south of the said northeast corner, and still be 'near' to such corner. And so also in regard to the point to which the embankment extended; such point was near the southwest corner, but it might be either north or east of such corner and yet be 'near' to it." *Indianapolis & V. R. Co. v. Newsom*, 54 Ind. 121, 125.

The words "at or near" are relative, and have different meanings under different circumstances. A description of the terminus of a proposed public highway that it is to be so widened and turned southerly "at or near" its terminus as to make a safe and convenient passage from one highway to the other is bad for uncertainty. *McDonald v. Wilson*, 59 Ind. 54, 55.

The words "at or near," in an indictment for card playing at or near a certain public place, render the indictment bad for uncertainty, as playing "near" a public place would not necessarily be a violation of the statute unless it appears so near that it too was rendered a public place by reason of its proximity. *Bishop v. Commonwealth* (Va.) 13 Grat. 785, 787.

The phrase "at a place near the house of K.," in a declaration against a town for a defect in a highway, which alleges the defendant's failure to keep it in repair at a place near the house of K., whereby the plaintiff walking at that place was injured, does not describe the spot where the accident occurred with such certainty that the defendant, if it does not expressly deny its liability to keep the highway in repair at that spot, can be deemed, under St. 1832, c.

322, § 26, to have admitted that it was bound to keep it in a fit condition for travel at that place. *Kellogg v. Inhabitants of Northampton*, 70 Mass. (4 Gray) 65.

An order of a highway commissioner to lay out a highway beginning at a certain point, "running nearly in a northwesterly direction near where the travel is now seeking the best route," to another specific point, is void for the uncertainty in the description. *Blodgett v. Highway Com'rs*, 11 N. W. 275, 47 Mich. 469.

"Near" is a relative term, and may mean various distances, dependent upon the thing which is said to be near to that spoken of, so that a notice that an accident on a highway happened "near by" a house is too indefinite. *Holcomb v. Town of Danby*, 51 Vt. 428, 433, 434.

"Near to," as used in an instruction in an action against a railroad company that it was negligence to allow weeds or bushes to grow near to the track, was too indefinite, in that it left the precise distance to which the duty extended so vague and uncertain that railroad companies could not provide against liability, however watchful their servants might be, except by keeping clear of weeds or bushes the whole right of way. "Near," in common parlance, means either close or at no great distance, and might have been understood by the jury as a declaration that it would be negligence to leave weeds or bushes that would hide from view anywhere on the right of way. *Ward v. Wilmington & W. R. Co.*, 13 S. E. 926, 928, 109 N. C. 358.

As allowing discretion as to place.

"Near," as used in a charter authorizing the company to erect a toll gate near a particular spot, does not mean the nearest possible place to such spot, but invests the company with the discretion as to its location, so long as it be near the place designated. *People v. Denslow* (N. Y.) 1 Caines, 177, 180.

The word "near," in a statute authorizing the commissioners of highways of two towns to unite in building bridges near county or town lines, is a relative term, and depends upon the circumstances and peculiar surroundings in each case, and those circumstances the court will presume were duly considered by the commissioners of highways before they decided upon the location. If a bridge could not be built upon the town line without great expense, and by going half a mile or a mile, or any other reasonable distance, from the town line, an eligible and much cheaper location could be found, so as in the judgment of the commissioners to equally accommodate the public, no doubt the action of the town authorities is binding and conclusive. The words "near county or town lines" clearly clothe the authorities with the power to determine the location.

They are to say, in the exercise of the discretion vested in them under the law, where the bridge shall be built, whether it shall be upon the town line or near it, and no other tribunal can review or revise their decision. True, there might be a location fixed that would so palpably violate the true meaning of the word "near" as to justify the court in holding that the town authorities had exceeded their powers and authority, but within any reasonable bounds the location fixed by the town authorities would be conclusive. *Insley v. Shepard* (U. S.) 31 Fed. 869, 872.

Commissioners were appointed by an act of Legislature of New York to lay out a road on the most direct route commencing "at or near" a certain village, and the road was laid out commencing at the distance of 60 rods from the village in a field where there was no road with which the new road could be connected, and the route, instead of being the most direct, was round about. Held, that the words "at or near" gave the commissioners a discretionary power to lay out the road in such manner as they should deem best, and that their acts would be considered a sufficient compliance with the statute. The word "near," as here used, is a relative term quite indefinite, and the precise points were purposely left to be settled by the commissioners appointed by the act; equally so the question of directness and eligibility. *People v. Collins* (N. Y.) 19 Wend. 56, 58.

As along.

"Near the seashore," as used in the patent of Connecticut describing the subject-matter of the grant as, "all that part of New England in America which lies and extends itself from a river there called Narragansett river, the space of 40 leagues upon a straight line 'near the seashore' towards the southwest," should be construed in the sense of "along the seashore." *Keyser v. Coe* (U. S.) 14 Fed. Cas. 442, 443.

At synonymous.

"At" and "near" may be considered synonymous. *Minter v. State*, 30 S. E. 989, 992, 104 Ga. 743; *Bartlett v. Jenkins*, 22 N. H. (2 Fost.) 53, 63.

In a provision that certain offices should be kept at or near a courthouse, the words "at" and "near" are synonymous. *Harris v. State*, 18 South. 387, 388, 72 Miss. 960, 33 L. R. A. 85.

The words "at" and "near," as used in an order directing a militia captain to parade his company at or near a certain house, are synonymous. *Annan v. Baker*, 49 N. H. 161, 171.

When the terminus of the line bounding land conveyed is described as "at or near" a certain house, the house itself must be re-

garded as the terminus of the line. *Proctor v. Andover*, 42 N. H. 348, 353.

As between.

A notice to a township of an injury received on a highway, that the person was injured in his spine "near" his shoulders, so that he had no use of his arms, designates a part of the body with sufficient certainty for all purposes of the statute requiring such notice to state the portion of the body on which the injury was, and is supported by proof of an injury between the shoulder blades, for such place is near the shoulders. *Fassett v. Town of Roxbury*, 55 Vt. 552, 554.

As in.

Where a statutory certificate of parties organizing a railroad corporation described one of the termini of the road as "in or near" a certain city, such words had substantially the same signification as the word "in," and authorized the building of no road that did not terminate substantially in such city. *Warner v. Callender*, 20 Ohio St. 180, 186.

As question of fact.

Where parties agreed to run certain staves for defendant "at or near" a certain point, whether or not a point a mile and a half from the one designated was near the required point within the meaning of the contract was a question of fact for the jury, and could not be decided as a matter of law by the court. *Shaw v. Davis*, 7 Mich. 318.

Laws 1850, c. 140, § 35, provides that "if any passenger shall refuse to pay his fare, it shall be lawful for the conductor to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place or near any dwelling house, as the conductor shall elect on stopping the train." A passenger was put off a train about 5 rods from a road crossing and 30 rods from a farmhouse. It was dark, and the passenger did not know that the farmhouse was there. The court held that whether the place at which the passenger was put off was "near" the farmhouse, within the contemplation of this statute, was for the jury, and not a question of law. *Loomis v. Jewett* (N. Y.) 35 Hun, 313, 314.

As the whereabouts.

Though the words "near the creek," strictly speaking, imply the existence of space betwixt the object immediately expressed and the object of reference beyond it, they indicate, in popular meaning, no more than the whereabouts. *Klingensmith v. Ground* (Pa.) 5 Watts, 458, 459; *Wood v. Appal*, 63 Pa. (13 P. F. Smith) 210 (cited in *Freeland v. Pennsylvania R. Co.*, 47 Atl. 745, 746, 197 Pa. 529, 58 L. R. A. 206, 80 Am. St. Rep. 850).

NEAR OPEN PORT.

In a contract insuring a vessel from New York to Bordeaux, and containing the following clause: "Warranted not to abandon if detained or captured until after a detention of six months, unless previously condemned; or if refused admittance he may proceed to another 'near open port'"—the words "near open port" are employed in a geographical sense, and not as depending on the facility of reaching a distant port if the wind should happen to be favorable. *Tenet v. Phoenix Ins. Co.* (N. Y.) 7 Johns. 363, 372.

NEAR RELATIVES.

The term "near relatives," in a will, held to mean next of kin. *Cox v. Wills*, 49 N. J. Eq. (4 Dick.) 130, 135, 22 Atl. 794, 796.

"Near relatives," as used in a devise to the testator's near relatives, should be construed to mean those who would take under the statute of distributions, and a devise should be distributed in the manner provided by such statute. *Handley v. Wrightson*, 60 Md. 198, 206.

NEAREST.

"Nearest" is immediately adjacent to; in closest proximity. The words in Rev. St. § 3374, providing that railroad fares shall always be made that "multiple of five nearest reached by multiplying the rate by the distance" mean the multiple of five closest in proximity to the result thus obtained, whether it is above or below. *Wells v. Cleveland, C., C. & St. L. Ry. Co.*, 9 O. C. D. 527, 530.

NEAREST AND LAWFUL HEIRS.

A testator gave his wife a life estate in all his property, remainder in fee one half to his adopted daughter and the other half to the "nearest and lawful heirs of mine and that of my wife, share and share alike." At the time of the execution of the will and the death of the testator, he and his wife each had brothers and sisters living. The wife afterwards married, and adopted a son of this last husband by a former wife as her heir. Held, that such adopted heir was not the "nearest and lawful heir" within the meaning of the testator, and hence was entitled to no interest under the will, but that the brothers and sisters of the testator's wife, or their representatives, were included within the meaning of the term. By his use of the term it was evident that his intention was that they would not include his adopted heir, and that they meant heirs of his other than such adopted heir. The same terms used in the same connection, when applied to the heirs of his wife, must also have the same meaning; that is, heirs of his wife

other than an adopted heir. *Reinders v. Koppelman*, 7 S. W. 288, 290, 94 Mo. 338.

NEAREST BUILDINGS.

In an application for insurance the marginal inquiry in relation to the premises was in these words: "How bounded, and distance from other buildings, if less than ten rods, and for what purpose occupied, and by whom." The answer stated the "nearest buildings" on the several sides of the insured premises, but did not state all the buildings within 10 rods. Held, that such answer did not mean that there were no other buildings within that distance than those mentioned. *Gates v. Madison County Mut. Ins. Co.*, 2 N. Y. (2 Comst.) 43, 52.

"Nearest," as used in an application for an insurance policy stating the distance of the nearest buildings to the risk as 10 rods, implied that there might be other buildings more remote, but within the range of 10 rods. *Kennedy v. St. Lawrence County Mut. Life Ins. Co.* (N. Y.) 10 Barb. 285, 288.

NEAREST COURTHOUSE.

As used in Act April 7, 1874, providing that on the grant of a change of venue the cause shall be removed to some adjoining county, the courthouse of which is nearest the courthouse of the county in which the suit is pending, the "nearest courthouse" in the meaning of the statute is not necessarily the one nearest by geometrical measurement, but may be the one most convenient of access and nearest by the usually traveled route. *Shaw v. Carle*, 54 Tex. 307, 311.

The expression "nearest for all practicable purposes," as used in an order changing the venue, and reciting that on hearing the evidence it appeared that the courthouse of G. county was for all practicable purposes the nearest to the courthouse of the county from which the venue was changed, is equivalent in meaning to "the most accessible." *Williams v. Planters' & Mechanics' Nat. Bank of Houston* (Tex.) 44 S. W. 617, 619.

NEAREST ENTRANCE.

Within the meaning of the statute which prohibits the establishment of a saloon within 200 feet of the nearest entrance to a dwelling house without the consent of the owner of such house, the "nearest entrance" is the one nearest such saloon, whether in the front, side, or rear of the dwelling. The distance is one arbitrarily fixed, and was intended for the protection of houses. A saloon in the rear of a dwelling might be as obnoxious as one in the front. In *re Veeder*, 31 Misc. Rep. 569, 570, 65 N. Y. Supp. 517.

NEAREST HEIRS.

A will bequeathed "to my stepson O. the use of rents accruing from my house and one acre of land that said house stands upon, after his father's death, provided his father does not sell the property, and after O.'s decease the house and land is to go to his nearest heirs." Held, that the word "nearest" did not qualify the word "heirs," and hence, under the rule in *Shelley's Case*, O. took the fee to the land subject to the estate and power reserved in his father. When there are a number of persons falling within the designation of "heirs"—that is, having the right to take by inheritance from the ancestor, although they may not take equally as to amount—the law furnishes no means of determining which one or more of the common class is or are nearest in the quality of right of inheritance. The word "nearest," like "next" or "first," prefixed to the term "heirs" or "heir," without the use of other words of limitation on the devise to the heir, will not vary the effect of the devise. The "nearest heirs" are all those persons upon whom the law would cast the inheritance in the first instance upon the death of the ancestor intestate, and there can be no other heirs. Those who are heirs are therefore necessarily "nearest heirs," and, conversely, "nearest heirs" can be no other than heirs generally, and must include all those who stand in the same relation to the ancestor in respect of the right of inheritance. *Ryan v. Allen*, 12 N. E. 65, 66, 120 Ill. 648 (citing *Jarm. Wills*, 326).

NEAREST IN BLOOD.

"Nearest in blood," as used in reference to the distribution of French spoliation claims, includes those whose relationship to the original sufferer would entitle them to a share in his estate if it was to be divided under the statute of distribution among such of his surviving relatives as are next of kin. *Codman v. Brooks*, 46 N. E. 102, 103, 167 Mass. 499.

NEAREST JUSTICE.

See "Nearest Magistrate."

NEAREST MAGISTRATE.

Where an insurance policy contained a condition that, on a loss occurring, the insured should procure a certificate under the hand and seal of a magistrate or a notary public nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, the word "nearest" would not be construed literally, but only required the procurement of the certificate from a justice or notary public residing in the same local-

ity. *American Cent. Ins. Co. v. Rothchild*, 82 Ill. 166, 167.

A requirement in a fire policy, that the certificate of loss be made by the "magistrate or notary public" nearest to the insured premises, is sufficiently complied with by a certificate of a notary living within a third of a mile of the premises, although there is another notary living a few rods nearer, if the insured has no knowledge of the business of such other person, and the latter maintains his office in another locality, and is commissioned as residing in such other locality. *Osewalt v. Hartford Fire Ins. Co.*, 34 Atl. 735, 175 Pa. 427.

In construing a fire policy requiring proof of loss to be certified by the notary living "nearest the place of fire," the court quotes *McNally v. Phoenix Ins. Co.*, 137 N. Y. 339, 33 N. E. 475, 477, where the court says that: "I think that the phrase 'living nearest the place of fire' should not be confined entirely to the food and sleep of the notary, and should take account of the place where he lives officially, and to which by some public sign he invites those who do business with him." *Paltrovitch v. Phoenix Ins. Co.*, 37 N. E. 639, 143 N. Y. 73, 25 L. R. A. 198.

Where a fire policy provided that the insured, in case of a loss, should produce a certificate under seal of the notary public nearest the place of the fire, the word "nearest" should not be construed as employed in such a strict sense as to render necessary a careful and correct measurement of distance, it appearing that an honest effort was made to comply with the policy. *German American Ins. Co. v. Etherton*, 41 N. W. 406, 407, 25 Neb. 505.

By the term "nearest justice," as used in the chapter relating to venue of suits in justices' courts, is meant the justice whose place of holding his court is nearest to that of the justice before whom the proceeding is pending or should have been brought. *Rev. St. Tex. 1895, art. 1593.*

NEAREST MALE HEIRS.

The phrase "nearest male heirs," in a devise to testator's sons during their lives, and at their deaths to their or each of their nearest male heirs, was construed to mean the nearest male kindred of testator's sons at the death of each. "Testator may well have thought that sons might not be born to his sons, and, in his concern that his estate should ultimately go to males of the blood of his sons, the devise was made to their nearest male heirs, whoever they may be; and, if the sons themselves should not be fathers of sons, their nearest male heirs may be sons of their sisters." Such a will does not create an estate tail. *Jones v. Jones*, 51 Atl. 362, 363, 201 Pa. 548.

NEAREST NOTARY.

See "Nearest Magistrate."

NEAREST OF KIN.

The words "nearest of kin" were held, in a case involving the construction of a will directing the testator's property to be divided between his nearest of kin, to mean nearest blood relations. *Leonard v. Haworth*, 51 N. E. 7, 9, 171 Mass. 496.

NEAREST RELATIONS.

"Nearest relations," as used in a will giving property to be equally divided between testator's nearest relations, means brothers, to the exclusion of nephews and nieces. It is not synonymous with "heirs." *Locke v. Locke*, 16 Atl. 49, 45 N. J. Eq. (18 Stew.) 97.

NEAREST TOWNS.

In the provision in *Rev. St. c. 24, § 19*, that jurors for the assessment of damages caused by the laying out of a highway shall be taken from the three nearest towns not interested, the words "the three nearest towns" mean the three towns nearest to the town in which the land lies over which the highway is laid out. *Wyman v. Lexington & W. C. R. Co.*, 54 Mass. (13 Metc.) 316.

The "three nearest towns not interested" from which jurors are to be taken to estimate the damages caused by the laying out of a highway or railroad are the three towns next to and exclusive of the town in which the land lies over which the highway or railroad is laid. *Meacham v. Fitchburg R. Co.*, 58 Mass. (4 Cush.) 291.

NEARLY.

See "As Nearly As May be."

In ascertaining a place to be found by its distance from another place, the vague words "about or nearly," and the like, are to be discarded, if there are no other words rendering it necessary to retain them, as the distance mentioned is to be taken positively. *Johnson v. Pannel*, 15 U. S. (2 Wheat.) 206, 211, 4 L. Ed. 221.

In an action against the directors of a corporation, an averment in the complaint that the board is composed "nearly," if not entirely, of the same persons who committed the wrong complained of, lacks sufficient precision to present an issuable fact, the court remarking that the term "nearly" is purely relative, and does not define with accuracy how many of the defendants are members of the present board of directors, and is not equivalent to an averment that the defendants compose even a majority of the present board. *Cogswell v. Bull*, 39 Cal. 320, 325.

NEARLY END ON.

The terms "meeting head on" or "nearly end on," in an admiralty rule in reference to vessels meeting head on or nearly end on, applies to vessels meeting in a narrow channel, where they must pass on narrow courses not exceeding a half point apart. *The F. W. Wheeler v. Churchill* (U. S.) 78 Fed. 824, 828, 24 C. C. A. 353.

NEAT CATTLE.

Beef as, see "Beef."

"Neat cattle" more appropriately describes kine or animals of the bovine species than the term "cattle." *Mathews v. State*, 47 S. W. 647, 648, 39 Tex. Cr. R. 553.

Under Rev. St. 1889, § 3535, making it a felony to take, steal, and carry away "neat cattle" belonging to another, an indictment charging defendants with having stolen "two head of neat cattle" sufficiently describes the property. *State v. Dewitt*, 53 S. W. 429, 431, 152 Mo. 76.

"Neat cattle" is a sufficient term as commonly applied in the United States to describe a beast of the bovine genus, and its use in an indictment was a sufficient description of the animal stolen. *Territory v. Christman*, 58 Pac. 343, 344, 9 N. M. 582 (citing *State v. Crow*, 17 S. W. 745, 107 Mo. 341; *Castello v. State*, 36 Tex. 324; *Hubotter v. State*, 32 Tex. 479).

"Neat cattle," as used in Rev. St. 1879, § 1307, making it criminal to steal any neat cattle, is to be construed as only including cattle of the bovine species. *State v. Lawn*, 80 Mo. 241, 242.

The words "horse" and "mule" and "neat cattle," in addition to severally including the plural and singular, shall also severally include animals of both sexes and of all ages. Rev. St. Wyo. 1899, § 5203.

Cow.

A cow is the mature female of bovine animals, and hence an indictment describing the animal stolen as a "cow" is sufficient, under Comp. Laws 1897, § 79, making it an offense to steal any "neat cattle." *Wilburn v. Territory*, 62 Pac. 968, 969, 10 N. M. 402.

Steers.

"Neat cattle" are animals of the genus *bos*, as distinguished from horses, sheep, and goats, and hence information for stealing four steers, charging the taking of four head of "neat cattle," is not defective on the theory that "neat" means "nice" or "clean." *State v. Hoffman*, 37 Pac. 138, 139, 53 Kan. 700 (citing *Johnson v. State*, 1 Tex. App. 118; *Hubotter v. State*, 32 Tex. 479; *People v. Winkler*, 9 Cal. 234; *Bish. Cr. Proc.* § 700).

The term "neat cattle" includes only cattle of the bovine species. A steer belongs to the class of "neat cattle." *State v. Bowers* (Mo.) 1 S. W. 288.

NEAT PROFITS.

"Neat profits" must mean after all charges and expenses have been deducted. *Owston v. Ogle*, 13 East, 538, 543.

NEBRASKA.

The word "Nebraska," being a geographical name, cannot be appropriated by a loan and trust company to its own exclusive use, building up thereby a trade name which will be protected, and to which such company will have the exclusive right. *Nebraska Loan & Trust Co. v. Nine*, 43 N. W. 348, 349, 27 Neb. 507, 20 Am. St. Rep. 686.

NECESSARIES.

In discussing what are "necessaries" within the meaning of Rev. St. 1899, §§ 4339, 4340, securing to a wife the profits of her separate estate, except that income from her realty and her personalty shall be liable for her husband's debts for "family necessities," the court remarks that what are family necessities depends largely upon the property condition of the husband or wife, so that whether an article purchased is a necessary article depends much on the ability of the parties to afford it, and the style of the life they lead. The property status, mode of life, and condition at the time of the purchase fixes the status of the thing purchased, and it is not charged by subsequent change of condition. *Megraw v. Woods*, 67 S. W. 709, 710, 93 Mo. App. 647.

Those necessities which a husband is bound to furnish his wife are described in general as such articles of food or apparel or medicine, or such medical attendance and nursing, or such private means of locomotion or private habitation of furniture, or such provision for or protection in society, and the like, as a husband, considering his ability and standing, ought to furnish the wife for her sustenance and the preservation of her health and comfort. *Warner v. Helden*, 28 Wis. 517, 519, 9 Am. Rep. 515.

Some courts have sought to draw a distinction between what they term "necessaries" or "necessaries of life" or "prime necessities," and contracts or agreements with reference to other articles of commerce or merchandise. But this distinction is not well founded. What is at one time a luxury, at another time is a necessity. Things which were considered sufficient to satisfy the description of "necessaries" a few years ago would be considered wholly insufficient now

under present conditions of civilization. How useful must a thing become before it enters the catalogue of "necessaries," so that contracts to restrain trade in regard to it, or to foster a monopoly in it, are void? Such distinction is unsound in principle. *Brown v. Jacobs Pharmacy Co.*, 41 S. E. 553, 556, 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126.

The term "necessaries," as applied to the duty of the husband toward his wife, has a more comprehensive meaning than the word "necessary," when used in connection with furnishing the articles. The former means such articles, services, or the like as the husband, considering his ability, ought to furnish the wife for sustenance and the preservation of her life, health, and comfort. The latter one has reference to the necessity of their being furnished. *Artz v. Robertson*, 50 Ill. App. 27, 33.

"Necessaries" which a husband is required to furnish his wife "are not confined to articles of food or clothing required to sustain life or preserve decency, but include such articles of utility as are suitable to maintain her according to the estate and degree of her husband." *Conant v. Burnham*, 133 Mass. 503, 505, 43 Am. Rep. 532.

It is not required, to constitute "necessaries," that they should be such in the absolute sense of the word. Such things are "necessary," in the legal sense, as are usual and proper for the use of a family in the circumstances of the parties. *Sulter v. Mustin*, 50 Ga. 242, 244.

The word "necessaries" is not restricted to articles of first necessity, but it includes everything proper for the person's condition. *La Rue v. Gillyson*, 4 Pa. (4 Barr) 375, 376, 45 Am. Dec. 700.

To constitute "necessaries," for which a wife, whose husband has neglected or refused to provide for her, may pledge his credit, they must be articles which are necessary and suitable for her comfort in her condition in life, and must be needed by the wife for her present use. *Compton v. Bates*, 10 Ill. App. (10 Bradw.) 78, 85.

The word "necessaries," as used in Rev. St. c. 47, art. 2, § 1, relating to the liability of a married woman for necessities, should receive a liberal construction, and be held to embrace such things as the family, including the husband, considering their social position and the estate of the wife, ought to have and enjoy. *Pell v. Cole*, 59 Ky. (2 Metc.) 252, 253; *Bergen v. Forsythe*, 56 Ky. (17 B. Mon.) 551, 556.

What constitutes "necessaries," within the meaning of the rule that the husband is bound to supply necessities for his wife, is a matter of relative fact, depending upon the

standing and circumstances of the parties. *Shelton v. Hoadley*, 15 Conn. 535, 538; *Thorpe v. Shapleigh*, 67 Me. 235, 237.

The term "necessaries," in the common-law rule that the husband was bound to provide necessities for the wife and children, was not confined to food and clothing, but was construed to include articles of utility and ornament ordinarily enjoyed by families of persons of estate and station similar to that of the husband. *Neasham v. McNair*, 72 N. W. 773, 103 Iowa, 695, 38 L. R. A. 847, 64 Am. St. Rep. 202.

"Questions as to the meaning of the word 'necessaries' have often arisen in actions brought against infants for goods alleged to have been furnished to them, or against husbands for goods furnished to their wives. It has also been held that those articles were to be considered necessary which were suitable to the degree and condition of life of the person to whom they were furnished, having regard to the estate of the infant or the husband, and that it was not to be confined to those which were required to sustain life or to preserve decency." *Hamilton v. Lane*, 138 Mass. 358, 359; *Bergh v. Warner*, 50 N. W. 77, 78, 47 Minn. 250, 28 Am. St. Rep. 362.

"Necessaries," as used in a statute declaring that the estate of a married female shall be liable for debts on account of necessities for herself or any member of her family, is one of relative signification, and should not generally be restricted in its application to such things merely as are proper and requisite for sustenance, but often includes much more, depending on the circumstances, situation, and social position of the parties. *Harris v. Dale*, 68 Ky. (5 Bush) 61, 63.

It is not enough that the articles sold a wife are, in their nature and from their description, necessary for the use of the wife and family. If they were not so, there would be no presumption of the husband's assent to the purchase in any case. It is indisputable, where the vender has been forbidden to sell upon the wife's request on the husband's credit, that the vender show not only that the goods were in their nature necessities, but that the husband neglected his duty to provide supplies and for that reason they were necessities. *Keller v. Phillips*, 39 N. Y. 351, 354.

Attorney's fees.

"Necessaries" for a wife are not confined to things demanded for her sustenance, apparel, and health, but extend to whatever is necessary to her happiness, comfort, and enjoyment of life, considering her station as to wealth and fashion, and include the expenses incurred by the wife in defending herself against an attack on her character in a proceeding for divorce by her husband on the

ground of adultery. *Porter v. Briggs*, 38 Iowa, 166, 167, 18 Am. Rep. 27.

Legal expenses are deemed "necessaries" where the conduct of the husband has been such as to render them necessary for the personal protection and safety of the wife. *Morrison v. Holt*, 42 N. H. 478, 480, 80 Am. Dec. 120.

The "necessaries" which a husband is bound to supply his wife do not include the professional services of an attorney rendered the wife in defending a bill for divorce by the husband against her, even if such defense may prove successful. *Ray v. Adden*, 50 N. H. 82, 83, 9 Am. Rep. 175.

A husband is not liable for legal services rendered his wife in a proceeding brought against him by the people for failure on his part to support her, on the ground that such services were "necessaries." *McQuhae v. Rey*, 22 N. Y. Supp. 175, 176, 2 Misc. Rep. 476.

Where a husband prosecuted his wife to find sureties to keep the peace, and failed to sustain the charges brought against her, the fees of attorneys employed by her to aid her against such prosecution were "necessaries" for which the husband was liable. *Warner v. Heiden*, 28 Wis. 517, 9 Am. Rep. 515.

The term "necessaries" includes the expenses of a wife's defense in a prosecution instituted against her by her husband for being a common drunkard. *Conant v. Burnham*, 133 Mass. 503, 505, 43 Am. Rep. 532.

Where a wife applied to an attorney, who made out a complaint against her husband for a breach of the peace, which was signed and sworn to by her, and such proceedings were had thereon that the husband was committed to the jail of the county, he was liable to the attorney for such charges as would be good against complainants in ordinary cases for legal services, on the ground that the services were "necessary services" furnished to the wife for her protection. It is as important that the person of the wife be protected from brutal outrage and violence as that her necessary food and clothing should be supplied. Both are for her preservation, and her husband should be as much bound to fulfill her contracts in the one case as in the other. The case of violence, however, would seem to be one of the greater necessity. *Morris v. Palmer*, 39 N. H. 123, 125.

The common law defines "necessaries" to consist only of necessary food, drink, clothing, washing, physic, instruction, and a competent place of residence. *Shelton v. Pendleton*, 18 Conn. 417. This definition is not broad enough to include counsel fees for services rendered by an attorney to defendant's wife in a divorce case by the wife

against him. *Yeiser v. Lowe*, 50 Neb. 310, 312, 69 N. W. 847.

What are "necessaries" furnished a debtor or his family, within the statute providing that no property shall be exempt for money due for necessities furnished, is a question of fact depending on the varying circumstances in each case. Legal professional services do not belong to the class which can be excluded as a matter of law. *Peaks v. Mayhew*, 94 Me. 571, 48 Atl. 172. A safe standard for lines of demarcation, as applied to legal services rendered in litigation, is found in the case of *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532. From the illustrations presented in that case it may be stated as a safe rule of general application that legal services rendered in the defense of a criminal prosecution fall within this class of necessities; that such services rendered in the institution of criminal proceedings are not comprised within the term. *Fisher v. Shea*, 54 Atl. 846, 847, 97 Me. 372, 61 L. R. A. 367.

Burial expenses.

Where a wife is compelled by the cruelty of her husband to leave him, he is responsible for her decent burial, when dead, as a "necessary" chargeable to his account. *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670.

A coffin and graveclothes purchased by defendant for his mother-in-law, who died while a member of his family, are "necessaries" within that term as used in the statute relative to trustee process. *Thompson v. Smith*, 57 N. H. 306.

"Necessaries" apply to a living person; something, be whatever it may, to sustain or maintain a living person, either food, clothing, medicine, habitation, education, or whatever is necessary for such a person in his station in life. The term "necessaries," as generally understood, applies to purchases made by minors and married women, whereby the estate of the minor, his parent, or the husband is bound to pay for the same according to the estate, circumstances, or conditions of the parties concerned. The word "necessaries," as used in Rev. St. § 6480, relating to the 10 per cent. of debtor's wages released from exemption on claims for necessities, applies to purchases of food, clothing, medicine, habitation, education, or whatever is necessary to sustain or maintain a living person, but does not include burial expenses. *Watkins v. Schlechter*, 9 Ohio Dec. 590, 594, 7 Ohio, N. P. 42.

Clothing, education, food, lodging, and ornaments.

Clothing supplied to a wife when in need thereof, on refusal of her husband to furnish her the same, is a "necessary," render-

ing the husband chargeable therefor. *Eames v. Swetser*, 101 Mass. 78, 80.

A suit of clothing for a debtor was a "necessary," with the meaning of the insolvent act, providing that a discharge in insolvency shall not bar a claim for necessities furnished the debtor or his family. *Smith v. Randall*, 83 Mass. (1 Allen) 456, 460.

"Necessaries" of a wife consist of food, drink, clothing, washing, medical assistance, instruction, and a suitable place of residence. *Reed v. Crissey*, 63 Mo. App. 184, 191.

The "necessaries" for which a wife may pledge her husband's credit, when he has turned her out of doors, or by his misconduct compelled her to leave him, include lodging, clothes, and subsistence. *Zeigler v. David*, 23 Ala. 127, 137.

"Necessaries," as used in reference to the liability for the necessities furnished a family, is relative in its meaning, and not capable of a very exact definition, and what are necessities is a question of fact, and in general the term embraces food, raiment, medicines, medical assistance, and habitation comporting with the social position of husband and wife and with the fortune of the husband. *Eskridge v. Ditmars*, 51 Ala. 245, 253.

A contract for subsistence, clothing, and education is a contract for "necessaries." *Stone v. Dennison*, 30 Mass. (13 Pick.) 1, 6, 23 Am. Dec. 654.

The term "necessaries," with reference to the duty of a husband to supply his wife with necessities, is not confined merely to what is requisite barely to support life, but includes many of the conveniences of refined society. It is a relative term, which must be applied to the circumstances and conditions of the parties. Ornaments and superfluities of dress, such as are usually worn by those in the parties' rank and station in life, have been classed among necessities, and as such are recognized in the law. The liability of a husband for necessities depends on a determination of the question whether the articles purchased by the wife were or were not articles needful and proper to be furnished to the wife in view of the husband's condition in life and of the society in which he moved. The question what is necessary cannot be determined on a consideration solely of the amount of the husband's property, but his earning capacity must also be considered. *Clark v. Cox*, 32 Mich. 204, 211; *Reed v. Crissey*, 63 Mo. App. 184, 191; *Eskridge v. Ditmars*, 51 Ala. 245, 253.

Cook stove.

Whether a cook stove was a "necessary," within the meaning of Code, § 1826, providing that no married woman not a free trader

may make a contract to affect her property, except for necessities, is a question for the jury, in view of all the circumstances, such as the woman's manner of living, her pecuniary means and those of her husband, and to what extent he contributed to the support of the family. *Berry v. Henderson*, 9 S. E. 455, 456, 102 N. C. 525.

Domestic service, and service of slaves.

Domestic service, in accordance with the means of the husband and social station of the family, is a necessity for which the wife, when living with him, may bind him. *Phillips v. Sanchez*, 17 South. 363, 365, 35 Fla. 187.

The labor and services of slaves, applied to the support and maintenance of the wife, cannot be regarded as "necessaries," though their value was not more than sufficient for her necessary support and maintenance, nor can the husband be charged with their value in a court of law. *Zeigler v. David*, 23 Ala. 127, 137.

False teeth.

A plate of mineral teeth are "necessaries" for which a husband is liable when furnished his wife. *Gilman v. Andrus*, 28 Vt. 241, 242, 67 Am. Dec. 713.

Expense of hotel or boarding house.

The provision of Code, § 531, rendering subject to execution property for any debt contracted for "necessaries," refers to debts contracted for the debtor and his family, but not for debts incurred in carrying on a hotel or boarding-house business. *Lehnoff v. Fisher*, 48 N. W. 821, 822, 32 Neb. 107.

The word "necessaries," as used in the insolvent statute providing that a claim for necessities shall not be discharged, means things necessary to the personal relief of the debtor or his family, and a debtor's boarders are not of his "family" within the meaning of the statute, and hence necessities furnished to them are not necessities for the debtor and his family. *Lincoln v. Dunbar*, 89 Mass. (7 Allen) 264, 265.

The word "necessaries" is so general and of so broad a signification in itself that it is necessary, in construing it, to consider the subject-matter in connection with which it is used. In a statute providing that a discharge in insolvency shall not bar any claim for "necessaries" furnished to the debtor and his family, the word is to be construed strictly, and in reference to the purpose for which it was introduced. This purpose appears to be founded on the great principle of humanity, which exempts certain property from attachment even for a just debt, and which gives effect to the contract of a minor for necessities, notwithstanding his general disability. It is to save the person from suffering for the

want of food, shelter, medicine, and the like wants, so imperative, that even the claims of strict justice must yield to them. Without attempting to lay down any general rule, the court are of the opinion that the rent of a house hired by a single woman, without a family, for the purpose of keeping a boarding-house, is not within the class of "necessaries" intended by the statute. *Prentice v. Richards*, 74 Mass. (8 Gray) 226, 227.

Medical attendance and medicines.

Medical services are "necessaries," such as to make a married woman's contract therefor binding upon herself. *Carstens v. Hanselman*, 28 N. W. 159, 61 Mich. 426, 1 Am. St. Rep. 606.

Medical attendance and medicines furnished to a debtor and his family is a demand for "necessaries," within Gen. St. c. 142, § 29, relating to such demands. *Darling v. Andrews*, 91 Mass. (9 Allen) 106, 109.

"Necessaries" within the rule that the husband is liable for necessities furnished his wife, include medical attendance of the wife in sickness, if such attendance is necessary. *Cothran v. Lee*, 24 Ala. 380, 381; *Bevier v. Galloway*, 71 Ill. 517, 518; *Pearl v. McDowell*, 26 Ky. (3 J. J. Marsh.) 658, 661, 20 Am. Dec. 199; *Mayhew v. Thayer*, 74 Mass. (8 Gray) 172, 175; *Tebbetts v. Haggood*, 34 N. H. 420, 421.

"Necessaries," as used in Ky. St. § 2130, providing that the husband shall be liable for necessities furnished to the wife after marriage, should be construed to include medical attention to the wife, suitable to her situation and to his condition in life. The term "necessaries," as used in the statute, does not mean what is absolutely essential to sustain life, but what is suitable to the wife's station and the husband's condition in life, and includes such medical attention and care as is proper with reference to these conditions. *Towery v. McGaw* (Ky.) 56 S. W. 727, 728 (citing 2 Kent, Comm. 132; *Bouv. Law Dict.* tit. "Necessaries").

The "necessaries," for which a wife may pledge her husband's credit when he has turned her out of doors, or by his misconduct compelled her to leave him, include, in case of her sickness, medicines, medical attendance, and reasonable expenses incurred during illness. *Zeigler v. David*, 23 Ala. 127, 137.

The law does not recognize the dreams, visions, or revelations of a woman in a mesmeric sleep as "necessaries" for a wife for which the husband, without his consent, can be held to pay. Those are fancy articles which those who have money of their own to dispose of may purchase if they think proper, but they are not necessities known to the law for which the wife can pledge the credit

of her absent husband, and he is not liable for medicines and advice prescribed by a party not professing to be a physician, but who had put the wife into a mesmeric sleep in which she declared the nature of her complaint and prescribed the medicine. *Wood v. O'Kelley*, 62 Mass. (8 Cush.) 406, 408.

A husband is never liable for agreements made by a wife without his consent, unless the circumstances are such as to raise the presumption or implication that the wife acts under his authority; and the power of the wife to bind a husband on contract is based on the ground of agency, she having no inherent power as a wife to make a contract, even for necessities, binding on him, so that it must be made to appear that the contract was made with his assent, or that it was for necessities. Medical attendance upon one, not a member of or dependent on a family for support, cannot be classed as "necessaries," and the master is not bound to provide medical attendance for an ordinary hired servant unless he stipulates for it in the contract of hiring. The term "necessaries" means all such things as are proper and requisite for the sustenance of man, and embraces food, clothing, medicine, and habitation, and, to hold the husband liable, these provisions must be consistent with his condition and estate. *Baker v. Witten*, 30 Pac. 491, 492, 1 Okl. 160.

Rent of church pew.

The "necessaries" which a husband is required to furnish his wife are said in the books to consist only of food, drink, clothing, washing, physic, instruction, and a suitable place of residence. It does not include religious instruction, and therefore a husband is not liable for the rent of a church pew hired and occupied by his wife without his consent. *St. John's Parish v. Bronson*, 40 Conn. 75, 76, 16 Am. Rep. 17.

Piano.

It is impossible to state a comprehensive definition of "family necessities"; they must be left for cases to define as cases arise. It is not to be doubted that in some circumstances a piano would be necessary to the support of a family, as where a wife must teach music for a livelihood, or a daughter was to be educated, for education may fairly enough be included in the word "support." In some circumstances it would be a luxury, and not a necessity. *Parke v. Kleeber*, 37 Pa. (1 Wright) 251, 253.

While in certain cases it would be the duty of the court to direct the jury authoritatively that the articles furnished could not be necessities, in others it would be for the jury to determine whether they would come within that class, and to determine whether they were suitable and proper in the particular cases; so that it could

not be said, as a matter of law, that a piano cannot come within that class of articles so as to be the subject of a valid gift to a married woman from her husband, and the mere fact that the husband at the time of the gift kept a saloon and a lodging house for fishermen did not show as a matter of law that it was not such an article. *Hamilton v. Lane*, 138 Mass. 358, 360.

Pipes, tobacco, cigars, and newspapers furnished husband.

Pipes, tobacco, and cigars furnished the husband, as well as newspapers, are not "necessaries" for which a wife's statutory estate can be rendered liable. *Bradley v. Murray*, 66 Ala. 269, 274.

Presents.

Whilst we are not prepared to say that there is no case in which an article intended as a present to a friend may not come within the term "necessaries," yet it is obviously a perversion of the meaning of words to class a present of a \$12.50 hat as a necessity. Social duties unquestionably create wants and necessities as well as do other relations of life, but a present of an article of the character described can hardly be spoken of as a duty, either of charity or friendship. *Sulter v. Mustin*, 50 Ga. 242, 244.

Question of law or fact.

"Necessaries" furnished a wife for which a husband is liable consist, it is said, of food, drink, clothing, washing, physic, instruction, and a suitable place of residence. These may be regarded as the strict necessities of support, but the husband may control the style of living; he may, by the mode of life which he adopts, confer upon her a power to pledge his credit for more than the mere necessities of life. Such power is under the control of the husband. Practically what shall be considered as necessities will vary with the rank, wealth, position, and fortune of the husband, though it should never go to the extravagance of mere luxury. What, then, should be considered necessities in a given case is generally a question for the jury. This is so when the articles in dispute are such as may be used in the household affairs, whether of the rich or the poor. But if they be articles clearly outside of household affairs, or luxuries, the court should so declare as a matter of law. *Sauter v. Scrutshfield*, 23 Mo. App. 150, 157; *Raynes v. Bennett*, 114 Mass. 424, 429; *Berry v. Henderson*, 9 S. E. 455, 456, 102 N. C. 525; *Winship v. Waterman*, 56 Vt. 181, 184; *Willey v. Beach*, 115 Mass. 559, 560; *Thorpe v. Shapleigh*, 67 Me. 235, 238.

The question whether the articles furnished a wife are necessities is, except in

a very clear case, one for the jury. *Bergh v. Warner*, 50 N. W. 77, 78, 47 Minn. 250, 28 Am. St. Rep. 362.

Repairs to property.

The word "necessaries," as used in the statute subjecting the general estate of a married woman in land and slaves to the payment of debts created after marriage on account of necessities for herself and family, includes needed repairs on fences, repairs on the dwelling and outhouses of the residence of a married woman and her family, so as to render the dwelling comfortable and the other houses fit for use, and to prevent the same from falling into ruin. *Marshall v. Miller*, 60 Ky. (3 Metc.) 333, 334.

A husband is liable for repairs to the homestead, made at request of the wife during the protracted absence of the husband, such repairs being necessary. *McAfee v. Robertson*, 41 Tex. 355.

Rent of house.

As used in an insolvency statute providing that the discharge of a debtor shall not bar any claim for necessities furnished to him or his family, the rent of a dwelling house occupied by the debtor and his family is within the meaning of the term "necessaries." *Bell v. Tuttle*, 83 Mass. (1 Allen) 219.

A claim for rent of a house, under a lease executed by several persons as joint lessees, cannot be excepted from the operation of a certificate of discharge in insolvency, granted to a portion of them on the ground that the rent was within the class of "necessaries" within the provisions of Gen. St. c. 118, § 79. *Plympton v. Roberts*, 94 Mass. (12 Allen) 366, 367.

Charge on separate estate.

Under the statute making the estate of a wife liable for food, raiment, habitation, medical assistance, and medicines, the estate of the wife is liable only for necessities for which the husband would be responsible at common law. *Lee v. Campbell*, 61 Ala. 12, 14, 16.

What are "necessaries" for which a married woman may bind her separate estate in a given case depends upon a variety of facts and circumstances—the kind of property furnished, the use to which it can be put, the occasion for its use, the rank and station of the person for whom it is furnished, etc. It is partly a conclusion of law from other facts, but not wholly so. It is a mixed question of law and fact. The same facts which would constitute the same articles necessities for one person would not for another person. *Winship v. Waterman*, 56 Vt. 181, 184.

Sewing machine.

Whether a sewing machine is a "necessary" for a wife, in such a sense that the husband can be sued for it, is a question of fact for the jury. *Willey v. Beach*, 115 Mass. 559, 560.

Watches and chains.

Whether gold watches and chains are necessities, for which a husband would be liable when purchased by his wife, is a question of difficulty. In some cases it is the duty of the court to rule as a matter of law that certain articles do not come within the class of "necessaries" for which the wife may pledge the credit of her husband without his consent, as a class of goods for ornament, or material for building a house, would not be "necessary" within the meaning of the law; but when the goods are bought by the wife, and are for her personal use, and not mere ornament, the question whether they are necessary is a question for the jury. As a general rule the term "necessary," applied to a wife, is not confined to articles of food or clothing for preserving decency, but includes such articles of utility as are suitable to maintain her according to the estate and degree of her husband. *Raynes v. Bennett*, 114 Mass. 424, 429.

NECESSARIES (For Bankrupt).

Under the bankruptcy act providing for an allowance to the bankrupt of such other articles and "necessaries" as the assignee may in his discretion think right, it was evidently intended that the bankrupt householder should be permitted to retain as much household furniture as was necessary to enable him to keep house in a plain and convenient manner, not exceeding the value named in the bankrupt act; and the fact that the wife may have as her separate property furniture in use in the house in which the bankrupt resides can make no difference, as it was not intended to make the bankrupt dependent on his wife for the necessary means of keeping house. In *re Cobb* (U. S.) 5 Fed. Cas. 1123, 1124.

Books and tools.

"Necessaries," as used in the bankruptcy act authorizing the assignee to set aside to the bankrupt certain articles and necessities, may include things other than household and kitchen furniture, and may, for example, include the books of a professional man. In *re Thiell* (U. S.) 23 Fed. Cas. 917, 918.

Clock or watch.

In Bankr. Act 1867 (14 Stat. 517), vesting the property of a bankrupt in his assignee, except the necessary household and

kitchen furniture, and such other articles and necessities of the bankrupt as the assignee should designate and set apart, not exceeding a certain sum in value, the term "necessaries" is a comprehensive and indefinite expression, but it should be construed to include a plain and not extravagantly costly watch owned by a commercial man. In *re Steele* (U. S.) 22 Fed. Cas. 1202, 1203.

In Bankr. Act 1841, c. 9, § 3 (5 Stat. 440), vesting in the assignee all the property of the bankrupt, except the necessary household and kitchen furniture, and such other articles and "necessaries" of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family conditions and circumstances of the bankrupt, but altogether not to exceed \$300, the word "necessaries" cannot be construed to include a clock or a silver watch. In *re Williams* (U. S.) 29 Fed. Cas. 1320.

Cow.

A cow may or may not, according to the circumstances, fall within the description of "necessaries" in Bankr. Act 1841, c. 9, § 3 (5 Stat. 440), vesting in the assignee all of the bankrupt's property, except such necessities of the bankrupt as the assignee shall designate. In *re Williams* (U. S.) 29 Fed. Cas. 1320.

Money.

In Act Cong. 1876, § 14 (14 Stat. 522), excepting from the operation of an assignment in bankruptcy the necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the assignee shall designate and set apart, "necessaries" should be construed to include money necessary for the support of the bankrupt. In *re Hay* (U. S.) 11 Fed. Cas. 887.

"Necessaries," within Bankr. Act, § 14 (14 Stat. 522), providing for the setting apart, in addition to certain things, of other articles and necessities of the bankrupt to his use, cannot be construed to include money, unless such money is the proceeds of specific goods which ought to be set apart as necessities. In *re Welch* (U. S.) 29 Fed. Cas. 605.

Money may be allowed to a bankrupt as exempt property under the term "necessaries," when the exigencies of a bankrupt seem to require it for the temporary subsistence of his family. In *re Thornton* (U. S.) 23 Fed. Cas. 1144, 1145.

Church pew.

The "necessaries" to be allowed a bankrupt and his family do not include a pew in a church. It is no more than desirable and convenient, and cannot be ranked with

the articles classed as "necessaries." In *re* Comstock, 1 N. Y. Leg. Obs. 326.

Provisions.

"Necessaries," as used in the bankruptcy act, authorizing the assignee to set aside to the bankrupt certain articles and necessities, may include things other than household and kitchen furniture, and may, for example, include provisions for the family. In *re* Thiehl (U. S.) 23 Fed. Cas. 917, 918.

Real estate.

Real estate cannot be set aside to a bankrupt as exempt property under the term "necessaries." In *re* Thornton (U. S.) 23 Fed. Cas. 1144, 1145.

Silver spoons.

Silver spoons may or may not, according to the circumstances, be "necessaries" within Bankr. Act 1841, c. 9, § 3 (5 Stat. 440), vesting in the assignee all of the bankrupt's property, except such necessities as the assignee shall designate. In *re* Williams (U. S.) 29 Fed. Cas. 1320.

NECESSARIES (For Infants).

It has been always held that those articles would be construed "necessaries" for an infant which were suitable to the degree and condition of life of the infant to whom they were furnished, having regard to her estate or that of her husband, and that it was not confined to those which were required to sustain life or preserve decency. *Hamilton v. Lane*, 138 Mass. 358, 360.

"Necessaries" for which an infant may become liable not only include such articles as are absolutely necessary to support life, but also those that are suitable to the state, station, and degree of life of the person to whom they are furnished. *Jordan v. Coffield*, 70 N. C. 110, 113.

The law has never limited its definition of the term "necessaries" to those things which are strictly essential to the support of life, as food, clothing, and medicine in sickness. The practical meaning of the term has always been in some measure relative, having reference as well to what may be called the "conventional necessities" of others in the same walk of life with the infant, as to his own pecuniary condition and other circumstances. *Middlebury College v. Chandler*, 16 Vt. 683, 685, 42 Am. Dec. 537.

It would be difficult to lay down any general rule upon the subject as to what is included within the term "necessaries" for which a binding contract may be made by an infant, and to say what would and would not be necessities. It is a flexible and not an absolute term, having relation to the infant's condition in life, and the habits and pursuits

of the place in which, and the people among whom, he lives, and to the changes in those habits and pursuits, occurring in the progress of society. *Breed v. Judd*, 67 Mass. (1 Gray) 455, 458.

"Under ever-varying circumstances there can be no legal standard for 'necessaries,' and it would be subversive of parental authority and dominion if interested third persons could assume to judge for the parent, and subject him to liability for their unauthorized interference in supplying the supposed wants of the child. So, where there was no proof to the contrary, it would not be presumed that the bulk of certain articles, for example, kid gloves, cologne, fiddle strings, bridles and spurs, walking canes, a powder flask and caps, a silk cravat, and a silk and linen coat, were such as minor sons required." *Lefils v. Sugg*, 15 Ark. 137, 140. See, also, *New Hampshire Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345, 350.

Articles furnished infant's wife.

The word "necessaries," within the rule that an infant may be charged with necessities, includes necessities furnished for the infant's wife; but if provided in order for the marriage, the infant is not chargeable, though the wife uses them. *Turner v. Trisby*, 1 Strange, 168.

Articles used in business enterprise.

The word "necessaries," as used to indicate those things for which an infant is liable when furnished to him, should be construed to mean things necessary to the infant, and not articles necessary to a business which he is engaged in; and hence, where an infant's sole business was to carry on his mother-in-law's farm for one-half of the produce, the price of a horse sold to him to be used in such business was not a necessary for which he was liable. *Wood v. Losey*, 15 N. W. 557, 558, 50 Mich. 475.

The keeping of four horses for six months, the principal use of which was in the business of a hackman, is not within the class of "necessaries" for which an infant is liable, although the horses are occasionally used to carry his family out for a ride. *Merriam v. Cunningham*, 65 Mass. (11 Cush.) 40, 44.

The law does not contemplate that a minor shall open a shop and become a trader or a proprietor of a business which involves the making of a variety of contracts. Hand tools, to a reasonable amount, such as are ordinarily provided by a journeyman and necessary in his trade, may be "necessaries" for which the estate of a minor would be bound, but a barber's chair and shop, and articles of furniture designed for furnishing the shop, are not necessities. *Ryan v. Smith*, 43 N. E. 109, 165 Mass. 303.

We suppose an infant who had learned the trade of carpenter might be charged with the chest of tools necessary to do his labor as a journeyman, or a laborer with his pick-ax and spade, as "necessaries." If the going to California to labor at mining by an infant residing in Massachusetts was, in view of his situation and condition in life, a reasonable and prudent step, it would be difficult to say that he might not be charged with the expense of the mining outfit necessary in his labor as "necessaries." *Breed v. Judd*, 67 Mass. (1 Gray) 455, 458.

Attorney's fees.

The power of an infant to contract for necessities is governed by the same general principles which determine the power of a married woman abandoned by her husband to procure necessities, and it is well settled that her power extends to legal proceedings necessary to her security. Therefore a female infant may employ an attorney to bring suit for her for a breach of promise of marriage. *Munson v. Washband*, 31 Conn. 303, 305, 83 Am. Dec. 151.

Services of an attorney, rendered to an infant in defending him in a bastardy proceeding, are necessities for which, if it was reasonable for him to make a defense, he is liable on an implied promise. *Barker v. Hibbard*, 54 N. H. 539, 540, 20 Am. Rep. 160.

Services and expenditures by an attorney in a suit brought by the guardian of an infant to protect the infant's title to his estate are not regarded as necessities, and may be avoided by the infant, even under an express promise. Though such services may promote the sound interest of the ward, they are not such assistance as comes within the term of "necessaries." Lord Coke considers the necessities of an infant to "include victuals, clothing, medical aid, and good teaching or instruction whereby he may profit himself afterwards." Such aid concerns the person, and not the estate. *Phelps v. Worcester*, 11 N. H. 51, 53.

"Necessaries" are usually food, lodging, wearing apparel, medicine, medical attendance, and the means of an education. Such is the more rigid rule of the common law. But there are cases which recognize that fees of attorneys for services rendered infants may under some circumstances be treated as necessities, for the payment of which the law will imply a contract. *Searcy v. Hunter*, 17 S. W. 372, 373, 81 Tex. 644, 26 Am. St. Rep. 837.

An action for damages for assault was successfully prosecuted by an attorney for a 17 year old minor at the instance of her father as next friend. After judgment the minor attempted to enter into an advantageous compromise of the claim, but by the attorney's efforts the full amount of the claim

was collected. Held, that the services of the attorney were "necessaries." *Crafts v. Carr*, 53 Atl. 275, 277, 24 R. I. 397, 60 L. R. A. 128, 96 Am. St. Rep. 721 (quoting *Bouv. Law Dict.*).

Betting books.

Betting books are not "necessaries" for an infant. *Jenner v. Walker*, 19 Law T. (N. S.) 398; *Genner v. Walker*, 3 Am. Law Rev. 590.

Bicycle.

In an action brought to recover of the defendant installments paid to him by the plaintiff, a minor, who had purchased of him a bicycle, it appeared that the plaintiff was employed at a place at a considerable distance from his father's house, and that it was impracticable for him to take his dinners at home unless he used a bicycle. Held, that the bicycle was not a necessary. *Pyne v. Wood*, 14 N. E. 775, 145 Mass. 558.

Clothing, education, food, lodging, and medicine.

Food, lodging, clothes, medical attendance, and education constitute the five leading elements in the doctrine of "infant's necessities." *People v. Pierson*, 68 N. E. 243, 246, 176 N. Y. 201, 63 L. R. A. 187.

"What are necessities for an infant cannot be defined by any general rule applicable to all cases. The common law defines 'necessaries' to consist only of necessary food, clothing, drink, washing, mending, instruction, and a competent place of residence. What are necessities is a mixed question of law and fact, to be determined in each case from the particular facts, circumstances, and surroundings in the case. The court, in *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151, said: 'The rule usually stated in the books confines the term 'necessaries,' for which a minor may bind himself, to suitable food and clothing, shelter, washing, medicine, medical attendance, and education, but this depends entirely on what the court or jury may think in each case suitable and proper, in reference to the infant's condition and station in life.'" *Englebert v. Troxell*, 58 N. W. 852, 854, 40 Neb. 195, 26 L. R. A. 177, 42 Am. St. Rep. 665.

It is a matter of law that the necessities for which an infant may bind himself by contract consist of diet, apparel, washing, lodging, schooling, and medicine. Whether within these limits certain articles were in fact necessary, and to what extent, becomes, in the language of Lord Kenyon, a relative fact, to be governed by the fortune and circumstances of the infant. *Grace v. Hale*, 21 Tenn. (2 Humph.) 27, 29, 36 Am. Dec. 296.

A good common-school education is now recognized as one of the necessities for an

infant. Such an education is essential to the intelligent discharge of civil, political, and religious duties. But the more extensive attainments in literature and science must be viewed in a light somewhat different. Though they tend greatly to elevate and adorn personal character, and may justly be expected to prove of public utility, yet in reference to men in general they are far from being "necessary" in a legal sense. Professional studies or education, and training necessary to the knowledge and practice of mechanic arts, stand on peculiar grounds of reason and policy, and partake of the nature of an apprenticeship. But a collegiate education is not a necessary for which an infant may be bound. *Middlebury College v. Chandler*, 16 Vt. 683, 685, 42 Am. Dec. 537.

Clothes purchased by an infant while away from home are necessities. *Lynch v. Johnson*, 109 Mich. 640, 643, 67 N. W. 908.

The word "necessaries," is a relative term, and is not limited to those things which are indispensable to the infant's personal support and comfort. Such an education and training as will fit one for the ordinary duties of life in the sphere in which he moves, and enable him to earn a respectable and honest living in his chosen vocation, should be so classed. *Cory v. Cook*, 53 Atl. 315, 316, 24 R. I. 421.

A board bill contracted by an infant to enable him to attend school is a necessary, the payment for which may be recovered of him by suit. *Kilgore v. Rich*, 22 Atl. 176, 83 Me. 305, 12 L. R. A. 859, 28 Am. St. Rep. 780.

Dental work.

The filling by a dentist of the decayed teeth of a minor 15 years old, and the owner of considerable estate, the work being necessary to the preservation of the teeth, is within the class of "necessaries." *Strong v. Foote*, 42 Conn. 203, 205.

Dwelling house.

"Necessaries" for an infant refer to supplies, such as food, clothing and lodging, and all those things for the mind, such as suitable instruction, etc. A dwelling house is not a necessity. *Allen v. Lardner*, 29 N. Y. Supp. 213, 214, 78 Hun, 603.

Horse.

Under the rule that an infant is only liable on his contract for necessities, a horse cannot be regarded as "necessaries," so as to make him liable under his contract to purchase it. *Rainwater v. Durham* (S. C.) 2 Nott & McC. 524, 525, 10 Am. Dec. 637.

Insurance of property.

A contract for the insurance of his property against loss or damage by fire is not

a contract for necessities which will bind an infant absolutely, although such a contract may be extremely beneficial to the infant, for the contract's being advantageous or disadvantageous to the infant or his estate furnishes no reliable test on the point as to whether or not the subject-matter of such contract is properly included within the term "necessaries." The true rule is that those things, and those only, are properly to be deemed necessities which pertain to the becoming and suitable maintenance, support, clothing, health, education, and appearance of the infant according to his condition and rank in life, the employment or pursuit in which he is engaged, and the circumstances in which he may be placed as to the profession or position. *New Hampshire Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345, 350.

Jewel solitaires.

A pair of jewel solitaires sold to an infant are not "necessaries." *Jenner v. Walker*, 19 Law T. (N. S.) 398; *Genner v. Walker*, 3 Am. Law Rev. 590 (citing *Ryder v. Wombrell*, Law Rep. 3, Ex. 90).

Question of law or fact.

What are "necessaries" for an infant cannot be defined by any general rule applicable to all cases, but is a mixed question of law and fact, to be determined in each instance from the facts, circumstances, and surroundings in the particular case. *Englebert v. Troxell*, 58 N. W. 852, 854, 40 Neb. 195, 26 L. R. A. 177, 184, 42 Am. St. Rep. 665; *Grace v. Hale*, 21 Tenn. (2 Humph.) 27, 29, 36 Am. Dec. 296; *Hamilton v. Lane*, 138 Mass. 358, 360.

Marriage outfit.

Goods purchased by an infant for his marriage, suited for such purpose to one in his circumstances in life, are "necessaries," and a contract for such is binding. *Sams v. Stockton*, 53 Ky. (14 B. Mon.) 232, 234.

"Necessaries" for which an infant may become liable may include a bridal outfit and a chamber set furnished to a bride before her marriage. *Jordan v. Coffield*, 70 N. C. 110, 113.

Presents to infant's bride.

Presents to a bride who eventually becomes the infant's wife may be "necessaries." *Jenner v. Walker*, 19 Law T. (N. S.) 398; *Genner v. Walker*, 3 Am. Law Rev. 590.

Rent of room.

It is said that things necessary are those without which an individual cannot reasonably exist; in the first place, food, raiment, lodging, and the like. But it is held that where an infant hired a room for a term

of weeks, and during its continuance ceased to reside there and lived elsewhere, the room during his absence was not necessary, so that he was not liable for the rent. *Gregory v. Lee*, 30 Atl. 53, 54, 64 Conn. 407, 25 L. R. A. 618.

Repairs on dwelling.

Repairs on a dwelling house are not necessities for which a minor's estate is chargeable. *Wallis v. Bardwell*, 126 Mass. 366, 367.

NECESSARIES (For Vessels).

In order to bring an article within the description of "necessaries" for a vessel for which a lien may be had, it need not appear that the voyage could not by any possibility be made without such article. It is sufficient if the article form part of the actual and reasonable outfit of a vessel for the business in which she is engaged. *The Plymouth Rock* (U. S.) 19 Fed. Cas. 897, 898.

The word "necessaries," in the twelfth rule of admiralty practice, providing that, in all suits by materialmen for supplies or repairs or other necessities for a foreign port, the libellant may proceed against the ship and freight in rem and sue the master or owners alone in personam, and the like proceeding in personam, but not in rem, shall apply to cases of domestic ships for supplies, repairs, or other necessities, cannot be construed to include the storage of the sails of a vessel, for "necessaries" for a vessel means those things which pertain to the navigation of the vessel, and which are directly incidental to and connected with her navigation; that is, those things which directly aid in keeping her in motion for the purpose of receiving, carrying, and delivering cargoes. *Hubbard v. Roach* (U. S.) 2 Fed. 393, 394.

By the term "necessaries" furnished to a vessel in a foreign port for which she is liable, the law does not contemplate those things only which are indispensable to the safety of the vessel and her crew; but whatever a prudent owner, if present, would be supposed to have authorized, the master may order, and the vessel will be held responsible for them. *The Gustavia* (U. S.) 11 Fed. Cas. 126, 127.

Ballast.

The ballast which is on board a vessel at the time of the sale is not included in the term "necessaries," in the bill of sale conveying such vessel, with her bowsprit, sails, boats, anchors, cables, and all other necessities thereto appertaining and belonging, since movable ballast, whether it consists of iron, stone, or any other substance, is not a necessary appurtenance to the ship. Vessels may perform voyages, and frequently do, without anything for ballast other than the

cargo. *Burchard v. Tapscott*, 10 N. Y. Super. Ct. (3 Duer) 363, 365.

Insurance.

Insurance on a vessel, expressly authorized by the owners, is a "necessary" within the English act defining the jurisdiction of the admiralty court, and creating a maritime lien on the vessel for a necessary. *The Maud Carter* (U. S.) 29 Fed. 156, 157.

NECESSARILY.

In an action for damages for wounding and maiming a valuable horse, the court instructed the jury that the proper measure of damages was the amount which the appellee "necessarily" expended for surgeons to treat the horse. In considering this instruction, the court said: "If the injured party is compelled to pay more than the services are actually worth, it does not lie in the mouth of the person responsible for the injury to complain." The word "necessarily," as used in the instruction given by the court, is defined by Webster as follows: "In a necessary manner; by necessity; unavoidably; indispensably." *Summers v. Tarney*, 24 N. E. 678, 679, 123 Ind. 560.

In an instruction that to justify homicide it must necessarily appear by the acts, or by words coupled with the acts, of the person killed, that it was his purpose and intent to either kill the person killing, or to do him some serious bodily injury, "necessarily" is not synonymous with "reasonably," as used in Pen. Code, art. 570, providing that to justify homicide it must reasonably appear by the acts, or by words coupled with the acts, of the person killed, that it was his purpose and intention to commit certain offenses. "Reasonably" is defined by Webster as follows: "In a reasonable manner; in consistency with reason." "Necessary" is defined by Webster: "Unavoidable; such as must be; impossible to be otherwise; not to be avoided; inevitable." It is quite evident from these definitions that there is a vast difference between "reasonably" and "necessarily." If it must necessarily appear from the acts, or words coupled with the acts, of the party killed, that it was his purpose to commit one of the offenses named, before a person can be justified in killing his adversary, then appearances, whether reasonable or not, would have nothing whatever to do with the case. *Stevenson v. State*, 17 Tex. App. 618, 634.

Under Rev. St. art. 4170, giving railroad corporations the right to construct their lines across any highway, but requiring such corporation "to restore * * * the highway * * * to its former state, or to such state as not unnecessarily to impair its usefulness," a charge that it was the duty of the company to restore the road to its former

state, "or to such a state as not necessarily to impair its usefulness as a public highway," was error, the word "necessarily," used in the charge, not meaning substantially the same as "unnecessarily." The court said, "A positive and a negative of the same term cannot be synonymous." The section evidently meant to forbid an impairment of the usefulness of the highway by the construction of a railway. "Therefore a charge which instructs a jury that it is the duty of the railroad company to restore a highway at a crossing to such a condition as to not 'necessarily' impair its usefulness admits of the construction that, if the utility of the highway be to any extent diminished, though a necessary result from the construction of the railway, the company has failed of its duty." *Dallas & G. Ry. Co. v. Able*, 9 S. W. 871, 873, 72 Tex. 150.

NECESSARILY EXPENDED.

"Necessarily expended," in Rev. St. p. 386, § 3, subd. 9, providing that the moneys necessarily expended by any county officer in executing the duties of his office shall be a charge on the county, means such expenditures as are not only needful and proper, as contradistinguished from such as are needless and improvident, but also reasonable, appropriate, and customary in the execution of the particular official duty. *People v. City of New York*, 32 N. Y. 473, 475.

NECESSARILY INCURRED.

In Sess. Laws Colo. 1891, p. 307, § 4, providing certain compensation to the sheriff for transporting prisoners, besides actual expenses necessarily incurred, "necessarily" means whatever is convenient, usual, or adapted to the end, proper or customary under similar circumstances. *Otting Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co.*, 5 Wis. 173; *United States v. Harmon*, 147 U. S. 268, 13 Sup. Ct. 327, 37 L. Ed. 164. Hence a sleeping-car berth will be held to be included in such statute. *Sargent v. La Plata County Com'rs*, 40 Pac. 366, 371, 21 Colo. 158.

Expenses incurred by the district attorney in employing expert witnesses of high standing in a murder trial, where the defense of insanity was made, are expenses "necessarily incurred," within a statute providing that expenses necessarily incurred by the district attorney in criminal actions shall be a county charge. *People v. Cayuga County Sup'rs*, 50 N. Y. Supp. 16, 22 Misc. Rep. 616.

"Expenses necessarily incurred," within 5 & 6 Wm. IV, c. 76, § 92, authorizing a corporation to incur indebtedness for expenses necessarily incurred, includes money expended for repairs of the corporate buildings. *Re-*

gina v. Town Council of Warwick, 8 Q. B. 926, 929.

NECESSARILY ON THE CALENDAR.

Within the meaning of a statute allowing the prevailing party in an action a term fee where the cause was "necessarily on the calendar," a cause is necessarily on the calendar when, being at issue and in readiness for trial, the party who has noticed it for trial has put it on the calendar for the purpose of trying it if he has an opportunity. and where, before the cause was reached for trial, it was referred, such reference did not deprive the plaintiff of the right to the fee. *Sipperly v. Warner* (N. Y.) 9 How. Prac. 332, 333.

NECESSARILY PRELIMINARY TO ORGANIZATION.

The words "necessarily preliminary to its organization," as used in U. S. Rev. St. § 5136 [U. S. Comp. St. 1901, p. 3455], providing that no association shall transact any business, except such as is incidental and "necessarily preliminary to its organization," until it has been authorized by the comptroller of the currency to commence the business of banking, refer to such business necessarily preliminary to the organization of the bank only, and not preliminary to its doing business as a bank, and hence the renting of rooms as a banking office, and for no other purpose, before its organization, was not necessarily preliminary to its organization, since the doing of banking business was not necessarily preliminary to its organization. *McCormick v. Market Nat. Bank*, 44 N. E. 381, 383, 162 Ill. 100.

NECESSARILY TRAVELED.

Rev. St. § 829 [U. S. Comp. St. 1901, p. 636], allowing a marshal mileage for each mile "actually and necessarily traveled," means mileage only on the shortest practicable route by the ordinary mode of travel, though the marshal actually traveled by a longer route, which, because of better railroad facilities, can be traveled in less time. *Hitch v. United States* (U. S.) 66 Fed. 937, 942.

"Necessarily traveled," in Acts 1879, p. 130, which allows the sheriff mileage for each "mile necessarily traveled in going and returning to serve process," means actually traveled, and so, where a sheriff travels a certain distance and serves subpoenas on several persons, he is entitled to mileage for the distance actually traveled, and not for such an amount as if he had traveled such distance as many times as there were witnesses served. *Marion County v. Pressley*, 81 Ind. 361, 363.

NECESSARILY USED.

In a pleading alleging that a railroad track was necessarily used by the public in passing along the street in which the track was located, "necessarily used" means that the street was so narrow, or otherwise so obstructed, that there was not room to walk along it without going on the track. *Lewis v. Galveston, H. & S. A. Ry. Co.*, 11 S. W. 528, 529, 73 Tex. 504.

"Property necessarily used," within Laws 1860, c. 173, declaring that the track, right of way, depot, cars, etc., and all other property of railroads necessarily used in operating its road shall be exempted from taxation, etc., is property the use of which is requisite for the full performance of the duty which the company owes as a common carrier; that is, when it is essential or requisite to the operation of the road. *Milwaukee & St. P. R. Co. v. City of Milwaukee*, 34 Wis. 271, 277.

In operation of railroad.

Rev. St. § 1213, exempting from general taxation property "necessarily" used in operating any railroad, does not mean that property which is inevitably and absolutely indispensable in the operation of a railroad, but that which is requisite or essential, as the terms "requisite" and "essential" are ordinarily used, or, perhaps, that which is reasonably necessary for the accomplishment of the purpose intended, and, further, that the exemption is coextensive with the right to take land by condemnation; and, as applied to an elevator erected by a railway, such erection could not be construed or held to be necessary to the railroad's shipment of grain over its road, since the carrier could perform its duties as a carrier of grain, and could transport it to other carriers, as fully and perfectly by using private elevators of others as if it used its own; but an elevator built by a railway company at a place where there are no elevators, and where none would have been built by private capital, and which was used exclusively for receiving and transporting grain shipped over the company's road, is in a different situation, and may properly be said to be "necessarily used" in the operation of the road within the statute. *Chicago, St. P., M. & O. Ry. Co. v. Bayfield Co.*, 58 N. W. 245, 247, 87 Wis. 188.

"Property necessarily used in operating any railroad," as used in Laws 1868, c. 130, § 2, subd. 13, providing that "property necessarily used in operating any railroad" in the state belonging to any railroad company is exempt from taxation, should be construed to include a hotel and premises used exclusively for the convenience and accommodation of travelers and guests arriving or to depart by the company's road; but if they are not so kept but are kept and used as a

hotel or inn for the accommodation and entertainment of all, they are not within the statute. *Milwaukee & St. P. Ry. Co. v. Crawford County*, 29 Wis. 116, 122.

NECESSARY.

See "Absolutely Necessary"; "If Necessary"; "Reasonably Necessary."

The word "necessary" must be construed in the connection in which it is used. It is a word susceptible of various meanings. It may import absolute physical necessity, or that which is only convenient or useful or essential. *City of Baltimore v. Chesapeake & P. Tel. Co.*, 48 Atl. 465, 468, 92 Md. 692 (citing *McCulloch v. Maryland*, 17 U. S. [4 Wheat.] 316, 413, 4 L. Ed. 579).

The word "necessary" is an adjective possessing degrees. A thing or purpose may be necessary, more necessary, or indispensably necessary. *Cotten v. Leon County Com'rs*, 6 Fla. 610, 629.

The word "necessary" has different significations, meaning sometimes indispensably requisite, at others needful, requisite, incidental, or conducive to. *Chambers v. City of St. Louis*, 29 Mo. 543, 576.

The word "necessary" has not a fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 414, 4 L. Ed. 579; *Moale v. Cutting*, 59 Md. 510, 522.

Priv. Laws 1817, c. 128, § 6, chartering the Elliott Bridge Company, and providing that no way shall at any time hereafter be located, or existing way altered, leading from said bridge, which shall be for the "necessary convenience of said company," etc., includes all ways which necessarily contribute to the increase of the income to be derived from the bridge, and, if a way is so located that it will increase the profits of the bridge company arising from the use of the bridge, it is for the necessary convenience of the company. *Appeal of Shattuck*, 73 Me. 318, 324.

An agreement between two parties by which one is to furnish all the boxes necessary to pack its output is not void for lacking mutuality. It is not necessary that the exact quantity of goods to be furnished should be set forth, if sufficient data be given from which the probable result of a breach can be computed. Thus it has been held that a contract to furnish all the ice a person might require was not unilateral. *Smith*

v. Morse, 20 La. Ann. 220. And in *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 43 N. E. 774, 160 Ill. 85, 31 L. R. A. 529, a contract to buy all its requirements of coal from plaintiff was held valid. *McCaw Mfg. Co. v. Felder*, 41 S. E. 664, 667, 115 Ga. 408.

As convenient.

"Necessary," as used in a statute exempting from attachment such suitable apparel, bedding, tools, etc., as may be necessary for upholding life, means convenient or useful, and that has been deemed convenient or useful which a man procures for his own reasonable use. *Garrett v. Patchin*, 29 Vt. 248, 249, 70 Am. Dec. 414.

The meaning of the word "necessary" is furnished not less by etymology than its use by approved writers, and it is derived from the Latin words "ne" and "cesso," or "nec" and "esse," and imports a thing without which another thing must fail, yield, or cease to be. In this sense it is used alike by the scholar, the man of science, and the jurist. The increased interest or importance of the topic upon which it is employed sometimes exacts from those using it annexed epithets, such as essentially, absolutely, indispensably, etc., which evince the ardor of the writer, and, without varying, heighten the glow of the impression made by its import. Those epithets do not increase the import of the word, but show an increased consciousness in the speaker or writer in the importance or interest of the thing imported thereby to the existence of the thing to which its import is applied. It cannot therefore be said that the word "necessary" is synonymous or convertible with the word "convenient." As well might it be said to be convertible with the term "useful," "expedient," "suitable," "eligible," "agreeable," "desirable," etc. *Commonwealth v. Morrison*, 9 Ky. (2 A. K. Marsh.) 75, 85.

In the case of *Camden & A. R. Transp. Co. v. Com'rs of Mansfield Tp.*, 23 N. J. Law (3 Zab.) 510, 57 Am. Dec. 409, the term "necessary," used in reference to the property necessary to the operation of a railroad, "is put in sharp contrast with the word 'convenient,' but this, I think, is clearly a mistake, and it is a mistake which has induced confusion. The word 'necessary,' in this use, is so far from being contradistinguished from the term 'convenient' that the former term comprehends much that in strictness is embraced in the latter term. Power 'necessary' to a corporation does not mean simply power which is 'indispensable.'" *New Jersey R. & Transp. Co. v. Hancock*, 35 N. J. Law (6 Vroom) 537, 545.

The word "necessary," in Code Civ. Proc. 1887, § 601, providing that land appropriated to a public use cannot again be so appropriated unless the use to which it is to be

applied is a more necessary public use, cannot be construed to mean absolutely necessary, but a railroad company may acquire the part of a right of way of another company not used for its roadbed where such right of way is the most desirable route for the new road, though it might be possible to build it without using the right of way. *Butte, A. & P. Ry. Co. v. Montana U. Ry. Co.*, 41 Pac. 232, 244, 16 Mont. 504, 31 L. R. A. 298, 50 Am. St. Rep. 508. See, also, *Alabama & V. Ry. Co. v. Odeneal*, 19 South. 202, 203, 73 Miss. 34; *Chalcraft v. Louisville, E. & St. L. R. Co.*, 113 Ill. 86, 88; *Gregory v. Jersey City*, 36 N. J. Law (7 Vroom) 166, 168; *Elleman v. Chicago Junction Rys. & Union Stockyards Co.*, 23 Atl. 287, 295, 49 N. J. Eq. (4 Dick.) 217; *Crawford v. Longstreet*, 43 N. J. Law (14 Vroom) 325, 328; *Getchell & Martin Lumber & Mfg. Co. v. Des Moines Union Ry. Co.*, 87 N. W. 670, 671, 115 Iowa, 734; *Towns v. Pratt*, 33 N. H. 345, 346, 349, 66 Am. Dec. 726 (citing *Peverly v. Sayles*, 10 N. H. 356); *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400, 438; *Boston & N. Y. Air-Line R. Co. v. Coffin*, 50 Conn. 150, 155; *Kelly v. People's Transp. Co.*, 3 Or. 189, 192.

As expedient or appropriate.

In a contract relating to the use of an alley for railway tracks, providing that if it becomes necessary to close the alley the railway will vacate said track, "necessary" will be construed to be analogous to "expedient" or "appropriate," as where the city considers that the vacation of the alley would be for the convenience and advantage of the citizens. *Getchell & Martin Lumber & Mfg. Co. v. Des Moines Union Ry. Co.*, 87 N. W. 670, 671, 115 Iowa, 734.

As indispensable.

The word "necessary" is defined by lexicographers as synonymous with "indispensable," "unavoidable," or "that which must be." *Town of Old Town v. Dooley*, 81 Ill. 255, 259.

In a mortgage of railroad property consisting of rails, bridges, depots, shops, etc., and of all property belonging or hereafter belonging to the company or appurtenant thereto, or "necessary for the construction or operation thereof," the word "necessary" imported more than property without which the road could not be operated at all. It included such property as the company should thereafter deem it best to acquire for the most profitable use of the franchise to itself and the most beneficial use of it to the public. *Buck v. Seymour*, 46 Conn. 156, 171.

"Necessary," as used in Laws 1859, p. 241, conferring on a turnpike company all the rights and privileges necessary to carry the objects of its charter as such corporation into effect, includes the right to take and

held, under lease, necessary premises for storing implements used on road repairs and for sheltering its servants. The corporation is not confined to such incidental privileges as are of indispensable use, without which the purpose of the charter must have an end, but extend to arrangements convenient, useful, and essential to the proper management of its business. *Crawford v. Longstreet*, 43 N. J. Law (14 Vroom) 325, 328.

The word "necessary" signifies essential, indispensable, requisite (Webst. Dict.), so that under Rev. St. 1895, art. 2395, subd. 15, exempting from forced sale forage on hand for home consumption, the forage need not be necessary for home consumption to render it exempt. *Stephens v. Hobbs*, 36 S. W. 287, 14 Tex. Civ. App. 148.

"Necessary," as used in a charter granting the entire tonnage of a vessel, except so much thereof as may be "necessary for the accommodation of the officers and crew," is not to be construed to mean so much as is actually and indispensably necessary for their accommodation. "The parties do not intend by the exception to limit the owners to the smallest possible space which could be occupied without prohibiting the intended voyage. The officers and crew were to be accommodated in the mode adapted or fitted to their station, the character of the vessel and the nature of the voyage being taken into consideration." *Almgren v. Dutilh*, 5 N. Y. (1 Seld.) 28, 32. See, also, *Ellerman v. Chicago Junction Rys. & Union Stockyards Co.*, 23 Atl. 287, 295, 49 N. J. Eq. (4 Dick.) 217; *Morris Canal & Banking Co. v. Love*, 37 N. J. Law (8 Vroom) 60, 61; *United New Jersey R. & Canal Co. v. Bimmgger*, 42 N. J. Law (13 Vroom) 528, 529; *National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. Co.*, 33 Atl. 860, 864, 54 N. J. Eq. 142; *City of Newark v. Inhabitants of Verona Tp.*, 34 Atl. 1060, 59 N. J. Law, 94 (citing *New Jersey R. & Transp. Co. v. Hancock*, 35 N. J. Law [6 Vroom] 537); *New Jersey R. & Transp. Co. v. Hancock*, 35 N. J. Law (6 Vroom) 537, 545; *The Fortitude* (U. S.) 9 Fed. Cas. 479, 481; *Grand Rapids Electric Light & Power Co. v. Grand Rapids, E. L. & F. Co.* (U. S.) 33 Fed. 659-667; *Cushing v. Quigley*, 29 Pac. 337, 338, 11 Mont. 577; *Towns v. Pratt*, 33 N. H. 345, 346, 349, 66 Am. Dec. 726 (citing *Peverly v. Sayles*, 10 N. H. 356); *Kelly v. People's Transp. Co.*, 3 Or. 189, 192; *Western Building & Loan Ass'n v. Fitzmaurice*, 7 Mo. App. 283, 293; *Maxwell v. Planters' Bank*, 29 Tenn. (10 Humph.) 507, 508; *Detroit & S. P. R. Co. v. City of Detroit*, 46 N. W. 12, 13, 81 Mich. 562; *Wolf & Son v. Independent School Dist.*, 1 N. W. 695, 696, 51 Iowa, 432; *Alabama & V. Ry. Co. v. Odeneal*, 19 South. 202, 203, 73 Miss. 34; *Chalcraft v. Louisville, E. & St. L. R. Co.*, 113 Ill. 86, 88.

As inevitable.

The word "necessary" means such as must be; impossible to be otherwise; not to be avoided; inevitable. *Lockwood v. Mildeberger*, 53 N. E. 803, 804, 159 N. Y. 181. See, also, *Stevenson v. State*, 17 Tex. App. 618, 634.

As occasion.

The term "necessary," in the statute requiring viewers of a private road to report whether it is necessary, is satisfied by a report that there is occasion for it, for, though mere convenience is perhaps not enough to authorize such road, a report is never drawn with the precision of an indictment, and, in the apprehension of the mass, the terms "necessary" and "occasion" are convertible. In *re Pocopson Road*, 16 Pa. (4 Harris) 15, 17.

As reasonably necessary.

"Necessary," as used in Baltimore City Ordinance of 1889, No. 41, authorizing telephone companies to lay wires in underground conduits, and requiring them, as rapidly as such conduits might be constructed and cables laid therein, to remove all poles on any street along where such conduit is constructed, except in so far as such poles are "necessary" for the purpose of making distribution of wires forming part of any cable, must be understood as authorizing such poles as are reasonably required for the purpose of distribution. *City of Baltimore v. Chesapeake & P. Tel. Co.*, 48 Atl. 465, 468, 92 Md. 692 (citing *McCulloch v. Maryland*, 17 U. S. [4 Wheat.] 316, 413, 4 L. Ed. 579).

Where a statute authorized a corporation to purchase, possess, and dispose of such real and personal property as may be necessary to carry into effect the object of the corporation, the word "necessary" should not be construed as meaning "indispensable," but merely as meaning that which was reasonably necessary or convenient under the circumstances. *Kelly v. People's Transp. Co.*, 3 Or. 189, 192.

In construing a plank-road charter which authorized it to use public highways when it shall become necessary, the court said: "The inference is that they are empowered to run the road in the direction of the terminus from the starting point in the route found by surveys most convenient and best adapted to the work. If, in pursuing this route, it becomes necessary to use any part of the public highway, they are authorized to use it. Used as the word 'necessary' is in reference to the business, by the law, and in connection with its provisions, such interpretation is to be given to it as will make the grant which it conveys available to the company. It is not to be so strictly construed as to defeat beneficiary results to them. We consider that the necessity contemplated by the Legislature is not an absolute unsurmountable necessity,

and conclude that it means what I can no otherwise designate than by calling it a 'reasonable necessity.' Justices of Inferior Court v. Griffin & W. P. Plank-Road Co., 9 Ga. 475, 481, 482.

Where the charter of a railroad company provided that the corporation should have power to acquire and hold such lands as necessary and convenient, the words "necessary or convenient" should be liberally construed, and include all lands found to be reasonably necessary or convenient for the purpose of operating the road. *Boston & N. Y. Air Line R. Co. v. Coffin*, 50 Conn. 150, 155.

As relatively necessary.

"Necessary," as used in reference to the right of a person to kill a dog to prevent the destruction of or damage to his property, if he has reasonable ground to believe that such killing is necessary to prevent such destruction or damage, does not mean absolutely necessary. It means relatively so, when it is considered that the animal in question is a dog, and when it is considered what his past acts have been, what his future acts will probably be, what the threatened injury from him at the time of his killing is, and what the available means of efficient protection to the defendant at the time are. *Simmonds v. Holmes*, 23 Atl. 702, 703, 61 Conn. 1, 15 L. R. A. 253. See, also, *Clark v. Smith*, 1 N. J. Eq. (Saxt.) 121, 139; *The Fortitude (U. S.)* 9 Fed. Cas. 479, 481.

As requisite.

In a statute providing that the city council is hereby authorized and required to levy and collect the necessary amount for school purposes the same as other taxes, the term "necessary amount" should be construed to mean the amount required. The necessary amount can be neither more nor less than the amount required. *State v. City of Omaha*, 58 N. W. 442, 443, 39 Neb. 745. "Necessary," as contained in a plea by a surety of an attachment bond stating that the levy was made "without the necessary attachment bond having been first given," means the requisite bond. *English v. Reed*, 25 S. E. 325, 97 Ga. 477. See, also, *Stephens v. Hobbs*, 36 S. W. 287, 14 Tex. Civ. App. 148; *Wolf & Son v. Independent School Dist.*, 1 N. W. 895, 696, 51 Iowa, 432.

As suitable or proper.

"Necessary" is not limited to such things as are absolutely indispensable, but includes all such things as are proper, useful, and suitable for the purpose. *Garfield County Com'rs v. Isenberg*, 61 Pac. 1067, 1068, 10 Okl. 378.

In exemptions from taxation to railroad corporations of property necessary to the conduct of their business, "necessary" does not mean indispensable, but embraces

all things suitable and proper for carrying into execution the granted powers. *City of Newark v. Inhabitants of Verona Tp.*, 34 Atl. 1060, 59 N. J. Law, 94 (citing *New Jersey R. & Transp. Co. v. Hancock*, 35 N. J. Law [6 Vroom] 537; *United New Jersey R. & Canal Co. v. Binninger*, 42 N. J. Law [13 Vroom] 528, 529.

The term "necessary," in *How. Ann. St. § 3568*, which enacts that turnpike companies shall be capable of purchasing and acquiring from any person or persons, by gift, grant, and otherwise, and holding, any lands, tenements, and hereditaments necessary to be used in the construction, repair, and preservation of any such road, does not apply to the taking by eminent domain, by such company, of a tollhouse, or property on which to erect a tollhouse, by the side of its road, but the road may purchase such property. "In the case of *Pennsylvania R. Co. v. Leggett*, 41 N. J. Law (12 Vroom) 319, which was a case where a railroad corporation had land which it used for the purpose of its corporation, but which it was claimed was unnecessary to the complainant in the operation of its road, the court said, 'Perhaps this land is not indispensably necessary to the company in the operation of its road, but indispensability is not the test whereby to determine what property in use will be exempt from taxation,' and the case of *New Jersey R. & Transp. Co. v. Hancock*, 35 N. J. Law (6 Vroom) 537, is cited in support of the proposition that absolute necessity is not required. In that case, in which the question arose whether the land in use of the railroad company was subject to taxation, the company being required to pay a specific tax, the court says that such an exempting clause will protect all property held by the company necessary to accomplish the end for which they were incorporated. The word 'necessary' in this connection does not mean indispensable; it embraces all things suitable and proper for carrying into execution the powers granted." *Detroit & Saline Plank Road Co. v. City of Detroit*, 46 N. W. 12, 13, 81 Mich. 562.

NECESSARY (In Eminent Domain).

As convenient.

A private act of Parliament for inclosing the waste lands of a manor reserved to the lord all mines, together with "convenient and necessary" ways then made or thereafter to be made in liberty or laying wagon ways, and to do such other works as might be necessary or convenient for the complete enjoyment thereof. Held, that on the construction of the words "convenient and necessary" the question was not whether a road which had been laid out by the lord over one of the allotments had been made in the direction or in the manner least injurious to the owner of the allotment, or in that direction or by that

mode which a strict and rigid necessity would point out, much less whether it had been made in that direction or by that mode which, on a view of the work when accomplished, and when a better judgment might be formed than could have been formed before, might be thought by persons possessing the highest degree of skill to be the best that could have been devised, but the question was whether the direction chosen had been such as a person of reasonable and ordinary skill and experience would have selected beforehand, and whether the mode adopted had been such as a prudent and rational person would have adopted if he had been making the road over his own land and not on the land of another. *Abson v. Fenton*, 1 Barn & C. 195, 198.

"Necessary," as used in the Illinois Laws allowing the condemnation of property when necessary for public improvements, etc., should be construed to mean expedient, reasonably convenient or useful to the public, and cannot be limited to an absolute physical necessity. *Aurora & G. Ry. Co. v. Harvey*, 53 N. E. 331, 334, 178 Ill. 477.

A statute gave canal commissioners power to enter upon and use any lands necessary for the prosecution of the improvements intended by the act. Held, that the word "necessary" does not mean absolute and indispensable, or that without the use of the "land" in a given case the work could not possibly go on. The Legislature used the word in the more reasonable and popular sense. It is sufficient that the land used and the materials taken from it are needful and conducive to the object, and more convenient in the application, and less valuable, and the use of them less injurious, to the owner, than any that might readily be selected. *Jerome v. Ross* (N. Y.) 7 John. Ch. 315, 340.

"Necessary," as used in reference to the taking of private property for the necessary use or benefit of the public, does not mean indispensable or imperative, but only convenient and useful. If the improvement is useful, and a convenience and a benefit to the public sufficient to warrant the expense of making it, it is necessary. *City of Detroit Com'r of Parks and Boulevards v. Moesta*, 51 N. W. 903, 904, 91 Mich. 149.

"Necessary," as used in a railroad act authorizing condemnation of such land as is necessary, does not mean appropriate and convenient, but the right is more restricted. *Central R. Co. v. Hudson Terminal Ry. Co.*, 46 N. J. Law (17 Vroom) 289, 292, 293.

As indispensable.

In a charter of a railroad company authorizing it to exercise the powers of eminent domain whenever the appropriation of land became necessary to attain the object for which the charter of the road was grant-

ed, "necessary" means something which, in the accomplishment of an object, cannot be dispensed with without abandoning the object itself. *Leisse v. St. Louis & I. M. R. Co.*, 2 Mo. App. 105, 114.

"Necessary," as used in Act 1857, § 3, authorizing a railroad company to enter upon, to take possession of, and use all lands for the location of depots and stopping places, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turn-outs, engine houses, shops, and other buildings necessary for the construction, completing, etc., of the road, does not authorize the company to take property already permanently set apart for and occupied by a state institution merely because it is thought by the railroad company indispensable necessary to its completion and operation, and that without it the objects and purposes of the creation of the company would be defeated and the company cease to exist, and that the having of the state property would be convenient or profitable to the railroad company. The word "necessary" has great flexibility of meaning; it is used to express mere convenience, or that which is indispensable to the accomplishment of a purpose. *St. Louis, J. & C. R. Co. v. Trustees of Illinois Inst. for Education of Blind*, 43 Ill. 303, 305.

"Necessary," when used with reference to the liability of a portion of the right of way of a railway company to condemnation for the use of another railway company when necessary, does not mean an absolute or indispensable necessity, but reasonably requisite and proper for the accomplishment of the end in view under the particular circumstances of the case. It would be difficult to lay down any specific rule, as to the measure of the necessity, of sufficient scope to include all cases. *Mobile & G. R. Co. v. Alabama Midland Ry. Co.*, 6 South. 404, 406, 87 Ala. 501.

"Necessary," as used in a statute authorizing an electric railway company to condemn land necessary for its corporate purposes, does not mean an absolute necessity in the sense that the particular land is indispensable, but rather that the land, or other similarly situated, is reasonably required for a public purpose. *In re Rhode Island Suburban Ry. Co.*, 48 Atl. 591, 592, 22 R. I. 457, 52 L. R. A. 879.

Permanent use imported.

Under an act of the Legislature authorizing canal commissioners to enter upon, take possession of, and use all and singular any lands, waters, and streams "necessary" for the prosecution of improvements intended by such act, such commissioners were authorized to enter upon and take only such lands as were to be taken and permanently used for the purpose of such canal, and had no

authority to enter upon the lands of individuals and blast and take therefrom rock, to be used in the construction of such canal, when the land from which such rock was taken was not to be permanently taken or necessary for the canal. *Jerome v. Ross* (N. Y.) 7 Johns. Ch. 315, 327, 337.

As reasonably necessary.

The term "necessary," as used in *Lateral Railroad Act* Feb. 17, 1871 (P. L. 56), authorizing the taking of land for railroads necessary and useful for public or private purposes, refers not to an absolute, but a reasonable, necessity. The burden of establishing the usefulness and necessity of the road for public or private purposes, however, is exclusively on the petitioner. *Hays v. Briggs* (Pa.) 3 Pittsb. R. 504, 517.

The term "necessary," as used in the definition of a railroad that the term cannot be confined to the track, or the land simply necessary to lay the track upon, may be used with several significations and limitations, but in this connection it must not be accepted in its most restricted and confined use. The authorities show that any piece of land that may be considered reasonably necessary for the proper operations of a road, or contemplated and prospective extensions or improvements, and held for that purpose, may be held to appertain to a railroad. *Knevals v. Florida Cent. & P. R. Co.* (U. S.) 66 Fed. 224, 231, 13 C. C. A. 410.

NECESSARY ABSENCE.

Under an act authorizing the Secretary of State, with the consent of the Governor, to employ an assistant, who, in case of the sickness or necessary absence of the Secretary, may do the business in his name, it is held that the word "necessary" is of indefinite and malleable signification, and does not always mean absolutely indispensable. *Page v. Hardin*, 47 Ky. (8 B. Mon.) 648, 663.

NECESSARY ACTS.

"Necessary acts for the prosperity of the society," as used in the articles of incorporation of a society authorizing the executive committee of the board of directors "to do all acts necessary for the prosperity of the society" in the intervals of the meeting of the board, simply authorizes the doing of acts, from the omission of which the prosperity of the society would suffer, and does not authorize the purchase of real estate. *Tracy v. Guthrie County Agricultural Soc.*, 47 Iowa, 27, 29.

NECESSARY ADDITIONAL DEPOT GROUNDS.

"Necessary additional depot grounds," as used in *Laws 1884, c. 190, § 1*, authorizing

railroad companies owning a completed road to condemn lands, "for necessary additional depot grounds," means such land, in addition to the right of way acquired, as may be necessary for depot purposes. *Jager v. Dey*, 45 N. W. 391, 80 Iowa, 23.

NECESSARY AND ACTUAL PURPOSES OF CANAL NAVIGATION.

The words "actual and necessary purposes of canal navigation," in a statute exempting the property of a canal company from taxation which is kept and held by the company for the actual and necessary purposes for canal navigation, includes crossings, piers, and basins owned by the company which are not rented, but which are actually used for conducting the boats engaged in the canal navigation and for the reception of their cargo. *Morris Canal & Banking Co. v. Betts*, 24 N. J. Law (4 Zab.) 555, 556.

"Necessary," as used in *Act 1867*, exempting from taxation all the lands occupied, possessed, and used by a canal company for the actual and necessary purposes of canal navigation under the act, should be construed to mean such land as is suitable and proper to accomplish the thing which the Legislature had in view at the time of the enactment of the charter, and not to mean indispensable. Lots of land leased to others for their exclusive use and occupancy by the canal company in discharging and shipping coal carried through the canal are not exempt. *Morris Canal & Banking Co. v. Love*, 37 N. J. Law (8 Vroom) 60, 61.

NECESSARY AND INCIDENTAL BUSINESS.

The necessary and incidental business referred to in the articles of association of a corporation, which state that its business shall be the manufacture of clothing of every description, and the sale of clothing so manufactured, and the transaction and sale of all other "business necessary and incidental" to such manufacture and sale of clothing, does not include a purely mercantile business, such as the buying and selling of ready-made clothing. *Nicollet Nat. Bank v. Frisk-Turner Co.*, 74 N. W. 160, 161, 71 Minn. 413, 70 Am. St. Rep. 334 (citing *Hood v. New York & N. H. R. Co.*, 22 Conn. 1).

NECESSARY AND PROPER.

"Necessary and proper," as used in a charter of a water company authorizing it to add to and enlarge its present works, and to increase its facility for furnishing water to a certain town, in such manner as may be necessary and proper, should be construed to mean "useful, needful, and requisite in order to create an ample water supply for the district." *Olmsted v. Pro-*

prietors of Morris Aqueduct, 47 N. J. Law (18 Vroom) 311, 329.

"Necessary," as used in the Constitution, conferring power upon Congress to make such laws as may be necessary and proper for carrying the powers conferred on the government into execution, does not "import an absolute physical necessity so strong that one thing to which another may be termed 'necessary' cannot exist without that other. 'To employ the means necessary to an end' is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable." *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 413, 4 L. Ed. 579; *Martin's Ex'rs v. Martin*, 20 N. J. Eq. (5 C. E. Green) 421, 428.

The term "necessary and proper," in the clause of the Constitution giving Congress the authority to make all laws which shall be necessary and proper for carrying into execution the specific powers vested in Congress, and all other powers vested by the Constitution in the United States, or in any department or officer thereof, cannot be limited to mean "indispensably necessary." In *United States v. Fisher*, 6 U. S. (2 Cranch) 358, 2 L. Ed. 304, this court, speaking by Chief Justice Marshall, said that, in construing it, it would be incorrect, and would produce endless difficulties, to say that no law was authorized which was not indispensably necessary to give effect to a specified power. Congress, said this court, must possess the choice of means, and must be empowered to use any means which are in fact conducive to render the exercise of a power granted by the Constitution. Chief Justice Marshall, in giving the opinion in *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 4 L. Ed. 579, said: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." *Legal Tender Cases*, 79 U. S. (12 Wall.) 457, 533, 20 L. Ed. 414.

The term "necessary and proper," as used in Const. art. 1, § 8, empowering Congress to establish uniform laws on the subject of bankruptcy, and to make all laws which shall be necessary and proper for carrying into execution the powers enumerated, means needful, requisite, essential, conducive to. *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 418, 4 L. Ed. 579 (citing *Story's Const.* §§ 1248-1255); *United States v. Pusey* (U. S.) 27 Fed. Cas. 631, 632. It includes such laws as are appropriate and adapted to carrying into effect such provisions, though not absolutely necessary for that end. *Martin's Ex'rs v. Martin*, 20 N. J. Eq.

(5 C. E. Green) 421, 428; *Griswold v. Hepburn*, 63 Ky. (2 Duv.) 20, 25.

The words "all laws necessary and proper" for carrying into execution powers expressly granted or vested have, in the United States Constitution, a sense equivalent to that of the word "laws," not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends, which are not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects intrusted to the government. *Hepburn v. Griswold*, 75 U. S. (8 Wall.) 603, 614.

"Necessary," as used in the federal Constitution, declaring that Congress shall have power to lay and collect taxes, duties, imposts, etc., and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, should not be construed to include power to locate banks within the states by the nation, since, as the revenue system could exist without banks, they were not necessary to that system. *Commonwealth v. Morrison*, 9 Ky. (2 A. K. Marsh.) 75, 84.

In his argument in the case of *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 416, 4 L. Ed. 579, in discussing the use of the words "necessary and proper" in a provision of the federal Constitution giving the federal government the right to use such measures as are necessary and proper in carrying out the enumerated powers, Mr. Webster said: "These words, 'necessary' and 'proper,' are properly to be construed as synonymous. 'Necessary powers' must here intend such powers as are suitable and fitted to the object; such as are best and most useful in relation to the end proposed. If this be not so, and if Congress could use no means but such as were absolutely indispensable to the existence of a granted power, the government would hardly exist; at least, it would be wholly inadequate to the purposes of its formation." Mr. Wirt, Attorney General, said it was not requisite that the particular thing done by Congress should be indispensably necessary to the execution of any of the specified powers of the government. An interpretation of this clause of the Constitution so strict and literal would render every law which could be passed by Congress unconstitutional, for of no particular law can it be predicated that it is absolutely and indispensably necessary to carry into effect any of the specified powers, since a different law might be imagined, which could be enacted tending to the same object, though not equally adapted to attain it. "Necessary and proper" are there equivalent to "needful and adapted." Such is the popular sense in which the word "necessary" is sometimes used. Among other definitions of the word "necessary," Johnson gives "needful," and he defines "need,"

the root of the latter, by the word "want," "occasion." Chief Justice Marshall, in giving the opinion of the court, said that if reference be had to the uses of the word "necessary" "In the common affairs of the world, or in approved authority, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To 'employ the means necessary to an end' is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable." *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400, 438.

"We are not aware of any opinion in which the word 'necessary' is so thoroughly discussed as in *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 4 L. Ed. 579, from which the following language of Marshall, C. J., is quoted: 'Congress is not empowered by it [the Constitution] to make all laws which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers to such as are indispensable, and without which the power would be nugatory; that it excludes the choice of means, and leaves to Congress in each case that only which is most direct and simple. Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute, physical necessity, so strong that one thing to which another may be termed "necessary" cannot exist without that other? We think it does not. If reference be had to its use in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful or essential to another. To "employ the means necessary to an end" is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be unattainable. Such is the character of human language that no word conveys to the mind, in all situations, one single definite idea, and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that obviously intended. It is essential to a just construction that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words which increase or diminish the impression the mind receives

of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases.' The word 'necessary,' considered in connection with the right of the board of supervisors to exercise such powers as are incidentally necessary to enable such board to carry into effect the powers granted, means no more than exercise of such powers as are reasonably required by the exigencies of each case as it arises." *Lancaster County v. Green*, 74 N. W. 430, 431, 54 Neb. 98.

"Necessary," as used in the federal Constitution declaring that Congress shall have power necessary to carry out other powers therein given, means that power without which the others cease to exist. *Commonwealth v. Morrison*, 9 Ky. (2 A. K. Marsh.) 75, 80.

U. S. Const. art. 1, § 8, giving Congress authority to borrow money on the credit of the United States, and granting power to it to make all laws which shall be "necessary and proper" for carrying into execution the powers named, does not mean laws which are indispensably necessary, but any law which is proper, and plainly conduces to the end authorized to be obtained, not prohibited and not inconsistent with the letter and spirit of the Constitution, is a "necessary and proper" law. Congress has the free choice of means adapted to the end, limited only by the letter and spirit of the Constitution, and hence an act of Congress in exercising its authority to borrow money, selecting as a means to accomplish that end the issue and delivery, to the lenders and government creditors, of treasury notes which should be a legal tender, was within the limits of constitutional authority as "necessary and proper" to carrying into execution the power of borrowing money, for it was well calculated to procure loans, and was a most efficient and convenient means of accomplishing that end. *Thayer v. Hedges*, 23 Ind. 141, 143.

NECESSARY APPARATUS.

A contract required the delivery of all necessary apparatus for the purpose of carrying on the business of papermaking for one vat. Held, that the words "all necessary apparatus" meant all such articles as are usually employed in the business referred to. *Patteson v. Garret*, 30 Ky. (7 J. J. Marsh.) 112, 113.

NECESSARY APPENDAGES.

"Necessary appendages," as used in How. Ann. St. § 5073, subd. 6, authorizing a school director to provide the "necessary appendages" for the schoolhouse, and keep the same in good condition and repair during the time school shall be taught therein.

should be construed to include a fence inclosing a schoolhouse site and separating it from adjacent lands. It comes within the same category as a well, woodhouse, etc. The word "appendage" does not necessarily mean simply the school apparatus to be used inside the building, nor can it be limited to such articles as brooms, pails, cups, etc., but must be construed in a broader sense, to include fuel, fences, and necessary outhouses. *Creager v. School Dist. No. 9*, 28 N. W. 794, 795, 82 Mich. 101.

Multiplication charts, being charts or cards containing the multiplication table, practical forms of business contracts, and brief mention of prominent historical events, are not a "necessary appendage" in a schoolhouse, within the meaning of Comp. Laws 1871, § 18, such as a school director is required to provide. *Gibson v. School Dist. No. 5 of Vevay Tp.*, 36 Mich. 404, 407.

NECESSARY BUILDINGS AND WORKS OF RAILROAD.

In construing a statute exempting a railroad from taxation, and determining what were the buildings and works necessary and expedient to the operation of the road within the meaning of the charter, the court say that: "We are met with the argument that 'necessary' means buildings and works indispensable to the road. This, however, is not a mere dictionary question, but one involving the construction of a power granted to a railroad company to enable it to accomplish the objects for which it was chartered. It is clear that the Legislature meant such buildings and works as were reasonably appropriate to the maintenance and operation of the road. Such works include elevators, wharves, piers, and docks necessary for the business of the railroad as a common carrier, for the purpose of receiving and storing grain and freight shipped over its road after the same has reached the place of destination, and previous to its delivery to the consignee or owner, but such common carrier has no right to own or use such structures for the storage of grain and freight after the owner or consignee has had reasonable time to remove the same. The term also includes hotels mainly designed and used for the accommodation of passengers from the defendant's road, and for ticket and telegraph offices, but not for hotels primarily used as places of summer resort." *State v. Baltimore & O. R. Co.*, 48 Md. 49, 76.

NECESSARY CHARGES.

In a building contract providing that the architect might make such changes during the progress of the work as he should find necessary, the word "necessary" should

not be restricted in its meaning to such changes as are indispensable to the completion of the work, but includes changes which are reasonably necessary for the greater comfort of the future occupant and for the gratification of the future owner. *Western Building & Loan Ass'n v. Fitzmaurice*, 7 Mo. App. 283, 293.

NECESSARY CHARGES.

Other necessary town charges, see "Other."

"Necessary charges," as used in a statute authorizing towns to raise money for certain specified objects and other necessary charges, may in general be considered as extending to such expenses as are clearly incident to the execution of the power granted, or which necessarily arise in the fulfillment of the duties imposed by law. *Bussey v. Gilmore*, 3 Me. (3 Greenl.) 191, 196.

"Necessary charges," as used in Gen. St. c. 18, § 10, authorizing towns to raise money for certain specified purposes and for all charges arising therein, are not confined to the objects specifically enumerated in section 10, but must include the necessary charges arising from the exercise of any power conferred or duty imposed on towns by other provisions of the general statutes or subsequent statutes. *Minot v. Inhabitants of West Roxbury*, 112 Mass. 1, 3, 17 Am. Dec. 52.

Act 1785, c. 78, authorizing towns to raise money by taxation for certain specified objects and other necessary charges arising within the town, is to be construed to only authorize the raising of such sums "as should be necessary to meet the ordinary expenses of the year, such as the payment of such municipal officers as they should be obliged to employ, the support and defense of such actions as they might be parties to, and the expenses they would incur in performing such duties as the laws impose, as the erection of powder houses, providing ammunition, making and repairing highways and town roads, and other things of a like nature which are necessary charges. The erection of public buildings for the accommodation of the inhabitants, such as townhouses to assemble in, and market houses for the sale of provisions, may also be a proper town charge, and may come within the fair meaning of the term 'necessity,' for these may be essential to the comfort and convenience of the citizens. But it cannot be supposed that the building of a theater and circus, or any other place of mere amusement, at the expense of the town, could be justified under the term, 'necessary town charges,' nor could the inhabitants be lawfully taxed for the purpose of raising a statue or monument, these being matters of taste and not

of necessity, unless in populous and wealthy towns they should be suitable ornaments to buildings or squares, the raising and maintenance of which are within the duty and care of the governors or officers of such towns." *Stetson v. Kempton*, 13 Mass. 272, 278, 7 Am. Dec. 145.

"Necessary charges," as used in Pub. St. c. 27, § 10, authorizing towns to appropriate money for certain purposes, and for all other necessary charges, arising in such town, are confined to matters in which the town or city has a duty to perform, an interest to protect, or a right to defend. *Waters v. Bonvouloir*, 52 N. E. 500, 501, 172 Mass. 286.

Under a statute providing that "towns shall have power to grant and vote such sums of money as they shall deem necessary for the following purposes * * * for all other necessary charges arising within the same town," to bring a particular subject within the description of "necessary town charges" it must appear to be money necessary to the execution of some corporate power, the enjoyment of some corporate right, or the performance of some corporate duty as established by law or by long usage. *Spaulding v. City of Lowell*, 40 Mass. (23 Pick.) 71, 76, 77.

Expenses of committee to convention.

Expenses of a committee to attend a convention of American municipalities is not a "necessary charge" within Pub. St. c. 27, § 10, authorizing towns to appropriate money for certain purposes, and for all other necessary charges arising in such towns. *Waters v. Bonvouloir*, 52 N. E. 500, 501, 172 Mass. 286.

Expenses of litigation.

Towns may prosecute and defend suits, as incident to which they may appropriate money to retain counsel, to pay costs, and to meet and satisfy judgments which may be recovered against them, such expenses being "necessary charges" within a statute authorizing appropriations for necessary charges arising within a town. *Spaulding v. City of Lowell*, 40 Mass. (23 Pick.) 71, 76, 77.

Under the statute limiting the authority of the town to raise money to the cases of providing for the poor, for schools, for the support of public worship, and other necessary charges, a town may pay the expenses of litigation incurred by its surveyor in determining the bounds of a highway. It is the duty of a town to repair all highways within its bounds at the expense of the inhabitants, so that the same may be safe and convenient for travelers, and, as an incident of such duty, it may engage in litigation to determine the bound of such highway. *Bancroft v. Inhabitants of Lynnfield*, 35 Mass. (18 Pick.) 566-568, 29 Am. Dec. 623.

Market house.

As towns are authorized to maintain markets, they may appropriate money to build a market house as a "necessary charge" within a statute authorizing appropriations for necessary charges. *Spaulding v. City of Lowell*, 40 Mass. (23 Pick.) 71, 76, 77.

Public clock.

The term "necessary charges," in the statute authorizing towns to vote money for the support of the ministry, schools, the poor, and other necessary charges, includes the support of a public clock, and the expense thereof may be assessed against the inhabitants of the town. "It seems very clear that this statement was not intended to be an enumeration of objects and purposes for which the town may raise money, but the expression of a few and prominent objects by way of instance, and a general reference to others under the term 'other necessary charges.'" *Willard v. Inhabitants of Newburyport*, 29 Mass. (12 Pick.) 227, 230.

Townhouses.

The term "necessary charges," in Gen. St. c. 19, § 10, providing that towns may appropriate money for certain purposes, and for all other necessary charges arising therein, includes the erection of townhouses, and a town erecting a townhouse may appropriate a sum as additional compensation to the builder. *Friend v. Gilbert*, 108 Mass. 408, 411.

Towns being authorized and required to hold meetings, as incidental thereto they may hire, purchase, or build a townhouse, which is a "necessary charge" within a statute authorizing towns to grant and vote money for all necessary charges arising within the town. *Spaulding v. City of Lowell*, 40 Mass. (23 Pick.) 71, 76, 77.

NECESSARY COMFORTS.

"Necessary comforts of life," as used in Const. art. 1, § 17, providing that the privilege of the debtor to enjoy the "necessary comforts of life" shall be recognized by wholesome laws exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability, should be construed to include a home. It is one of the necessary comforts of life in the enjoyment of which the Legislature was required to protect every debtor. *Binzel v. Grogan*, 29 N. W. 895, 897, 67 Wis. 147.

NECESSARY DAMAGES.

"Pecuniary" is a term of much narrower scope in the law of damages than the word "necessary." The latter embraces all those consequences of an injury usually denominated "general damages," as distinguished

from "special damages," whereas "pecuniary damages" cover a smaller class of damages within the larger class of "general damages." *Browning v. Wabash Western R. Co. (Mo.)* 24 S. W. 731, 746.

NECESSARY DILIGENCE.

"Necessary diligence" is that degree of diligence which men ordinarily engaged in and acquainted with a certain business will use in their own affairs." *Sanderson v. Brown*, 57 Me. 308, 312.

In an action involving the question of a purchase of personalty in good faith, it is held that the term "necessary diligence," in an instruction, doubtless meant that degree of diligence which the law requires a purchaser to exercise in order to be entitled to protection as a purchaser in good faith, and that the expression is not erroneous as a substitute for the expression of "reasonable diligence." *Garahy v. Bayley*, 25 Tex. Supp. 294, 302.

NECESSARY DISBURSEMENTS.

"Necessary disbursements," as used in Code, § 3256, providing that a party to whom costs are awarded in an action is entitled to his necessary disbursements, means such as the parties are compelled to make or incur incident to the regular proceedings in the action, and to bring it to trial according to the course and practice of the court. *Kohn v. Manhattan Ry. Co.*, 28 N. Y. Supp. 663, 664, 8 Misc. Rep. 421 (citing *Delcomyn v. Chamberlain* [N. Y.] 48 How. Prac. 411).

"Necessary disbursements," as used in Laws 1860, c. 264, § 36, allowing the prevailing party on appeal his necessary disbursements, means only the actual expenses, so that where the printer charged less than an agreed price, because appellant's attorney agreed to pay and did pay as soon as the work was done, they were only entitled to the amount paid, and not to the usual price. *Wolf v. McGavock*, 24 Wis. 54, 55.

"Necessary disbursements," as used in Code, § 311, relating to taxation of costs and allowing necessary disbursements, means the actual necessary expense of the action, and would not include money for plans and measurements and compensation of experts, beyond the fees of witnesses and money paid for a copy of the stenographer's minutes of the trial, claimed to have been furnished to the referees on their order. *Mark v. City of Buffalo*, 87 N. Y. 184, 189.

The term "necessary disbursements," which may be taxed in a creditors' suit, does not include traveling expenses incurred by plaintiffs in attending court. *Putney v. McDow*, 32 S. E. 67, 54 S. C. 172.

NECESSARY DEPOSIT.

The "necessary deposit" is that which has been compelled by some accident, such as fire, falling down of a house, pillage, shipwreck, or other casualty. Civ. Code La. 1900, art. 2964.

NECESSARY EXPENSES.

Of city.

The term "necessary expenses," in a statute providing that a town may raise and expend money for the support of schools, and for all necessary expenses arising in the town, includes the expense of a suit against the agents or servants of a town, in which its interests are directly involved. *Babbitt v. Selectmen of Savoy*, 57 Mass. (3 Cush.) 530, 533.

The "necessary current expenses of a city" included only the reasonable salary allowed by law to the mayor, council, assessor, marshal, constable, attorney, and a reasonable police force of the city, and did not include expenses for keeping streets in repair, publishing city ordinances, expenses of city elections, removing nuisance, etc. *Webb City & C. Waterworks Co. v. City of Carterville*, 43 S. W. 625, 629, 142 Mo. 101.

"Necessary expenses," as used in Const. art. 7, § 7, prohibiting a city from levying a tax, otherwise than by a vote of majority of its qualified voters, except for necessary expenses, does not include the furnishing of a supply of water to the people of the city in the sense that the city must own and operate a system of waterworks. *City of Charlotte v. Shepard*, 27 S. E. 109, 111, 120 N. C. 411.

Lighting the streets of a town with electric lights is not a "necessary expense" of the corporation, and a town cannot issue bonds or incur indebtedness for the erection of an electric light plant for lighting its streets, under Const. art. 7, § 7, prohibiting municipal corporations from contracting debts or laying taxes "except for necessary expenses," unless by consent of a majority of the qualified voters. *Mayo v. Town of Washington Com'rs*, 29 S. E. 343, 346, 122 N. C. 5, 40 L. R. A. 163.

Building and repairing public bridges and roads are "necessary expenses," and a town may incur indebtedness for the same without a vote of the people, under Const. art. 7, § 7, prohibiting any tax to be levied by municipal corporations, except "for necessary expenses," unless by a majority of the voters therein. *Herring v. Dixon*, 29 S. E. 368, 369, 122 N. C. 420.

Of company.

In Act Ohio April 15, 1803, granting an act of incorporation to the proprietors of cer-

tain land, and empowering them to appoint directors, who were authorized to extinguish the Indian title, make partition of the lands among the proprietors in proportion to their losses in the Revolutionary War, and to defray all "necessary expenses of the company" in purchasing and extinguishing the Indian claim and making partition thereof as aforesaid, and all other "necessary expenses of the company," the words "all necessary expenses of the company" meant the expenses incurred by the directors in the exercise of the powers specifically conferred on them. *Knowles v. Beaty* (U. S.) 14 Fed. Cas. 787, 788.

Of execution of will.

The term "necessary expenses," used in a bond, given by the person entitled to the personal estate of a testator to the executors on receipt of such property, conditioned for the payment of the just debts of the testator and the necessary expenses of the execution of the said will, includes all expenses the executors may be subjected to in their administration as executors or trustees, including the expenses of defending a suit to restrain them from selling testator's real estate as authorized by the will. *Scofield v. Moore*, 11 N. Y. Supp. 303, 58 Hun, 601.

Of funeral.

The phrase "necessary expenses," found in Pub. St. c. 135, § 3, cl. 1, providing that if the estate of a decedent is insufficient to pay all his debts it shall, after discharging the necessary expenses of his funeral and last sickness and the charges of administration, be applied to the payment of his debts in a certain order, does not embrace the purchase of a tombstone. The necessity for a decent burial arises immediately on a decease, and the law pledges the credit of the estate for the payment of such reasonable sums of money as are expended for that purpose; but there is no similar necessity for the erection of a tombstone, and, if one is erected without the authority of the administrator, the expense thereof is not a debt of the estate within the statute. The statute merely authorizes an administrator or executor to expend a reasonable sum for a tombstone if it becomes necessary and there are sufficient assets, but the administrator was not liable for a tombstone erected by another person without any authority from him. *Sweeney v. Muldoon*, 31 N. E. 720, 721, 139 Mass. 304, 52 Am. Rep. 708.

Of schools.

"Necessary," as used in Code, § 1748, providing that the money collected by district tax designed for rent, fuel, and repairs, and all other contingent expenses necessary for keeping the schools in operation, means indispensable, requisite, and cannot be con-

strued to include the erection of a lightning rod. While lightning rods on a school building may be very desirable, and may greatly promote the safety of the building and the security of its inmates, still it is evident that they are not indispensable nor requisite for keeping the schools in operation, since many schools are conducted successfully without them. *Wolf & Son v. Independent School Dist.*, 1 N. W. 695, 696, 51 Iowa, 432.

NECESSARY FARM CROSSINGS.

Within a statute requiring railroad corporations to construct farm crossings where the same may become necessary for the use of adjoining land owners, "necessary" is not construed according to its primary meaning as equivalent to "indispensable" or "inevitable," but is used in its more popular sense as equivalent to "reasonably convenient." *Chalcraft v. Louisville, E. & St. L. R. Co.*, 113 Ill. 86, 88.

NECESSARY FOOD.

"Necessary food," as used in 2 Rev. St. p. 254, § 169, subd. 4, and page 367, § 22, exempting from sale and execution certain live stock and the necessary food for them, means, where a householder owns a cow and ten sheep, so much hay as will be necessary for their feed during the next fodder season after harvesting the hay. *Farrell v. Higley* (N. Y.) *Lalor's Supp.* 87, 88.

"The term 'necessary food,' in Rev. St. c. 134, § 31, exempting from sale on execution certain animals belonging to the debtor, and also the necessary food for all the stock mentioned in this section for one year's support, should be construed as referring only to animals of that class which the debtor already possesses, and as not referring to and including food for animals which the debtor does not possess and has no present purpose of obtaining. Where the debtor has none of the animals which are exempt, and no present bona fide intention or purpose of obtaining them, there the object of exempting food for such exempt animals fails. The exemption of the food was doubtless made in order to render that of the animals practically beneficial, and when the debtor has not the animals, and no intention or purpose of immediately obtaining them, he needs not the food." *Cowan v. Main*, 24 Wis. 569, 570.

Within 2 Rev. St. p. 254, § 169, and page 367, § 22, providing that all sheep to the number of ten, one cow, two swine, and the "necessary food" for them, all necessary pork, beef, fish, flour, and vegetables actually provided for family use, and necessary fuel for the use of the family for 60 days, should be exempt from execution on the owner's debt, the necessary food is not restricted to an amount sufficient to keep them for 60 days, but a debtor is allowed a sufficient amount to

keep them through the winter. The restriction to 60 days only applies to the fuel. *Farrell v. Higley* (N. Y.) *Lalor's Supp.* 87, 88.

NECESSARY FOR DRAINAGE.

Rev. St. 1874, c. 42, § 1, authorizing the construction of a levee by the joint owners "if it shall be deemed necessary for the drainage of the lands," authorized such construction only in connection with drainage for agricultural and sanitary purposes, and a levee cannot be constructed to prevent the submerging of land. *Updike v. Wright*, 81 Ill. 49, 52.

NECESSARY FOR SCHOOLS, RELIGIOUS AND CHARITABLE PURPOSES.

"Necessary for schools, religious and charitable purposes," as used in Const. art. 9, § 3, providing that such "property" as the general assembly shall deem "necessary for schools, religious and charitable purposes," may be exempted from taxation, cannot be construed to include property owned by educational, religious, or charitable corporations, which was not itself used directly in the aid of the purposes for which the corporations were created, but which was held for profit merely, though the profits were to be devoted to the proper purposes of the corporation. *Northwestern University v. People*, 80 Ill. 333, 334, 22 Am. Rep. 187.

NECESSARY FOR SUPPORT.

Code Civ. Proc. § 831, exempting the wages of a laboring man when "necessary" for the support of his family, does not mean that his wages must be absolutely indispensable to the bare subsistence of the family, and that the family could not live without them, but is used in a broader and less rigid sense, looking rather to the comfort and well-being of the family, and contemplating the furnishing to it whatever is necessary to its comfort and well-being, as distinguished from luxuries. *Cushing v. Quigley*, 29 Pac. 837, 338, 11 Mont. 577.

NECESSARY FORD.

Under a statute authorizing a landowner to connect his fences with the bridge crossing a stream, provided no necessary ford was obstructed thereby, where a ford was used only for the purposes of watering teams and convenient for that purpose only, it was not a "necessary ford" within the meaning of such statute. *Town of Old Town v. Dooley*, 81 Ill. 255, 259.

NECESSARY FURNITURE.

"Necessary," as used in Rev. St. tit. 1, c. 14, § 179, exempting from warrant or exe-

cution "bedding and household furniture necessary for supporting life," should be construed to embrace those things which are requisite in order to enable the debtor and his family to live in a convenient and comfortable manner. The term "necessary" in such act, while it excludes superfluities and articles of luxury, was not intended to denote those articles of furniture only which are indispensable to the bare subsistence of the debtor and his family. *Montague v. Richardson*, 24 Conn. 338, 346, 63 Am. Dec. 173; *Hitchcock v. Holmes*, 43 Conn. 528, 529.

"Necessary furniture," within the meaning of a statute exempting necessary furniture to the debtor, includes such furniture reasonably necessary to enable the debtor to keep house, whether it was purchased for that purpose or not. *Clark v. Averill*, 31 Vt. 512, 514, 76 Am. Dec. 131.

Within the meaning of a statute securing to a debtor and his family such household furniture as is necessary, it is held that in determining what furniture is "necessary" the occupation of the debtor may be properly considered, and that, if the fact that she kept boarders made it necessary for her to have more furniture for her personal use, such additional furniture would be exempt. *Weed v. Dayton*, 40 Conn. 293, 297.

Chairs, sofa, and carpet.

In Rev. St. c. 97, § 22, cl. 2, exempting from execution "household furniture necessary for the debtor and his family," not exceeding a certain amount in value, "necessary" does not mean something absolutely indispensable and without which the debtor cannot live, but something so essential as to be regarded amongst the necessities of life, as contradistinguished from luxuries, and hence cheap and common chairs and plain and cheap sofa and carpet are exempt. *Davlin v. Stone*, 58 Mass. (4 Cush.) 359, 360.

Cook stove.

"Necessary furniture," within the meaning of a Vermont statute exempting articles of "household furniture necessary for upholding life" from attachment and execution, includes a cooking stove. Such a stove is calculated for no other use than as an article of household furniture. It is not an article of ornament or luxury, and if it is not necessary it is difficult to account for its origin or its continuance in use. Though of modern invention, it is, in the present state of the country, as necessary as any other single article of household furniture. *Crocker v. Spencer* (Vt.) 2 D. Chip. 68, 70, 15 Am. Dec. 652.

A cooking stove is protected from attachment as a "necessary" article of household furniture, because, since the general introduction of this article as one of common use, many dwellings, and especially those occupied by the poorer class, are constructed with

a view to the exclusive use of it, and would be uninhabitable without it. Perhaps there is no article found in the dwellings of the poor which might not be as easily dispensed with. It is an article of permanent necessity, and the temporary suspension of the use of it does not render it unnecessary. There is scarcely any protected article which is always in actual use, and, if it can be held that such articles were attachable because not actually in use at the moment, the protection would be of little use. *Hart v. Hyde*, 5 Vt. 328, 332.

Timepiece.

V. S. 1797, pp. 208, 209, § 1, exempting from execution such articles of household furniture belonging to the debtor as may be "necessary for upholding life," should be construed to include a timepiece. It is not absolutely necessary for subsistence, but the word "necessary" or "necessaries" has always been considered in legal language to extend to things of convenience and comfort, and to things suitable to the situation of the person in society, and not as confined to things absolutely necessary for means of subsistence. *Leavitt v. Metcalf*, 2 Vt. 342, 343, 19 Am. Dec. 718.

NECESSARY GROUNDS.

As used in Gen. St. 1878, c. 11, § 5, declaring that all public burying grounds, schoolhouses, academies, colleges, universities, and seminaries of learning, with the books and furniture therein, and the grounds attached to such building "necessary" for their proper occupancy, use, and enjoyment, and not leased or otherwise used with a view to profit, should be exempt from taxation, "necessary" should not be read in its strictest sense, restricting the exemption to the land actually occupied by such college buildings as are devoted to the purposes of class rooms, lecture rooms, libraries, and the accommodation of students. The language has this broader meaning, viz., "reasonably necessary or appropriate for the proper occupancy, use, and enjoyment of the institution." *Hennepin County v. Brotherhood of Gethsemane*, 27 Minn. 460, 8 N. W. 595, 38 Am. Rep. 298; *Hennepin County v. Grace*, 27 Minn. 503, 8 N. W. 761. What uses may be thus appropriate, within the limits of reasonable necessity, has been left to be determined with reference to the circumstances of each case. It embraces land near college buildings on which the college has erected several houses as places of residence by the professors or faculty, such premises being used for no other purposes. *Ramsey County v. Macalester College*, 53 N. W. 704, 705, 51 Minn. 437, 18 L. R. A. 278.

NECESSARY HELP.

"Necessary help," in St. 1877, p. 66, conferring authority on the warden of the state

prison to appoint all necessary help, includes the power to employ a physician. *State v. Hobart*, 13 Nev. 419, 420.

NECESSARY HIGHWAY.

The term "necessary," when applied to a determination by a jury on appeal, in proceedings to lay out a highway, whether the highway is necessary, means reasonably necessary, the cost, as well as the benefit, being considered. *Hazard v. Town Council of Midletown*, 12 R. I. 227, 232.

The term "necessary," in Dig. 1844, p. 319, § 2, providing that if it be found necessary that other highways be laid out in any town, besides such as have been or shall be laid out by the proprietors, it shall be lawful for the town council to order a highway to be laid out so far and through such parts of the same town as they may deem necessary, does not mean an absolute necessity, "for in that sense no new way, in modern days at least, could ever become necessary. There are always ways which may be used, though at great inconvenience; so great that it would be unreasonable that the public should be subjected to it, but yet such as may be endured. If, therefore, the town council, or the mayor and aldermen, are of opinion that the inconvenience is so great that it is unreasonable that the public should be subjected to it, and that it requires a remedy, and so all judge, this, we think, is all the 'necessity' which the act contemplates." *Hunter v. City of Newport*, 5 R. I. 325, 331.

NECESSARY IMPLICATION.

"Necessary implication" is that which leaves no room to doubt. It is not an implication upon conjecture. *Whitfield v. Garriss* (N. C.) 45 S. E. 904, 905.

The phrase "necessary implication," as applied in the law of statutory construction, means an implication that is absolutely necessary and unavoidable. *Attorney General v. Sands*, 44 Atl. 83, 85, 68 N. H. 54.

"Necessary implication" does not mean to shut out every other possible or imaginary conclusion, and from which there is no possible escape, but means one leading to such a conclusion as, under the circumstances, a reasonable view impels us to take, the contrary of which would be improbable and absurd. Speaking on the matter of implication in the consideration of the statutes, *Black, Interp. Laws*, § 33, says: "This doctrine does not empower the courts to go to the length of supplying things that were intentionally omitted from the act, but it authorizes them to draw inferences from the general meaning and purpose of the Legislature, and from the necessity of making the act operative and effectual as to those minor or more specific things which are included in the more broad or general terms of the law, or as to those

consequences of the enactment which the Legislature must be understood to have foreseen and intended." *Gilbert v. Craddock*, 72 Pac. 869, 871, 67 Kan. 346.

"Necessary implication" in determining the intention of a testator was defined by Lord Hardwicke not as being the only possible conclusion, but because the court finds it so to answer the intention of the devisor. *Coryton v. Helyar*, 2 Cox, 340, 348. Lord Mansfield in 1773 defined it in the same way. The term "necessary implication," he said, was used simply in opposition to "conjecture." The rule, as stated by Jarman, took its final form from a remark of Lord Eldon, in 1813, that "necessary implication" means not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed. *Weed v. Scofield*, 49 Atl. 22, 25, 73 Conn. 670 (citing *Wilkinson v. Adam*, 1 Ves. & B. 459, 460); *State v. Union Bank*, 17 Tenn. (9 Yerg.) 119, 164; *McCoury's Ex'rs v. Leek*, 14 N. J. Eq. (1 McCart.) 70, 72; *Detroit Citizens' St. R. Co. v. City of Detroit*, 64 Fed. 628, 647, 12 O. C. A. 365; *Gelston v. Shields* (N. Y.) 16 Hun, 143, 151; *Lockwood v. Mildeberger*, 53 N. E. 803, 804, 159 N. Y. 181; *People v. Draper*, 15 N. Y. 532, 558; *In re Jacobs' Estate*, 21 Atl. 318, 319, 140 Pa. 268, 11 L. R. A. 767, 23 Am. St. Rep. 230; *Wright v. Hicks*, 12 Ga. 155-162, 56 Am. Dec. 451; *Detroit Citizens' St. Ry. Co. v. Detroit Ry.*, 18 Sup. Ct. 732-734, 171 U. S. 48, 43 L. Ed. 67. As Lord Mansfield expresses it, "necessary implication" is that which leaves no doubt." *Carr v. Bradenberg*, 27 S. E. 925-928, 50 S. C. 471. The implication must in every case be necessary to carry into effect the clear intention of the testator. Conjecture cannot be taken for implication in such case. *Beard v. Beard*, 22 W. Va. 130, 136. "Necessary implication" is the implication which arises upon the words the testator has made use of that clearly satisfy the court what was his meaning—and that, as put in opposition to conjecture. *Boisseau v. Aldridges* (Va.) 5 Leigh, 222, 233, 27 Am. Dec. 590. In passing on the question whether a will created a gift by necessary implication, it was said that "the term 'necessary implication' is thus defined by Lord Eldon in *Wilkinson v. Adam*, 1 Ves. & B. 456: 'It does not mean natural necessity, but so strong a probability of intention that an intention contrary to it which is imputed to a testator cannot be presumed.'" In *Mitchell v. Mitchell*, 5 Mad. 69, the court says: "The expression 'a necessary implication' is frequently applied to cases between a devisee and an heir at law, and yet there is hardly a case decided against an heir at law where the implication on which it was so decided was of absolute necessity. It is but a loose way of defining this expression to say that the intention must be so probable that the judge can-

not suppose to the contrary." *Coale v. Smith*, 4 Pa. (4 Barr) 376, 379.

NECESSARY IMPROVEMENTS.

"Necessary improvements," as used in an order of the court referring a cause to a commissioner to state an account between the parties requiring him to ascertain the amount of necessary improvements upon lands, should not be construed to mean only improvements actually necessary or indispensable. The decree should be construed so that where the parties are the proprietors of a town plat, and by expending considerable sums in the repair of mills, dams, etc., in existence, and other improvements of a public character, settlers would be attracted to the town, even though the improvements might not of themselves be profitable, such improvements should be construed as within the term "necessary," if the collateral advantages resulting from the investment to the other party and the town were such as a judicious man would make. The "necessary improvements" spoken of in the decree were such as were proper, fit, and adapted to the accomplishment of the objects in view—the enhancement of their property by the improvement, and the building up of an important town at that point. *Reed v. Jones*, 8 Wis. 421, 464.

NECESSARY INJURY.

In Rev. St. 1889 § 4427, providing that in an action for death by wrongful act the jury may award "such damages, not exceeding \$5,000, as they may deem fair and just with reference to the necessary injury resulting from such death," the words "necessary injury" are broad enough to include any damages which may be estimated according to a pecuniary standard, whether present, prospective, or proximate. *Barth v. Kansas City El. Ry. Co.*, 44 S. W. 778, 785, 142 Mo. 535.

"Necessary injury," as used in Rev. St. 1879, § 2123, authorizing a parent to recover damages for the necessary injury resulting from the negligent killing of a minor child, "includes loss of services of the deceased during minority, costs of nursing and surgical and medical attendance, and appropriate funeral expenses." *Rains v. St. Louis, I. M. & S. Ry. Co.*, 71 Mo. 164, 169, 36 Am. Rep. 459.

The phrase "pecuniary injury," in an instruction in a personal injury damage suit, is equivalent to "necessary injury." *Goss v. Missouri Pac. Ry. Co.*, 50 Mo. App. 614, 629.

NECESSARY LICENSES.

The meaning of the word "necessary," in the provision of the liquor law authorizing the court to refuse licenses not neces-

sary for the accommodation of the public and entertainment of strangers and travelers, is not to be construed according to the strict etymological definition of the word "necessary," and the judges must rely on their knowledge of the customs and habits of their respective communities from observation and experience as to results in former years, and on the unsatisfactory evidence of ex parte witnesses. Few persons would say that it is necessary to the existence of man, collectively or individually, that any license should be granted or any place provided or allowed where liquor can be obtained, but that, our Supreme Court has said, and it is plain from the language of the statute, is not the meaning intended by the Legislature. In re Erie Licenses, 4 Pa. Dist. R. 167, 168.

NECESSARY MEANS.

"Means necessary to the end," signifies any means calculated to produce the end, and is not confined to those single means without which the end would be entirely unobtainable. New Jersey R. & Transp. Co. v. Hancock, 35 N. J. Law (6 Vroom) 537, 546.

NECESSARY OATHS.

As used in 1 Gav. & H. St. p. 123, providing that auditors and their deputies are authorized to administer "oaths necessary in the performance of their duties," should be construed to include the oath of verification by the contestor of an election, of his statement of the grounds of contest, as pertaining to and being necessary and proper in the discharge of their duties. The word "necessary," in connection with the performance of the duties of auditors, must be regarded as relating to matters filed with or business transacted before the auditor in which an oath is required, and in reference to which some duty is enjoined on the auditor. The oath in such case is a necessity without which the auditor cannot perform the duty required of him, and he is therefore authorized to administer it as necessary in the performance of his duty. Wheat v. Ragsdale, 27 Ind. 191, 198.

NECESSARY OFFICER.

Other necessary officer, see "Other."

NECESSARY PARTIES.

Persons whose interests will necessarily be affected by any decree that can be rendered are necessary and indispensable parties. "Necessary and indispensable parties" include all persons who have an interest in the controversy of such a nature that the final decree cannot be made without either affecting their interests, or leaving the controversy in such condition that its final ter-

mination may be wholly inconsistent with equity and good conscience. The term 'necessary parties' also includes persons who are so connected with the subject-matter of the controversy that it is necessary to have them before the court for the proper protection of those whom the decree will necessarily and directly affect." Chandler v. Ward, 58 N. E. 919, 924, 188 Ill. 322.

The term "necessary parties" to a bill in equity is commonly used to designate formal parties. California v. Southern Pac. Co., 15 Sup. Ct. 591, 599, 157 U. S. 229, 39 L. Ed. 683.

A necessary party to an action is one without whose presence a substantial decree cannot be made. Mahoney v. Bernhardt, 58 N. Y. Supp. 748, 753, 27 Misc. Rep. 339.

Necessary parties are those without whom no decree at all can be effectively made determining the principal issues in the case. Phoenix Nat. Bank v. A. B. Cleveland Co., 11 N. Y. Supp. 873, 58 Hun, 606 (citing Pom. Rem. § 329); Rosina v. Trowbridge, 17 Pac. 751, 754, 20 Nev. 105. Parties to the main issue or issues to be determined, and which are essential to any valid decree, are necessary parties. Tregear v. Etiwanda Water Co., 18 Pac. 658, 659, 76 Cal. 537, 9 Am. St. Rep. 245.

Where a person has a direct interest in the subject-matter of the suit, his rights will be affected by the final decree, and he is a necessary party. Robinson v. Kind, 47 Pac. 1, 2, 23 Nev. 330 (citing Richards v. Richards, 75 Mass. [9 Gray] 313, 315).

Necessary parties are those who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does complete and full justice between them. Chadbourne v. Coe (U. S.) 51 Fed. 479, 480, 2 C. C. A. 327.

Persons are necessary parties where no decree can be made respecting the subject-matter of litigation until they are before the court, either as complainants or defendants, or where the defendants already before the court have such an interest in having them made parties as to authorize them to object to proceeding without such parties. Burrill v. Garst, 31 Atl. 436, 19 R. I. 38; Wilkinson v. Dodd, 3 Atl. 360, 364, 40 N. J. Eq. (13 Stew.) 123; Robinson v. Kind, 47 Pac. 1, 2, 23 Nev. 330 (citing Bailey v. Inglee [N. Y.] 2 Paige, 278).

Persons having an interest in the controversy, and who ought to be made parties in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy and do complete justice by adjusting all the rights in-

volved in it, are commonly termed "necessary parties." *Castle v. City of Madison*, 89 N. W. 156, 159, 113 Wis. 346; *California v. Southern Pac. Co.*, 15 Sup. Ct. 591, 599, 157 U. S. 229, 39 L. Ed. 683. But if their interests are separable from those before the court, so that the court can proceed to the decree and do complete and final justice without affecting other persons not before the court, they are not indispensable parties. *Shields v. Barrow*, 58 U. S. (17 How.) 130, 139, 15 L. Ed. 158; *James H. Rice Co. v. Libbey* (U. S.) 105 Fed. 825, 827, 45 C. C. A. 78.

The question as to who may or may not be necessary or proper parties is and always has been in very many cases a most difficult and perplexing one. It constitutes of itself a title in the law of equity jurisprudence upon which great learning has been expended, without the ascertainment of any rule of general or universal application. Each case must still be determined to a considerable extent upon its own peculiar facts and circumstances, the object of all rules upon the subject being in accordance with the cherished principle in equity that the adjudication may be as complete and conclusive as possible. The rule to be gathered from all the authorities may in a few words be stated to be that in no case does the jurisdiction of the court over the subject-matter and parties properly before it depend, nor can it be made to depend, on the absence of other parties, however the right of other parties may be complicated by the decree, or however necessary it may be that they should be brought in, in order that a complete and final determination of the controversy may be had. *Iowa County Sup'rs v. Mineral Point R. Co.*, 24 Wis. 93, 132.

Proper parties distinguished.

In actions in equity, "proper parties" are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all persons who have any interest in the subject-matter of the litigation; while "necessary parties" are those without whom no decree can be effectively made. In an action by mortgagees to have the liens of their mortgages adjudged to be liens on the money awarded as damages to the mortgaged premises by an easement in the premises acquired by the public subsequent to the execution of the mortgages, the owners of the fee to whom the award would belong, in the absence of any lien in favor of the mortgagees, are proper, if not necessary, parties to the action. *Lumbermen's Ins. Co. v. City of St. Paul*, 90 N. W. 357, 358, 77 Minn. 410.

In all equitable actions, a broad and most important distinction must be made between two classes of parties defendant,

namely, those who are necessary and those who are proper. "Necessary parties," when the term is accurately used, are those without whom no decree can be effectively made determining the issues in the cause. "Proper parties" are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all persons who may have any interest in the subject-matter of the litigation. *Rosina v. Trowbridge*, 17 Pac. 751, 755, 20 Nev. 105; *Tatum v. Roberts*, 60 N. W. 848, 849, 59 Minn. 52.

The old chancery rule is that all those whose presence is necessary to the determination of the entire controversy must be, and all those who have an interest in the subject-matter of the litigation which may be conveniently settled therein may be, made parties to the suit. The former are termed the "necessary," and the latter the "proper parties." *Donovan v. Campion* (U. S.) 85 Fed. 71, 72, 29 C. C. A. 30.

NECESSARY POLICE ORDINANCES.

"Necessary," as used in an act for the incorporation of cities and villages, providing that the city council should have power to pass all necessary police ordinances, cannot be construed to mean indispensable, but only such ordinances as would be conducive to, or beneficial or effective in the promotion of, the comfort, safety, health, convenience, good order, or general welfare of the municipal public. *Wice v. Chicago & N. W. Ry. Co.*, 61 N. E. 1084, 1085, 193 Ill. 351, 56 L. R. A. 268.

"Necessary," in Rev. Laws, p. 445, § 267, providing that the mayor, aldermen, and commonalty of New York City shall have full power and authority to make and pass such by-laws and ordinances as they shall from time to time deem proper and necessary for regulating, or, if they shall find it necessary, preventing, the interring of the dead within the said city, the word "necessary" is nearly synonymous with "expedient," or what is necessary for the public good. The word "necessary," when applied to a law for the taking of private property, is constantly understood and acted upon in this sense, or as contradistinguished from "unnecessary" or "inexpedient." This necessity is not absolute. *Stuyvesant v. City of New York* (N. Y.) 7 Cow. 588, 606.

Where a city was given power by its charter to make necessary local police, sanitary, and other laws and regulations, it was held that the insertion of the word "necessary" did not limit or restrict the power given to the city. *Odd Fellows' Cemetery Ass'n v. City and County of San Francisco*, 73 Pac. 987, 989, 140 Cal. 228.

NECESSARY POWERS.

In considering the authority of a cashier of a bank to indorse and transfer a note payable to bank, the court said: "In all agencies there must be, to some extent, implied powers conferred. An agent, to perform any act or discharge any function, is clothed with all such incidental powers as may be necessary to the performance of the act for which the agency was created. And by the word 'necessary' is not meant that it is indispensable, and without which the act cannot be done, but such powers are implied as are convenient and proper, and as are usually exercised in the discharge of such agencies." *Maxwell v. Planters' Bank*, 29 Tenn. (10 Humph.) 507, 508 (citing *Story on Agency*, § 58 et seq.).

Of corporation.

In *Transportation Co. v. Hancock*, 35 N. J. Law (6 Vroom) 437, 446, in interpreting the meaning of the word "necessary," as used in respect to power necessary to a railroad company for the accomplishment of the objects of its incorporation and so exempt from taxation, the court said: "Power 'necessary' to a corporation does not mean simply power which is indispensable. Such phraseology has never been interpreted in so narrow a sense. There are a few powers which are in the strict sense absolutely necessary to these artificial persons, and to concede to them powers only of such a character, while it might not entirely paralyze, would very greatly embarrass their operations." *National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. Co.*, 33 Atl. 860, 864, 54 N. J. Eq. 142.

In the construction of charters of corporations, the power to contract and the mode of contracting is not limited to the express grant, but may be extended by implication to all necessary and proper means for the accomplishment of the purposes of the charter. If the means are usual and appropriate, the implication of power arises. So a corporation created to construct a road has the power to borrow money as one of the implied means necessary and proper to carry into effect its specified powers, even though the charter directs that the funds shall be made by subscription. *Union Bank v. Jacobs*, 25 Tenn. (6 Humph.) 515, 522.

A power which the law will regard as existing in a corporation by implication must be one in a sense "necessary"—that is, needful, suitable, and proper—to accomplish the object of the grant in its charter, and one that is directly and immediately appropriate to the execution of the specific powers, and not one that has but a slight, indirect, or remote relation to the specific purposes of the corporation. Thus a cor-

poration chartered to manufacture railway cars and operate, lease, and sell such cars, and to purchase and hold such real estate as may be necessary in the prosecution of such business, may own an office building and rent such portions thereof as it does not need for its own use, but it has no power to purchase real estate on which to lay out towns with streets and alleys, sewerage, water and light systems, and erect buildings and dwellings, schools, churches, and business houses, in order to furnish homes to its employes, such scheme not being necessary for the prosecution of such purposes. *People v. Pullman's Palace-Car Co.*, 51 N. E. 664-668, 175 Ill. 125, 64 L. R. A. 366.

Municipal corporations can exercise only such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those essential to the declared object and purposes of the corporation—not simply convenient, but indispensable. "Implied powers," says Judge Cooley, "are such as are necessary in order to carry into effect those expressly granted, and which must therefore be presumed to have been within the intention of the legislative grant." The power given in the charter of the city to regulate the lighting of the streets and alleys does not give the power to grant an exclusive franchise for lighting such streets and alleys, the grant of an exclusive franchise not being necessary, and the power to make such grant, therefore, cannot be implied. *Grand Rapids E. L. & P. Co. v. Grand Rapids E. L. & F. G. Co.* (U. S.) 33 Fed. 659-667.

"Necessary," as used in Corporation Act, § 3, providing that in addition to the powers enumerated in the first section, and to those expressly given in its charter or certificate under which it is incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given, does not mean simply power which is indispensable, but one which is obviously appropriate and convenient to carry into effect the franchise granted. It means suitable and proper to accomplish the end which the Legislature had in view at the time of the enactment of the charter. *Elleman v. Chicago Junction Rys. & Union Stockyards Co.*, 23 Atl. 287, 295, 49 N. J. Eq. (4 Dick.) 217.

"Necessary," does not always import an absolute physical necessity so strong that one thing to which another may be termed as "necessary" cannot exist without that other, and where a charter conferred on a railroad the rights necessary to the operation of the railroad, the railroad had power to use all means suitable and proper for that

purpose. *New Jersey R. & Transp. Co. v. Hancock*, 35 N. J. Law (6 Vroom) 537, 546.

"Necessary," as used in Laws 1841, c. 178, authorizing certain associations to carry on a business of banking by discounting bills, notes, and other evidences of debt, by receiving deposits, by loaning money on real and personal security, and by exercising such incidental powers as shall be necessary to carry on such business, does not mean physical, logical, or moral necessity. If the word "necessity" is to be construed in logical strictness, it is impossible to hold that these banks can incur any sort of degree of indebtedness, for the reason that they can always pay down or in advance. The term is used to mean that kind of necessity which custom and usage impose on that particular branch of business called "banking." These customs vary with times and localities, and hence these incidental powers cannot be enumerated, but are left to time and circumstances. Taken together with the word "incidental," they may, and probably must, mean to authorize those occasional acts of power which are necessitated by the mutual wants of the banks and their customers, but may not fall within the strict letter of the enumerated powers. *Curtis v. Leavitt*, 15 N. Y. 9, 165.

NECESSARY PROVISIONS.

"Necessary provisions," as used in St. 1857, c. 235, exempting from attachment and execution necessary provisions procured and intended for the use of the family of the debtor up to a certain amount, includes vegetables planted and raised by the debtor for the use of his family and ripe for harvest, though not severed from the soil. *Mulligan v. Newton*, 82 Mass. (16 Gray) 211, 212.

NECESSARY PURPOSES.

"Necessary purposes," as used in Code Civ. Proc. § 1415, providing that a special administrator may for certain enumerated purposes, and for all "necessary purposes," maintain actions and other legal proceedings as an administrator, means purposes having in view the enforcement of the substantial rights of parties entitled to the benefits of the estate, or to have its assets applied to the satisfaction of their established claims. *Forde v. Exempt Fire Co.*, 50 Cal. 290, 302.

Where a corporate charter authorizes the board of public works to purchase sites for and purchase or construct a city hall, schoolhouse, engine house, and such other buildings as may be necessary for the purpose of this act, the word "necessary" is to be understood here in its ordinary and popular sense, and to include a building convenient and proper for such purpose. A

resolution of the board to purchase a tract of about nine acres of land, to be used as a site for the location of a city hall and other city buildings, is not authorized where there is no determination of the board as to the necessity of so large a tract for the location and proper use of a city hall. *Gregory v. Jersey City*, 36 N. J. Law (7 Vroom) 166, 168.

The word "necessary," as used in a constitutional grant of power to county authorities to levy taxes for necessary county purposes, is to be taken rather as an indication of a grant of discretion than as a restraint upon power, and the word in such connection cannot be construed as limited in its meaning to "indispensably necessary." *Cotton v. Leon County Com'rs*, 6 Fla. 610, 629.

NECESSARY REPAIRS.

"Necessary repairs," as used in connection with the duty resting on a mortgagee in possession to expend money on the mortgaged premises, is construed strictly, and means such repairs as are absolutely necessary for the protection of the estate. *Clark v. Smith*, 1 N. J. Eq. (Saxt.) 121, 139.

To vessel.

"Necessary," in reference to the necessary repairs for which a ship is liable, where furnished on the master's order, means such as are fit and proper for the vessel upon her voyage, and such as a prudent owner himself, if present, would order. *Webster v. Seekamp*, 4 Barn. & Ald. 352.

"Necessary," as used in reference to the authority of a master in a foreign port to procure all supplies and repairs necessary for the safety of the ship and the due performance of the voyage, does not mean absolutely necessary or indispensably necessary, but includes such supplies and repairs as are reasonably fit and proper for the ship and voyage. *The Fortitude* (U. S.) 9 Fed. Cas. 479, 481.

NECESSARY ROAD.

See "Way of Necessity."

A road cannot be necessary without being a convenience. "Necessary" seems to include convenience, and something more, to wit, a convenience that is indispensable. *Inhabitants of Cushing v. Gay*, 23 Me. (10 Shep.) 9, 16.

"Necessary," as used in Ann. Code 1892, § 3561, requiring railroad companies to construct crossings for necessary plantation roads, does not mean "indispensable," but "reasonably convenient." The question of the necessity of a road is to be determined by the jury, taking into consideration the size and location of the plantation, the uses to which it is devoted, and all other relevant

facts. *Alabama & V. Ry. Co. v. Odeneal*, 19 South. 202, 203, 73 Miss. 34.

NECESSARY SELF-DEFENSE.

"'Necessary self-defense,' as explained in the text-books, as defined in our Penal Code, and, indeed, as generally understood by laymen as well as by lawyers, includes every case where there is reasonable ground to apprehend a design to commit felony or to do some great bodily injury, and where the circumstances are sufficient to excite the fears of a reasonable man." *People v. Dollor*, 26 Pac. 1086, 89 Cal. 513.

NECESSARY SUPPLIES.

Supplies for a vessel are necessary, so that a lien therefor may be had if they are fit and proper for the service in which the vessel is engaged, and what the owner of that vessel, as a prudent man, would have ordered if present. *The Medora* (U. S.) 18 Fed. Cas. 1309, 1310 (citing *The Alexander*, 1 Wm. Rob. Adm. 362).

Mules bought for a plantation are "necessary supplies," within Civ. Code, § 3184, and the money advanced for their purchase will be a privileged claim under such section. *Farrar v. Rowley*, 3 La. Ann. 276, 277.

NECESSARY TEAM.

The horse of the country physician whose patients reside at too great a distance to visit them on foot is a "necessary team," etc., within Act 1842, exempting the necessary team, etc., from sale on execution. *Wheeler v. Cropsey* (N. Y.) 5 How. Prac. 288, 291.

NECESSARY TO PROTECT INTEREST AND TITLE.

"Necessary to protect the interests and title to land," as used in a power of attorney authorizing him to do "all things necessary to protect the interests and title to land" described therein belonging to the grantor of the power, should be construed to include the payment of taxes, and the redemption of land for the owner from the purchaser thereof at a sale for delinquent taxes. *Townshend v. Schaffer*, 3 S. E. 586, 587, 30 W. Va. 176.

NECESSARY TOOLS.

"Necessary tools of employment," within the meaning of Code Civ. Proc. § 690, subd. 4, exempting the tools or implements of a mechanic or artisan necessary to carry on his trade, does not include any number of presses and amount of type claimed by a person engaged in the printing business, but only such as are necessary to carry on his trade. The question of how much property

is exempted under the statute is for the jury. *In re Mitchell*, 36 Pac. 840, 841, 102 Cal. 534.

"Necessary," as used in Act 1805, c. 100, § 1, exempting from execution the "tools" of any debtor necessary for his trade or occupation, excludes from the exemption everything without which the debtor can work at his trade. *Buckingham v. Billings*, 13 Mass. 82, 85.

Cal. Code Civ. Proc. § 690, exempting the tools or implements of a mechanic "necessary to carry on his trade," might include an implement used by a journeyman in his trade and necessary thereto, though such implements were furnished to the journeyman by some employers. *In re Robb*, 33 Pac. 890, 99 Cal. 202, 37 Am. St. Rep. 48.

In construing the claim of a weaver that the looms, wheel and switch, and shuttles used by him in his business were exempt from attachment or execution as "necessary tools of a tradesman," the court said: "Without undertaking to lay down and specify what in every instance may be comprised in the terms 'necessary tools of a tradesman,' we may say that generally those articles without which a man cannot work at his trade must be within the meaning of the act. This will embrace the anvil of the smith, the wheel of the turner, and the loom of the weaver. These several trades cannot be carried on without them, though neither of them is taken into the hand of the tradesman." *McDowell v. Shotwell* (Pa.) 2 Whart. 26, 31.

The "tools of a debtor exempted from attachment" by St. 1805, c. 100, are such as are necessary to enable him to carry on his trade in a convenient and usual manner, and where the debtor himself worked on watches and his apprentice on jewelry, and the jury found the debtor's principal business to be that of a jeweler, the "tools" used by the apprentice were exempted. *Howard v. Williams*, 19 Mass. (2 Pick.) 80, 83.

"Necessary for his trade or occupation," as used in statute exempting from execution or attachment the tools of a debtor "necessary for his trade or occupation," include a shovel, pickax, dung fork, and hoe used by a debtor in tilling his land, although tilling is not his particular business. "In the country, farming or gardening is, or ought to be, part of every man's business; and the soundest policy, as well as the language of the statute, forbids the taking of any of the tools so necessary to good husbandry. The statute exempts the tools to be used by the hand and foot, and which are of simple construction and of moderate expense." *Pierce v. Gray*, 73 Mass. (7 Gray) 67, 69.

The buggy of an insurance agent, used by him in carrying on his business, is "the necessary tools and implements" of any person, used and kept for the purpose of carry-

ing on his trade or business, within the exemption law. *Wilhite v. Williams*, 21 Pac. 256, 257, 41 Kan. 288, 13 Am. St. Rep. 281.

NECESSARY VEGETABLES.

2 Rev. St. p. 367, § 22, subd. 4, exempting from execution the necessary vegetables actually provided for family use, includes potatoes in the field before they are dug, which are to be used by the family, and is not limited to potatoes in store. *Carpenter v. Herrington* (N. Y.) 25 Wend. 370, 37 Am. Dec. 239.

NECESSARY VIOLENCE.

The word "necessary," in an instruction in a homicide case as to the effect of defendants using more violence than was necessary to repel the assault of deceased, means reasonably necessary, or what the prisoner, under all the circumstances, might reasonably believe to be necessary. *Bull v. Commonwealth* (Va.) 14 Grat. 613, 624.

NECESSARY WAY.

The word "necessary," in Ky. St. § 4296, providing that a passway may be established whenever it shall appear to the county court that it is necessary for the citizen to have a private passway over the lands of one or more persons in the county to enable him to attend the court, elections, a meetinghouse, etc., is not to be construed in the sense of "absolutely necessary." The necessity contemplated by the statute is a practical necessity. If the applicant's outlet to the highway on his own ground or the way he now has does not afford him practical access to the highway, and cannot be made to do so at a reasonable expense, he is entitled to the establishment of a way as a necessity. *Vice v. Eden* (Ky.) 68 S. W. 125, 127.

Where the owner of two lots conveyed the northerly one, with a covenant against an incumbrance, and there was on the southerly lot a building with a window facing north, it was contended that there was an easement of light and air, because such light and air was necessary, but it was held that the covenant negated the reservation by implication, and required the necessity to be an actual necessity, in the sense of a way of necessity given by the policy of the law that no land may be made inaccessible or useless. *Denman v. Mentz*, 52 Atl. 1117, 1119, 63 N. J. Eq. 613.

NECESSARY WEARING APPAREL.

"Necessary," as used in a statute exempting necessary wearing apparel, is not to be understood in its most rigid sense, implying something indispensable, but is equivalent to "convenient and comfortable." *Towns v.*

Pratt, 33 N. H. 345, 349, 66 Am. Dec. 726 (citing *Peverly v. Sayles*, 10 N. H. 356).

2 Rev. St. § 169, exempting all "necessary wearing apparel for a householder and his family" from execution, means apparel for the family when it is owned by the householder or head of the family. The husband, father, mother, or other person who takes the charge and provides for the wants of others living with him may be regarded as the owner of the clothing which he furnishes for their use, and such apparel, as well as that worn by the head of the family, is exempt from execution, and does not include the clothing purchased by a person, nearly 40 years old, living in a family in which he received his board and some other compensation for the services he rendered. *Bowne v. Witt* (N. Y.) 19 Wend. 475, 476.

Lace shawl.

"Necessary wearing apparel" includes a lace shawl, within the meaning of the exemption law, though of greater value than the owner ought to wear in her condition in life as to property. *Frazier v. Barnum*, 19 N. J. Eq. (4 C. E. Green) 316, 318, 97 Am. Dec. 666.

Rings and jewelry.

"Necessary wearing apparel," within the meaning of the exemption law, does not include rings and jewelry. *Frazier v. Barnum*, 19 N. J. Eq. (4 C. E. Green) 316, 318, 97 Am. Dec. 666.

Watch.

"Necessary wearing apparel," as used in Code, § 297, subd. 2, providing that the necessary wearing apparel owned by any person to the value of \$100 shall be exempt from execution, cannot be construed to include a gold watch and chain worth from \$60 to \$70. The phrase "necessary wearing apparel" may include in it a watch and chain of moderate value, for it cannot be said that a watch and chain of moderate value is not a necessary article of wearing apparel when it is made to appear that the watch does not exceed the amount limited in the statute. If the value of the watch be unreasonable, or too much money be invested in it, the law regards it rather as a luxury than as a necessity. *Stewart v. McClung*, 8 Pac. 447, 12 Or. 431, 53 Am. Rep. 374.

"Necessary wearing apparel," as used in exemption statutes, will be held to include a watch and chain constantly carried by the debtor. *Brown v. Edmonds*, 66 N. W. 310, 8 S. D. 271, 59 Am. St. Rep. 762 (citing *Stewart v. McClung*, 8 Pac. 447, 12 Or. 431, 53 Am. Rep. 374; *Rothschild v. Boelter*, 18 Minn. 361, 362 [Gil. 331, 232]).

A watch is not "necessary wearing apparel," within Pub. St. Mass. c. 171, § 34.

so as to be exempt from execution. In re Turnbull (U. S.) 106 Fed. 667, 669.

NECESSARY WORK.

A contract to construct a reservoir for a city, tear down and remove buildings, make excavations, construct embankments and roadways, seed and sod the grounds, build walls, line the interior slope, build walks and stop-houses, remove all surplus material, and "all work necessary" to make a complete and perfect reservoir ready for use, covers points of construction which might have been overlooked, or which might afterward be found to be necessary, or which could not then be specified. *Filbert v. City of Philadelphia*, 37 Atl. 545, 546, 181 Pa. 530.

NECESSITIES.

"Necessities," as used in a conveyance in trust of certain real estate for the support and maintenance of the grantors during their lives, and, in case the income should prove insufficient to supply their wants and necessities, a portion or all of the real estate should be sold or mortgaged for that purpose, embraces within its meaning the requirement both for shelter and occupation. *Appeal of Taylor* (Pa.) 11 Atl. 307, 310.

NECESSITOUS CIRCUMSTANCES.

Rev. Civ. Code, § 2382, provides that when the wife has not brought any dowry, or when what she has brought as a dowry is inconsiderable with respect to the condition of the husband, if either husband or wife die rich, leaving the survivor in necessitous circumstances, the latter may take out of the succession of the deceased what is called the "marital portion," etc. Held, that the term "necessitous circumstances," as so used, was a relative term, dependent on the fortune of the deceased and the condition in which the claimant lived during the marriage. In estimating the necessities, the law requires the court to take into consideration the condition of the deceased spouse, and the habits of life which his ample fortune must have engendered in the family. The rules derived from the Roman and Spanish laws in such cases is that the surviving wife is entitled to the marital portion unless she has the means bene et honeste vivere according to the condition of her husband. *Smith v. Smith*, 10 South. 248, 43 La. Ann. 1140; *Dunbar v. Dunbar's Heirs*, 5 La. Ann. 158. Property which would make a person in one condition of life rich would be inadequate to supply the wants, although they are artificial, of one in another condition in life. *Dupuy v. Dupuy*, 27 South. 287, 288, 52 La. Ann. 869 (citing *Succession of Leppelman*, 30 La. Ann. 468).

NECESSITY.

See "Agency of Necessity"; "Immediate Necessity"; "Imperious Necessity"; "Moral Necessity"; "Physical Necessity"; "Public Necessity"; "Urgent Necessity"; "Way of Necessity." Other great necessity, see "Other."

The term "necessity," in the statute authorizing the condemnation of land in certain cases of necessity, is held not to mean an absolute and unconditional necessity as determined by physical causes, but a reasonable necessity under the circumstances of the particular case. *Samish River Boom Co. v. Union Boom Co.*, 73 Pac. 670, 673, 32 Wash. 580.

The necessity which is the criterion of a parent's liability for support to his minor child is not mere physical necessity, but rather social and moral propriety, having regard to the situation of the parties and the fitness of things. Food, shelter, and clothing are physical necessities. In an enlightened community the common education of a child is a moral and social necessity. Professional training is not a general necessity, but is a special advantage. *Streitwolf v. Streitwolf*, 43 Atl. 904, 907, 58 N. J. Eq. 570, 45 L. R. A. 842.

For construction of ditch.

"Necessity," as used in Rev. St. 1876, p. 428, requiring the filing of a petition for the construction of a ditch, "setting forth the necessity of the proposed construction," does not mean that which is absolutely requisite, but that which is essentially requisite, and that which will benefit the public and conduce to the general health and welfare, may be regarded as a necessity. *Corey v. Swagger*, 74 Ind. 211, 213.

For discharge of jury.

It is well settled that a jury charged with a cause on an indictment for felony may be discharged of it without a verdict, in cases of necessity, and the accused may be tried again for the same offense; and such acts do not constitute putting him "twice in jeopardy" within the meaning of the Constitution. The necessity which will authorize the discharge of the jury is not physical only. It is a moral necessity, arising from the impossibility of proceeding with the cause without producing evils which ought not to be sustained. According to the practice of England in ancient, if not modern, times, it may be doubtful whether the mere disagreement of a jury would constitute the necessity in question; for by that law the jury, after the cause is committed to them, are to be kept without meat or drink, fire or candle, until they shall have agreed, and, if this shall not be until the term of the court is closed, they may be made to follow the judge in

carts to the next shire, and so until they shall have agreed. Under this severe coercion it will be rare that a jury withholds a verdict beyond a reasonable time, though it may well be doubted whether a verdict so obtained would do any honor to the administration of justice. This manner of dealing with juries is not practiced in this commonwealth. In all cases committed to them they are made as comfortable as circumstances will admit of, are accommodated with fire and light, and are allowed reasonable refreshments at proper intervals. Practically, as well as theoretically, there is now a trial by jury; the members of it are deemed to be sound and intelligent men, it is supposed that their minds and faculties are to be exercised on the subjects committed to them, and that their verdict is the truth, as found by the evidence submitted to them. This change in the manners of the times, of necessity produces a change in the course of trials. If a jury cannot now be starved into a verdict, if they cannot be carried in the train of the judge from county to county, it seems necessarily to follow that, when they have applied their minds to the case as long as attention can be useful, and have come to a settled opinion resulting in a disagreement, the cause must be taken from them; and public justice demands that another trial be had. *Commonwealth v. Purchase*, 19 Mass. (2 Pick.) 521, 525, 526, 13 Am. Dec. 452.

Of using dying declaration.

"Necessity," as used in relation to the necessity of the commonwealth to use the dying declarations as evidence in a prosecution for murder which makes them admissible, does not mean the exigency of any particular case, but a public necessity which civilized society feels the pressure of for the protection of human life by the punishment of manslaughter. *Commonwealth v. Roddy*, 39 Atl. 211, 213, 184 Pa. 274.

For using an estray.

The necessity which authorizes one taking up an estray or a distrained animal to use it, is its preservation, and not the necessity of the taker, such as sending for a physician. *Weber v. Hartman*, 1 Pac. 230 235, 7 Colo. 13, 49 Am. Rep. 339.

For highway.

"Necessity," as used in Laws 1884, c. 18, § 6, providing that a town assessed toward the maintenance of a highway in another town may be relieved from such assessment on proof that such highway is a necessity to any inhabitant of the town to which the assessment is paid, means the necessity for the use of any considerable portion of the highway for ordinary use; not an absolute necessity, but such a necessity as highways are ordinarily used for in the transaction of

usual business. *Town of Wardsboro v. Town of Jamaica*, 9 Atl. 11, 12, 59 Vt. 514.

"Necessity," as used in Gen. St. p. 238, § 38, authorizing the laying out of highways as required by "common convenience and necessity," does not mean indispensable. The word "necessary," as used in statutes and legal propositions, is usually given a much more liberal meaning. *Bryan v. Town of Branford*, 50 Conn. 246, 253.

Of leaving the state.

The expression "under the necessity of leaving the state" is not to be taken in its strict sense, but it is to have a liberal interpretation, as it is used in common parlance, when it is said, in reference to a man's business, it is necessary for him to go from one place to another, because the word "necessity," taken literally, would confine the statute to very narrow limits. So, on the other hand, it is very obvious that the expression "about to leave the state" is not to be taken in the sense of the mere act of going out of the state, because this would give the statute a most unbounded operation, in which would be included the case of a merchant whose business called him to New York or Charleston, and who expected to be absent but a few weeks, etc. *Alexander v. Walker*, 35 N. C. 13, 15.

For private way.

See, also, "Way of Necessity."

To establish a right of way of necessity, nothing is required but to show the necessity. Neither time nor occupation are necessary. If the necessity has existed but for a day, the claim is as well founded as where it has existed for half a century; but there must be an actual necessity, and not a mere inconvenience, to entitle a person to such a right. In discussing this question the court said: "I do not mean to say that there must be an absolute and irresistible necessity; an inconvenience may be so great as to amount to that kind of necessity which the law requires, and it is difficult, and perhaps impossible, to lay down with exact precision the degree of inconvenience which will be required to constitute a legal necessity. It is apparent, however, that no such necessity existed in this case. The plaintiff has a navigable water course from his door to the public road or highway, by which the distance is not greater than by land, and, although there may be some inconvenience in being obliged always to go by water when he visits his plantation, yet it is not greater than necessarily attends every insular situation, and perhaps not so great to him as it would be to his neighbor to keep up a lane through his plantation for his accommodation." *Lawton v. Rivers* (S. C.) 2 McCord, 445-448, 13 Am. Dec. 741.

"Necessity," as used in the Georgia Constitution (Civ. Code, § 5729), declaring that in cases of necessity private ways may be granted on just compensation being paid, means that the way sought to be established must be absolutely indispensable to the applicant as a means of reaching his property; and, if there is in existence a way suitable for all the purposes for which the property is to be used, a case of necessity does not arise, though such way may be less convenient than the one proposed. *Chattanooga, R. & S. R. Co. v. Philpot*, 37 S. E. 181, 182, 112 Ga. 153.

For removal from homestead.

The word "necessity," as used in a statute providing that, whenever a debtor shall cease to reside on his homestead, it shall be liable for his debts, unless his removal is temporary by reason of some "necessity," etc., may embrace considerations of health or travel, or public business or private business—emergency of an exceptional and temporary character. *Thompson v. Tillotson*, 56 Miss. 36, 38.

For sale of lands of estate.

In Acts 1859, p. 620, conferring jurisdiction on the probate court to order a sale or distribution of lands belonging to a testator's estate on the filing of a petition by any of the parties interested in it, "setting forth the necessity of a sale or distribution," "necessity" means only a strong or urgent reason why the thing proposed should be done, and is not used in its absolute sense. The meaning of the word varies according to subject and connection. *Todd v. Flournoy's Heirs*, 56 Ala. 99, 118, 28 Am. Rep. 758.

For sale of vessel by master.

There is a necessity which authorizes the master of a vessel to sell it in a foreign port, when it is in such a condition that nothing better could be done for the owner than to sell it, and the master could not within a reasonable time have consulted with the owner. *The Herald* (U. S.) 11 Fed. Cas. 1196, 1197.

The necessity which authorizes the sale of a vessel by the master is not itself of any distinct or definite signification. A necessity must be actual, and not merely apprehended, or one which on a balancing of chances may turn out to be absolute and real, or only threatening and imaginary. *The Henry* (U. S.) 11 Fed. Cas. 1153, 1154, 1155.

For supplies for a vessel.

The necessity for supplies for a vessel which furnishes a basis for a lien on the vessel is relative. What is necessary for a packet ship to Liverpool or Havre, carrying

passengers who pay the highest price, and expect a table to be liberally supplied, may not be necessary for a vessel carrying coal or lumber, with crews working at low wages and accustomed to plain fare. But in each case a lien may exist for the articles supplied. The fact of the dispensation of the supplies from a restaurant—that is, to individuals as called for, and to be paid for by such individuals—rather than that the passenger should be charged a passage price intended to include a charge for meals furnished, makes no difference. *The Plymouth Rock* (U. S.) 19 Fed. Cas. 897, 898.

NECESSITY (Sunday Labor).

In discussing the meaning of the word "necessity" in a statute prohibiting transaction of business on Sunday, but excepting from its provisions works of necessity, the court says: "The word 'necessity' means (1) irresistible force; (2) inevitable consequence. But these are not its true meanings when used in a law touching the voluntary conduct of men. It means (3) being necessary; (4) something that is necessary. We say: 'The necessities of our nature; the necessities of life. Habit and desire create necessities, but nature requires only necessities.' Sometimes the word 'necessity' means no more than 'occasion,' or that which gives rise to something else. Worcester. We are not to seek the physical, metaphysical, philosophical, scientific, moral, or theological meaning of the word 'necessity,' but its legal meaning, as applicable to the rights, duties, and conduct of men. Sailing ships, running steamboats and railroad trains, carrying the mails, operating telegraph lines, keeping up waterworks and gasworks, carrying on distilleries, breweries, and running flouring mills, are not prohibited on Sunday, we believe, anywhere in the civilized world, and seldom regulated any differently on Sunday than on a week day; and large manufactories, blast furnaces, saltworks, oil wells, and other pursuits wherein heavy machinery is used, and where a stoppage is attended with loss or inconvenience, are seldom interfered with in their operations on Sunday by legal restriction." *Carver v. State*, 69 Ind. 61, 64, 35 Am. Rep. 205 (quoting Webst. Dict.).

Many legal definitions of the word "necessity" are to be found in the authorities, but the following from 12 Chi. Leg. News, p. 44, seems to give the result of all the authorities on the subject: "The law contemplates that the community has a general need that all should rest on Sunday. Most of the affairs and doings of week days are less important than this need of a rest day, but some few are superior. To keep the body physically sustained by food; to provide the facilities for worship during some hours of the day, and for restful mental oc-

cupation during others; to nurse and heal the sick; to provide prompt burial for the dead—these and some other objects are superior to the need for general repose. Necessary work includes all that is indispensable to be done on Sunday in order to secure the attainment of whatever is more important to the community than its day of rest." The word "necessity," in Rev. St. 1881, § 2000, prohibiting labor on Sunday, except works of necessity, does not mean an absolute or physical necessity, but a moral fitness or propriety of the work or labor done under the circumstances of any particular case. Generally speaking, it ought to be an unforeseen necessity, or, if foreseen, such as could not have been provided against. *Ungericht v. State*, 119 Ind. 379, 381, 21 N. E. 1082, 1083, 12 Am. St. Rep. 419 (citing *Morris v. State*, 31 Ind. 189).

The term "necessity," as employed in the Sunday statutes, is generally given a liberal rather than a literal interpretation by the courts. It is not an absolute, unavoidable, physical necessity that is meant, but rather an economic and moral necessity. *Flagg v. Inhabitants of Millbury*, 58 Mass. (4 Cush.) 243, 244; *Commonwealth v. Knox*, 6 Mass. 76, 77; *Shipley v. State*, 32 S. W. 489, 490, 61 Ark. 216; *McGatrick v. Wason*, 4 Ohio St. 566, 573; *Wilkinson v. State*, 59 Ind. 416, 423, 26 Am. Rep. 84; *Ungericht v. State*, 21 N. E. 1082, 1083, 119 Ind. 379, 12 Am. St. Rep. 419; *Yonoski v. State*, 79 Ind. 393, 396, 41 Am. Rep. 614; *Mueller v. State*, 76 Ind. 310, 313, 40 Am. Rep. 245; *Western Union Tel. Co. v. Henley*, 54 N. E. 775, 777, 23 Ind. App. 14; *Johnston v. People*, 31 Ill. 469, 473; *Hammons v. State*, 59 Ala. 164, 170, 31 Am. Rep. 13; *People v. Cayuga County Sup'rs*, 50 N. Y. Supp. 16, 20, 22 Misc. Rep. 616; *Ex parte Kennedy*, 58 S. W. 129, 130, 42 Tex. Cr. R. 148, 51 L. R. A. 270. Nor need the necessity be dangerous to life, health, or property, which is beyond human foresight or control. On the contrary, the necessity may grow out of, or be incident to, a particular trade or calling, and yet be a work of necessity, within the meaning of the act. It is not the design of the law to impose onerous restrictions upon, or add burdens to, any lawful trade or business. *Edgerton v. State*, 67 Ind. 588, 592, 33 Am. Rep. 110; *Hennersdorf v. State*, 8 S. W. 926, 927, 25 Tex. App. 597.

"Necessity," as used in Code 1876, § 21,038, providing that all contracts made on Sunday, unless for the advancement of religion, or in the execution or for the performance of some work of charity, or in case of necessity, are void, means more than physical necessity. It is universally construed to involve, also, considerations of moral fitness and propriety under the peculiar circumstances of the particular case. The necessity which will excuse, if not a

physical one, must at least be a moral emergency which will not reasonably admit of delay, but is so pressing in its nature as to rescue the act done from the implication of a willful desecration of a day made sacred for certain purposes in morals, as well as in law. *Burns v. Moore*, 76 Ala. 339-342, 52 Am. Rep. 332.

"Necessity," within the Sunday law, prohibiting work on Sunday, except work of charity or necessity, is totally incapable of any sharp definition. What is a mere luxury or perhaps entirely useless or burdensome to a savage may be a matter of necessity to a civilized man. What may be a mere luxury or pleasure to a poor man may be a necessity when he has grown rich. Necessity, therefore, can itself be only approximately defined. The law regards that as necessary which the common sense of the country, in its ordinary modes of doing its business, regards as necessary. By this test, the business of keeping livery stables for the care of people's horses is a necessary employment in large towns, and, of course, this requires some work and attention on Sundays; and this may be performed, to the extent of the necessity, by the ordinary means belonging to the business. By this test, also, iron and glass are necessities of life, and they cannot be obtained without some work being done on Sunday, if the business is to be performed according to the ordinary skill and science of the country. The law never inquires whether iron and glass generally, or in such large quantities, are really necessary, in the strictest sense of the word, or whether it is not possible to improve the art so that Sunday may not need to be violated. This is not the province of the law, but of individual enterprise and science. The law therefore does not condemn those employments which society regards as necessary, even when they encroach on the Sabbath, if, according to the ordinary skill of the business, it is necessary to do so. *Commonwealth v. Nesbitt*, 34 Pa. (10 Casey) 398, 409.

The word "necessity," as used in Rev. St. 1881, § 2000, prohibiting labor on Sunday, except works of necessity, is incapable of an accurate and comprehensive definition. The question in each case must be decided according to the circumstances, and it is therefore more a question of fact than of law whether the labor done in the particular case is to be deemed of necessity or not. *Ungericht v. State*, 21 N. E. 1082, 1083, 119 Ind. 379, 12 Am. St. Rep. 419. All authorities agree that an absolute and physical necessity is not meant or required. *Johnston v. People*, 42 Ill. App. 594, 598.

The necessity referred to in the statute imposing a penalty for doing any work on the Lord's Day, except works of charity or necessity, is not limited, on the one hand,

to absolute physical necessity; nor, on the other hand, is it to be so enlarged as to include mere business convenience or advantage. It is not easy to give a precise definition which shall determine, as a matter of law, what facts constitute the necessity intended by the statute. *Davis v. City of Somerville*, 128 Mass. 594-597, 35 Am. Rep. 399.

All labor on Sunday is prohibited, except works of necessity or charity. In works of necessity or charity is included whatever is needful during the day for the good order, health, or comfort of the community. *Pen. Code N. Y. 1903, § 263.*

As convenient.

It is no sufficient excuse for work on the Lord's Day that it is more convenient or profitable if then done than it would be to defer or omit it. *Commonwealth v. Sampson*, 97 Mass. 407; *McGrath v. Merwin*, 112 Mass. 467, 17 Am. Rep. 119.

The exception in *Pen. Code*, art. 196, prohibiting Sunday labor, except works of necessity, does not embrace work which is merely convenient, but not necessary. *Ex parte Kennedy*, 58 S. W. 129, 130, 42 Tex. Cr. R. 148, 51 L. R. A. 270.

"Necessity," as used in *Comp. Laws, § 1984*, providing that no person shall do any manner of labor, business, or work on Sunday, except only works of necessity and charity, is not to be tested by mere convenience. *Allen v. Duffy*, 4 N. W. 427, 429, 43 Mich. 1, 38 Am. Rep. 150. See, also, *Lawton v. Rivers (S. C.)* 2 McCord, 445, 448, 13 Am. Dec. 741; *Commonwealth v. Funk*, 9 Pa. Co. Ct. R. 277, 279.

As daily necessity.

Works of necessity, as used in a statute making it a misdemeanor for any person to labor or perform any work other than the household offices of daily necessity, or other works of necessity, on the first day of the week, commonly called Sunday, does not of necessity contemplate that the work must be one of daily necessity; and an indictment for violation of this statute, charging that the work done was not a work of daily necessity, is defective. *State v. Stone*, 15 Mo. 513, 514.

The work of those employed in furnishing articles of daily and general need, like gas, water, milk, mails, telegrams, and the Monday morning newspaper, has at least a certain popular sanction as permitted labor, within Sunday laws allowing works of necessity. *Donovan v. McCarty*, 30 N. E. 221, 222, 155 Mass. 543.

As real necessity.

"The necessity must be a real, and not a fancied, one. There must not be merely

an honest belief on the part of the defendant that the necessity exists, but the real existence of the necessity must be shown." *Ex parte Kennedy*, 58 S. W. 129, 130, 42 Tex. Cr. R. 148, 51 L. R. A. 270.

Butchering.

St. 1882, c. 123, § 16, providing for punishment of a person laboring on the Sabbath day, except doing a "work of necessity" or charity, cannot be construed to include the butchering of a beef on Sunday in order to save the meat; fearing that the beef would become fevered from the breaking off of a horn. *State v. Knight*, 1 S. E. 569, 29 W. Va. 340.

Care of poor.

The term "necessity or charity," in a statute prohibiting work, etc., on Sunday, but excepting work of necessity or charity, includes the care of the poor on Sunday by the overseers of the town, and a contract made on such day by the overseers for the relief of a sick pauper is not in violation of the statute. *Aldrich v. Inhabitants of Blackstone*, 128 Mass. 148, 151.

Care of sick and dead.

The work of physicians, nurses, apothecaries, and undertakers is by general concession within the exceptions of the Sunday law prohibiting Sunday labor, except of necessity or charity. *Donovan v. McCarty*, 30 N. E. 221, 222, 155 Mass. 543.

Carrying persons to picnic.

Rev. St. § 2000, declares that any person over 14 years of age found at common labor or engaged in his usual avocation (works of necessity and charity alone excepted) on Sunday shall be fined, etc. Held, that the words "works of necessity and charity" cannot be extended or enlarged so as to include mere matters of business or pleasure, and therefore the carrying of a party to a picnic on Sunday could not be regarded as within the exception, since the word "picnic" implies a mere pleasure party. *Dougan v. State*, 25 N. E. 171, 172, 125 Ind. 180, 9 L. R. A. 321.

Cutting grain.

The term "necessity," in a statute prohibiting work on Sunday, except work of necessity, applies to cutting wheat on Sunday, when it is dead ripe, and may be spoiled by rain if the cutting is delayed to a later day. *Turner v. State*, 67 Ind. 595, 596.

The term "necessity," in a statute making it criminal to perform labor on the Sabbath day, except customary household duties of daily necessity, comfort, or charity, does not characterize the act of a poor defendant, who, having no implement with which to cut his wheat, which is wasting from over-ripeness, and not being able to borrow such

implement, works for his neighbors during the week, and cuts his wheat on Sunday. *State v. Goff*, 20 Ark. 289-291.

Harvesting oats on Sunday may be a work of necessity, within the meaning of the statute prohibiting labor on Sunday, except works of necessity and charity. *Johnson v. People*, 42 Ill. App. 594, 598.

Delivering goods.

The delivery of a quantity of flour on board a steamboat on Sunday, in order to avoid the liability of delay in getting it to market occasioned by the danger of the closing of navigation, is not a work of necessity; and, in the absence of a contract to deliver the flour on that day, performance of a contract to deliver flour to a certain steamboat cannot be demanded on Sunday. *Pate v. Wright*, 30 Ind. 476-481, 95 Am. Dec. 705.

Driving master's family to church.

The act of a servant in driving his master's family to religious worship is not a violation of the Sunday law, prohibiting work on Sunday, except work of charity or necessity. *Commonwealth v. Nesbit*, 34 Pa. (10 Casey) 398, 408.

Driving omnibus.

Driving an omnibus as a public conveyance, daily and every day, is worldly employment, and not a work of charity or necessity, within the meaning of a statute providing that "if any person shall do or perform any worldly employment or business on the Lord's day, commonly called Sunday (works of necessity and charity alone excepted) he shall be fined." *Johnston v. Commonwealth*, 22 Pa. (10 Harris) 102, 108.

Execution of bail.

The execution of an undertaking of bail entered into on Sunday is a work of necessity, within the meaning of Code 1876, § 2138, prohibiting all contracts made on Sunday, unless in the performance of some work of charity, or in case of necessity, in the sense that it is an act morally fit and proper under the circumstances of the case. *Hammons v. State*, 59 Ala. 164, 170, 31 Am. Rep. 13.

Forwarding cattle.

Where cattle are delivered to a railroad company on Sunday, the forwarding of the cattle directly to their destination is a matter of necessity within the meaning of the laws prohibiting the exercise of business occupations, other than works of necessity, on Sunday. *Philadelphia, W. & B. R. Co. v. Lehman*, 56 Md. 209, 228, 40 Am. Rep. 415.

Gathering feed for stock.

The feeding of hogs on Sunday being a lawful work, it is not in violation of the stat-

utes to gather the necessary daily feed in the field, when such practice is according to good husbandry. *Edgerton v. State*, 67 Ind. 588-592, 33 Am. Rep. 110.

Gathering maple sap.

On the trial of defendant for a violation of the Sabbath, the evidence showed that he was engaged on a certain Sunday in gathering and boiling sugar water on his premises; that it was a good day for the flowing of the water; that his troughs were full and running over; that he had no way to save the water, but by gathering it and by boiling it. Held, that it was a work of necessity, within the statute. The court said: "Sugar-making from the maple is but for short periods, depending on the season and the weather. It is too short and precarious to justify a very large outlay in preparing vessels. The water is usually boiled down as it is gathered in the troughs in which it is caught. We think the labor performed by the appellant in gathering and boiling the sugar water was a necessity, under the statute." *Morris v. State*, 31 Ind. 189-191.

"Works of necessity," as used in an exception of works of necessity in a statute prohibiting labor on Sunday, includes making maple sugar, when such work was necessary in order to save a great waste of sap. *Whitcomb v. Gilman*, 35 Vt. 297, 299.

Gathering seaweed.

The definition which has been given of the phrase "works of necessity or charity" is that it comprehends all acts which it is morally fit and proper should be done on the Sabbath. This definition may itself require some explanation. Thus, to save life, or prevent or relieve suffering, both in the cases of animals and men; to prepare needful food for man and beast; to save property, as in the case of fire, flood, or tempest, or other unusual peril—would be acts which fall within such definition, but it is no sufficient excuse for work on the Lord's Day that it is more convenient or profitable if then done; than it would be to defer or omit it. The gathering of seaweed is not a work of necessity, even though it might have floated away beyond reach unless gathered. *Commonwealth v. Sampson*, 97 Mass. 407, 409.

Giving mortgage by absconding debtor.

While a debtor, taking advantage of the day, was taking his property out of the state on Sunday to keep it from the reach of his creditor, the creditor overtook him, and induced him to give a mortgage on such property, which was executed on that day, and was claimed to be void because so executed. In construing such claim, the court said: "The act providing that no worldly business or employment (works of necessity or char-

ity excepted) shall be done or performed on the Sabbath was passed to prevent vice and immorality; and while we must give it such construction as will carry out the intention of the Legislature in its enactment, and prevent the desecration of the first day of the week to common secular business, we must not, on the other hand, so construe it as to make it a shield and protection to those who, under cover of it, would remove their property out of the state, or place it beyond the reach of their creditors. If one availing himself of the Sabbath to run his property off, and to avoid his creditor, could not the latter pursue him on that day? Would the creditor for such an act, be liable to the penalty prescribed by the statute for the violation of the first day of the week? We are of the opinion that he would not. Now, would it not be absurd to say that if his horse escapes from his possession, and is about being lost to him, he may pursue him and retake him on that day, or if, from some unseen casualty, his property is in danger of destruction, he may, as a matter of necessity, protect it on that day, and yet that, when his entire estate may be in imminent danger of being lost by the absconding of a debtor, he may not pursue him and obtain indemnity?" The court held that whether it was necessary, under the circumstances, for the party to do what he did, was a question of fact for the jury to determine. *Hooper v. Edwards*, 18 Ala. 280, 284.

Keeping barber shop open and shaving.

The clause excepting works of necessity or charity, in Pub. St. c. 98, § 2, providing that whoever on the Lord's Day keeps open his shop, warehouse, or workhouse, or does any manner of labor, business, or work, except works of necessity and charity shall be guilty, etc., has no reference to the offense of keeping open a shop, warehouse, or workhouse, but only qualifies the second offense, of doing any manner of labor, business, or work. Thus a prosecution for keeping open a barber shop on Sunday does not involve the question whether the business conducted therein is a work of necessity or charity. An allegation that it is not a work of necessity or charity, in the information charging the offense, may be rejected as surplusage. *Commonwealth v. Dextra*, 8 N. E. 756, 759, 143 Mass. 28.

The keeping of a barber shop open on Sunday for the purpose of shaving customers is not a work of necessity, within the meaning of that word as used in statutes prohibiting Sunday labor, excepting works of necessity. *Petit v. Minnesota*, 20 Sup. Ct. 666, 667, 177 U. S. 164, 44 L. Ed. 716 (citing *Phillips v. Innes*, 4 Clark & F. 234; *Commonwealth v. Waldman*, 140 Pa. 89, 98, 21 Atl. 248, 11 L. R. A. 563; *State v. Frederick*, 45 Ark. 347, 55 Am. Rep. 555).

The business of barbering is so essential to the comfort and convenience of a town or city that it may be regarded as a necessary occupation, but the prosecution of such business on Sunday is not an act of such real necessity as to exempt it from the provision of the law which prohibits any merchant or other person from exercising any of the common avocations of life, except acts of real necessity or charity, on Sunday. *State v. Lorry*, 66 Tenn. (7 Baxt.) 95, 97, 32 Am. Rep. 555; *State v. Frederick*, 45 Ark. 347, 348, 55 Am. Rep. 555.

It cannot be said, as a matter of law, that shaving a man for hire is a necessity, within the law prohibiting labor on Sunday, except of necessity. To keep the body physically sustained by food; to provide the facilities for worship during some hours of the day, and for restful mental occupation during others; to nurse and help the sick; to provide prompt burial for the dead—are necessities. Generally speaking, the necessity ought to be an unforeseen necessity, or, if foreseen, such as could not reasonably have been provided against. *Ungericht v. State*, 21 N. E. 1082, 1083, 119 Ind. 379, 12 Am. St. Rep. 419.

"Necessity," within Pen. Code, art. 196, prohibiting Sunday labor, except works of necessity, cannot be construed to include, in the absence of special circumstances, the work of a barber in shaving customers on Sunday. *Ex parte Kennedy*, 58 S. W. 129, 130, 42 Tex. Cr. R. 148, 51 L. R. A. 270.

The term "necessity," in a statute prohibiting worldly employment or business on the Lord's Day, except works of charity and necessity, does not include the work of a barber in shaving on Sunday, without compensation and as a mere matter of accommodation, persons who were sick, and could not be shaved on Saturday. *Commonwealth v. Williams* (Pa.) 1 Pears. 61, 62.

Where an old man has been injured so that he cannot well shave himself, the act of another in shaving him at his own house on Sunday is not in violation of a statute prohibiting the doing of any manner of labor, business, or work, except works of necessity and charity, on the Lord's Day. *Stone v. Graves*, 13 N. E. 906, 145 Mass. 353.

Letting of carriage.

"Necessity or charity," within the meaning of the exception of a statute making it criminal for the proprietors of carriages to allow any person or persons to travel therein on Sunday, except from necessity or charity, means for the purpose or with a view of contributing to the relief of necessity, or to some office of charity. The letting of a carriage for the conveyance of persons on Sunday, from a belief that it is to be used in a case of necessity or charity, though no

such case in fact exists, is not an offense within the prohibition of the statute. *Myers v. State*, 1 Conn. 502, 506.

Loading vessel.

"Necessity," as used in a statute excepting works of necessity from a prohibition of labor on Sunday, is not limited to those cases of danger to life, health, or property which are beyond human foresight or control. On the contrary, the necessity may grow out of, or, indeed, be incident to, a particular trade or calling, and yet be a case of necessity, within the meaning of the act, for it is no part of the design of the act to destroy or impose onerous restrictions on any lawful trade or business; and hence, under a similar statute, it has been held that it is lawful to keep a blast furnace at work on Sunday. So, too, it has been held that under special circumstances a mill may grind on that day; and I think it will hardly be questioned that a gas company may supply gas, a water company water, and a dairyman milk, to their respective customers, on that day. Hence, where there was danger of the closing of navigation, the loading of a vessel on Sunday was a work of necessity. *McGatrick v. Wason*, 4 Ohio St. 566, 573.

Loaning money.

The loaning of money on Sunday is not a work of "necessity," within the meaning of that word as used in an exception to the Sunday statute. *Meador v. White*, 66 Me. 90, 91, 22 Am. Rep. 551.

Malting barley.

In a prosecution for performing labor on Sunday, it was shown that defendant's occupation was the manufacture of beer, and malting barley for that purpose; that the process of malting barley occupied 10 days, during which time it was necessary to turn and work over the barley two to four times each day, or the barley would be spoiled; and it was for doing such work that he was convicted. It was held that such work was a work of necessity, and as such excepted from the provisions of the law. Such labor on Sunday as is a necessary incident to the accomplishment of a lawful purpose, such as the manufacture of malt beer, is not a violation of the statute for the protection of the Sabbath. *Crockett v. State*, 33 Ind. 416, 417.

Marketing melons.

Under 2 Rev. St. 1876, p. 483, fining persons found on Sunday at common labor, or engaged in their usual avocations, "works of charity and necessity only excepted," the gathering of ripe watermelons, and transporting them to market, is a work of necessity; the melon season being of short duration, and depending on the season and the weather. *Wilkinson v. State*, 59 Ind. 416, 422, 423, 26 Am. Rep. 84.

Moving engine.

One moving an engine on Sunday is not engaged in a work of necessity. *State v. Stuckey*, 73 S. W. 735, 736, 98 Mo. App. 664.

Opening canal locks.

The Schuylkill river is a public river, and, as people are not forbidden by law, and therefore have a right, for some purposes, to pass upon it even on the Lord's Day, a navigation company must keep it open, and for this purpose must have lock keepers to act for it. There may, indeed, be unlawful travel on Sunday, and for such travel there can be no right to have the locks opened. But the criminality of a lock keeper is not proved by the criminality of the traveler, because, as agent of the company, he is bound to keep the lock open for travel, and is not made the judge of its righteousness. Therefore the employment of a lock keeper on Sunday is a work of necessity, and is not a violation of the law prohibiting worldly employment on Sunday, except works of necessity or charity. *Murray v. Commonwealth*, 24 Pa. (12 Harris) 270, 271.

Operating factory.

Pen. Code, arts. 183, 184, prohibiting laboring on Sunday, except works of necessity and charity, should be construed to include the operation of an ice factory on Sunday; it appearing that to close the factory over Sunday would result in losing from 24 to 30 hours after resuming operations, that time being required to reduce the temperature after such stop. *Hemersdorf v. State*, 8 S. W. 926, 927, 25 Tex. App. 597, 8 Am. St. Rep. 448.

Payment of money.

A creditor drew an order upon his debtor on Sunday. The debtor accepted the order on the same day, and the amount was paid to the debtor by a third person, who took the order, the payment being also made on Sunday. The transaction took place on Sunday in order that the creditor, who was about to leave, might receive his money before going. Held, that the transaction was not a work of necessity, within the exception of a Sunday statute. *Mace v. Putnam*, 71 Me. 238.

Piloting vessel.

The term "necessity" in the exception in the statute prohibiting work on Sunday, which permits work of necessity, includes the act of a pilot in piloting a vessel into port on Sunday. *Perkins v. O'Mahoney*, 131 Mass. 546, 547.

Placing goods in warehouse.

The term "necessity," in a statute prohibiting work on Sunday, except works of necessity, etc., applies to the act of a railroad company in placing goods which are de-

livered to it by a connecting carrier on Sunday morning in its warehouse, and caring for them therein till Monday. *Powhatan Steamboat Co. v. Appomattox R. Co.*, 65 U. S. (24 How.) 247, 256, 16 L. Ed. 682.

Preparing food.

The term "necessity," in the statute prohibiting work on Sunday, but excepting works of necessity, includes the act of a maidservant in preparing food on Sunday for her employer's family. *Grosman v. City of Lynn*, 121 Mass. 301, 303.

Preventing waste.

Work to prevent a great waste of property has always been held to be within the exception of such statutes. Cases supposed to announce a contrary doctrine, such as *Commonwealth v. Sampson*, 97 Mass. 407, where it is held that gathering seaweed, on a secluded beach on Sunday is unlawful, though the seaweed be in danger of being washed away by the coming tide, and the case where the labor was that of catching a whale which had become stranded on Sunday, and other like cases, are not, it seems to us, at all at variance with this general doctrine. In these latter cases the work was not so much for the purpose of saving property already acquired, as it was for gaining and securing additional property. The necessity for the work to be done must be real and urgent, and must not have been the result of unreasonable negligence or indolence on the part of the person doing the work. It must not be understood that by the words "great waste of property" is necessarily meant property of great value. *Johnson v. People*, 42 Ill. App. 594, 598.

Pumping water from oil well.

The term "necessity," within the meaning of the statute prohibiting working on Sunday, but exempting works of necessity, does not include the pumping of water out of an oil well on Sunday, when it is not absolutely necessary. Thus, where the accumulation of water in such a well during a period of 24 hours is not sufficient to do any perceptible injury, the pumping out of the water on Sunday is a violation of the statute. The word "necessity," as used in the statute, cannot be construed to mean convenience. *Commonwealth v. Funk*, 9 Pa. Co. Ct. R. 277-279.

Repairing highway.

Under Rev. St. c. 50, § 1, prohibiting labor, business, or work on the Lord's Day, except works of necessity, the repairing of a dangerous obstruction of a public highway is a work of necessity. *Flagg v. Inhabitants of Millbury*, 58 Mass. (4 Cush.) 243, 244.

Repairing mill or factory.

Repairing a mill on Sunday in order to avoid the losing of a week day is not a work

of "necessity," within the meaning of that word as used in an exception to a Sunday statute. *Hamilton v. Austin*, 62 N. H. 575.

Gen. St. c. 84, § 1, making it unlawful to do any manner of labor, business, or work, except works of necessity and charity, on the Lord's Day, cannot be construed to include the repairing of a wheel pit because if done on a secular day it would make necessary the stopping of the machinery of a mill in which many men were employed. *McGrath v. Merwin*, 112 Mass. 467, 468, 17 Am. Rep. 119.

Securing a felon.

Under Cr. Code, § 144, prohibiting all labor on Sunday, except works of "necessity" and charity, any work necessary to be done to secure the public safety, by the safe-keeping of a felon or delivering him to bail, must come within the true meaning of the exception in the statute. *Johnston v. People*, 31 Ill. 469, 473.

Running of railroad trains.

Under Rev. St. 1876, p. 483, prohibiting all work on the Sabbath, except works of necessity, work performed by a railroad company on Sunday, which could have been performed on another day, but in which event delays in the running of its trains would have been caused, and the general public might have been injuriously affected thereby, is a work of necessity. *Yonoski v. State*, 79 Ind. 393, 396, 41 Am. Rep. 614.

Gen. St. c. 25, art. 17, § 10, prohibiting work or business on the Sabbath day, except the ordinary household offices, or other work of necessity or charity, means that which the common sense of the country, in its ordinary mode of doing business, regards as necessary. It is to be construed so as to apply to the wants of the citizen, adapting the language, in its construction, to the manners, habits, wants, and customs of the people it is to affect; and in many cases the rights and duties of those charged with a public or private duty, and the obligations they are under to others, must be considered in determining the character of labor falling within the statutory provision. It does not mean a work of necessity to him who does the labor, and the running of passenger trains and transporting passengers, baggage, etc., on the Sabbath, is a work of necessity. *Commonwealth v. Louisville & N. R. Co.*, 80 Ky. 291, 296, 44 Am. Rep. 475.

Running of street railroads.

A statute prohibiting work on Sunday, except works of necessity or charity, is violated by the running of passenger street cars on Sunday. *Sparhawk v. Union Pass. Ry. Co.*, 54 Pa. (4 P. F. Smith) 401.

The running of street railroads in cities and the vicinity thereof where the same had

been established cannot be said not to be a work of necessity, within the meaning of Code, § 4579, making it unlawful to carry on anything but works of necessity on Sunday. *Augusta & S. R. Co. v. Renz*, 55 Ga. 126, 128.

Sale of cigars.

The word "necessity," as used in a statute prohibiting the selling of goods on Sunday, except articles of immediate necessity, is limited to a necessity that is imperious, and could not be reasonably foreseen or guarded against; and the selling of cigars and tobacco by the keeper of a hotel and restaurant cannot be regarded as a necessity. *State v. Ohmer*, 34 Mo. App. 115, 125.

The sale of cigars on Sunday, in the usual course of the seller's business, to a habitual smoker, is not a work of necessity. *Mueller v. State*, 76 Ind. 310, 318, 40 Am. Rep. 245.

Vending cigars on Sunday is not a work of necessity, within the meaning of the statutory provision exempting such works from the operation of Sunday laws. *Anonymous* (N. Y.) 12 Abb. N. C. 458, 459.

Service of process.

The service of civil process on days set apart for religious observance either by divine command or civil authority cannot be said to be a work of necessity, much less of mercy, within the meaning of a statute prohibiting anything but a work of necessity on such days. *Gladwin v. Lewis*, 6 Conn. 49, 54, 16 Am. Dec. 83.

Smelting iron

The business of an ironmaster, when engaged on Sunday in a process of smelting iron and other metallic ores, which process or processes cannot be interrupted on Sunday without irreparable loss or damage to property, is to be regarded as a work of necessity, within the meaning of the statute regulating the observation of Sunday. *Manhattan Ironworks v. French* (N. Y.) 12 Abb. N. C. 446, 448.

Sunday papers.

The issuing, publishing, and circulating of a newspaper on Sunday is not a work of necessity, within the statute prohibiting the doing of any manner of labor, business or work, except works of necessity and charity, on Sunday. *Handy v. St. Paul Globe Pub. Co.*, 42 N. W. 872, 873, 41 Minn. 188, 4 L. R. A. 466, 16 Am. St. Rep. 695.

Act 1794, which prohibits secular employment on the first day of the week, excepts works of necessity or charity from the penalty thereof. Held, that the term "works of necessity or charity," as there used, must be limited to the actual and indispensable things required for the use of mankind, and hence does not include the furnishing of

Sunday papers to be read by purchasers on that day. *Commonwealth v. Matthews*, 25 Atl. 548, 152 Pa. 166, 18 L. R. A. 761.

The service to be rendered another in the publication of an advertisement in a newspaper to be issued and sold on Sunday is not included within "works of necessity and charity," as used in a statute declaring it unlawful to engage in anything other than works of necessity and charity on Sunday. *Smith v. Wilcox*, 24 N. Y. 353, 357, 82 Am. Dec. 302.

Transfer of property.

In deciding that an assignment of property by a single woman 80 years of age, while in the hospital, to which she was taken on account of severe injuries, made in trust for her benefit, comfort, and support during her life, for funeral expenses and burial lot, and for the celebration of masses for the benefit of her father, brother, and herself, was not unlawful because made on Sunday, under the statute imposing a penalty for the doing of any labor, business, or work on that day, except works of necessity and charity, the court said: "The words 'necessity and charity' have never received a very strict construction, and it has been said that they cover everything which is morally fit and proper to be done under the peculiar circumstances of the case." *Stone v. Graves*, 13 N. E. 906, 145 Mass. 353 (citing *Doyle v. Lynn & B. R. Co.*, 118 Mass. 195, 19 Am. Rep. 431, and cases); *Donovan v. McCarty*, 80 N. E. 221, 222, 155 Mass. 543.

Transmission of telegraph messages.

The statute prohibiting acts on the Sabbath, except works of necessity, applies to the business of telegraphy, though there are many cases when the sending and delivering of a message would be a work of necessity, but all contracts for the transmission of telegraphic messages cannot be construed within the statutory exception, and a message, "Come up in morning, bring all," implying a friendly invitation to visit the sender, is not a work of necessity. *Rogers v. Western Union Tel. Co.*, 78 Ind. 169, 170, 41 Am. Rep. 558.

A statute prohibiting persons from pursuing their vocations on Sunday, except where it is a work of necessity, cannot be construed to include, as a general rule, a telegraphic message respecting ordinary business affairs, but there may be facts which will impress it with that character. An emergency may occur in a man's business which will make a telegraphic message one of necessity. *Western Union Telegraphic Co. v. Yopst* (Ind.) 11 N. E. 16, 17; *Id.*, 20 N. E. 222, 224, 118 Ind. 248, 3 L. R. A. 224.

A telegraph message which stated that the sender would arrive in the city where the person to whom it was sent resided, over

a given road, at a certain time, does not show on its face a reasonable necessity for its transmission on Sunday. *Western Union Telegraph Co. v. Henley*, 54 N. E. 775, 777, 23 Ind. App. 14.

Work of clergymen.

The work of clergymen is, by general concession, within the exceptions of the law prohibiting Sunday labor except of necessity. *Donovan v. McCarty*, 30 N. E. 221, 222, 155 Mass. 543.

NECESSITY (Sunday Travel).

In the statute relating to traveling on Sunday, it has been declared that the question whether it was an act of necessity or charity is to be determined, to a great extent, by considerations of moral fitness and propriety, and that in most cases it should be submitted to the jury, with proper instructions. *Smith v. Boston & M. R. R.*, 120 Mass. 490, 21 Am. Rep. 538; *Feital v. Middlesex R. Co.*, 109 Mass. 398, 404, 12 Am. Rep. 720. It would at once be assumed by all that in great emergencies, as in the case of fire, flood, tempest, war, wrecks, accidents to man, beasts, or property, both travel and labor are lawful. *Donovan v. McCarty*, 30 N. E. 221, 222, 155 Mass. 543.

The necessity which will excuse one for traveling on Sunday in violation of a statute prohibiting such travel except in cases of necessity must be real, and not a fancied one. It is not an honest belief that a necessity for traveling exists, but the actual existence of necessity, which renders traveling on Sunday lawful. *Johnson v. Town of Irasburgh*, 47 Vt. 28, 32, 19 Am. Rep. 111.

The term "necessity or charity," in the provision of the Lord's Day act which prohibits traveling, like that which forbids the doing of any business, labor, or work, except what is done from necessity or charity, has been often said by this court to cover anything which is morally fit and proper to be done on that day under the particular circumstances of the case. *Doyle v. Lynn & B. R. Co.*, 118 Mass. 195, 197, 19 Am. Rep. 431.

Traveling on Sunday is *prima facie* not a work of necessity. *Hinckley v. Inhabitants of Penobscot*, 42 Me. 89, 92.

The term "necessity," in a statute prohibiting traveling on Sunday except from necessity or charity, does not include the act of traveling in order to reach a certain place in order to receive news from the traveler's sister, who is sick and away from home, in relation to bringing her home, in a case when the traveler has been delayed by his own private business from making the journey sooner. *Bucher v. Fitchburg R. Co.*, 131 Mass. 156, 159, 41 Am. Rep. 216.

A person traveling on the highway on the Sabbath day because she and her brother had arranged to do so some weeks before, so that her brother could have all the week to do other work in, is not traveling from necessity, within the meaning of Gen. St. c. 93, § 3, prohibiting traveling on the Sabbath day, except from necessity or charity, so as to entitle her to recover for injuries received from a defect in the highway. *Holcomb v. Town of Danby*, 51 Vt. 428, 435.

Business transactions in general.

The term "necessity" or "charity," in a statute forbidding travel on Sunday, except traveling for charity or necessity, does not characterize traveling in order to conduct negotiations between a creditor and his debtor, or for any other purpose of profit or gain. *Stanton v. Metropolitan R. Co.*, 96 Mass. (14 Allen) 485, 486.

One who travels on the Lord's Day to ascertain whether a house which he has hired, and into which he intends to move next day, has been cleaned, is not traveling from necessity, so as to entitle him to maintain an action for injuries sustained at a railroad crossing through the negligence of the servants of the railroad corporation. *Smith v. Boston & M. R. R.*, 120 Mass. 490, 492, 21 Am. Rep. 538.

Bringing home a cook is not a violation of a statute prohibiting labor on Sunday, except of necessity. *Crosman v. City of Lynn*, 121 Mass. 301, 303.

The words "necessity or charity," in the exception to the Sunday law prohibiting traveling on Sunday, except for necessity or charity, do not characterize the act of a servant in traveling to see his master, to induce the latter to change the servant's hours of work from night to day, in order that the servant may sleep better, as the traveling was merely for a matter of secular business. *Connolly v. City of Boston*, 117 Mass. 64, 65, 19 Am. Rep. 306.

It is not unlawful for a servant to ride to prepare needful food for her employer, on Sunday, within a statute prohibiting Sunday labor, except of necessity. *Crosman v. City of Lynn*, 121 Mass. 301, 303.

Carrying mail.

The word "necessity," in Acts 1791, c. 58, in which it is enacted that no traveler, etc., shall travel on the Lord's Day, except through necessity or charity, cannot be understood to mean physical necessity, for the case in which any man is physically obliged to travel can hardly be imagined, but a moral fitness or propriety of travel under the circumstances of any particular case may be deemed necessity, within this section; and, a fortiori, when the traveling is necessary to execute a lawful contract, it cannot be con-

strued as unnecessary traveling, against the prohibition of the statute. Thus it is not contrary to the statute to carry the mail on Sunday in pursuance of the contract with the Attorney General of the United States. *Commonwealth v. Knox*, 6 Mass. 76, 77.

Attending funeral.

A person may lawfully travel on the Lord's Day for the purpose of going to or returning from a funeral, and he is not required to return by the same or by the shortest route; but where, on returning from the cemetery, at the request of his companion he turned out of his way to enable her to visit a friend, and after so turning out of his way he was injured by a defect in the highway, he was not engaged in a work of necessity when so injured, and could not recover therefor. *Davis v. City of Summerville*, 128 Mass. 594, 597, 35 Am. Rep. 399.

It has been held not to be unlawful to ride to a funeral, within a statute prohibiting labor on Sunday, except work of necessity. *Horne v. Meakin*, 115 Mass. 326, 331.

Obtaining medicine.

The words "necessity or charity," in the exception in the statute prohibiting traveling on Sunday, except through necessity or charity, characterize the act of traveling by a mother to obtain medicine for her sick child. *Gorman v. City of Lowell*, 117 Mass. 65, 66.

Taking visitor home.

A woman visiting plaintiff's house informed him on the Lord's Day that she had to go home that night, a distance of some two miles. It was a cold, windy day in December, and he thereupon took her home with his horse and sleigh. While on the way the horse was injured by a defect in the highway, and plaintiff's right to recover therefor was opposed on the ground that the injury occurred while he was unlawfully traveling on Sunday. The court held that his journey was justified, on the ground of necessity, or as a deed of charity, and was therefore lawful. *Buck v. City of Biddeford*, 82 Me. 433, 19 Atl. 912.

Visiting children or parents

A journey on Sunday to visit one's children who are properly away from home is not unlawful, and section 3, c. 93, Gen. St., prohibiting travelling on that day except from necessity or charity, is no bar to a recovery for injury received on such journey by insufficiency of the highway. The necessity provided for in the exceptions to the prohibitions of the statute is a moral, and not a physical, necessity. An act which under the circumstances is morally fit and proper to be done on the Sabbath is not prohibited by the statute. Parents are under moral obligations to attend to the welfare of their chil-

dren at all times during childhood and youth. These obligations cannot be fully satisfied without personal association and acquaintance, when reasonably practicable. They are morally bound to improve all fit opportunities for the discharge of these duties. Where the parent and his children were separated by a distance of eight miles, the parent could not fully discharge his obligations to them without being where they were. Under these circumstances, it was morally proper for him to travel to them. No other facts or circumstances were necessary to show the fitness of this traveling. His duties to his children arose out of his relation to them; the propriety of the journey, out of its necessity to the discharge of his duties. *McClary v. Town of Lowell*, 44 Vt. 116, 118, 8 Am. Rep. 366.

Visiting children or parents is not a violation of a statute prohibiting Sunday labor, except of necessity. *Logan v. Mathews*, 6 Pa. (6 Barr) 417, 419.

Visiting sick.

Riding to visit a sick sister is not unlawful, within a statute prohibiting Sunday labor, except of necessity. *Cronan v. City of Boston*, 136 Mass. 384, 385.

Traveling to visit a sick friend is not unlawful, within a statute prohibiting Sunday labor, except of necessity. *Doyle v. Lynn & B. R. Co.*, 118 Mass. 195, 197, 19 Am. Rep. 431.

Walking or riding for exercise.

Walking out in the open air upon the Sabbath for exercise is not a violation of the statute prohibiting traveling on Sunday or any work except works of necessity. *O'Connell v. City of Lewiston*, 65 Me. 34, 20 Am. Rep. 673; *Davidson v. City of Portland*, 60 Me. 116, 31 Am. Rep. 253; *Hamilton v. City of Boston*, 96 Mass. (14 Allen) 475, 484. Nor is walking partly for exercise and partly to make a social call. *Barker v. City of Worcester*, 20 N. E. 474, 139 Mass. 74.

The exception in a Sunday law prohibiting work on Sunday, except works of necessity or charity, may properly be said to cover everything which is morally fit and proper, under the particular circumstances of the case, to be done upon the Sabbath. Riding upon Sunday for exercise, and for no other purpose, is not a violation of the statute. *Sullivan v. Maine Cent. R. Co.*, 19 Atl. 169, 82 Me. 196, 8 L. R. A. 427. See, also, *Nagle v. Brown*, 37 Ohio St. 7, 9.

NECKLACES.

Where a will disposed of pearls, and afterwards of necklaces, a pearl necklace would pass under the bequest of necklaces; and a subsequent bequest of pearls, without any mention of necklaces, was an alteration only of the disposition of the pearls, and would

not include the pearl necklace. *Attorney General v. Harley*, 5 Rusa. 178, 182.

NEED.

A bequest that the testator's widow should have \$10 a year for spending money, if she should need it and call for it, should be construed as giving to the executor no power of a revision of her own judgment of her need of it; the expression of her wish for the money at any time being conclusive of her need of it, in the sense of the word "need" in this connection. *Conant v. Stratton*, 107 Mass. 474, 481.

Where a testator provided that all of his money should be left at interest during the natural lifetime of his wife, except that the interest should be drawn and used by her as she might need it, it was held that the word "need" was equivalent to "desire"; giving the widow the right to use and dispose of all the interest accruing during her life, without reference to her personal wants or necessities. *Gillen v. Kimball*, 34 Ohio St. 352, 363.

A promise to pay an indebtedness at any time the creditor should need it is not a conditional promise, but the term "need" is used in the sense of request, and the promise is sufficient to avoid the bar of the statute of limitations. *Cooper v. Olcott*, 1 App. D. C. 123, 131.

NEEDFUL BUILDINGS.

Const. U. S. art. 1, § 8, giving Congress power to legislate in regard to forts, arsenals, dockyards, and other needful buildings, meant such as were a necessary means employed by the government in executing its sovereign powers. *Bannon v. Burnes* (U. S.) 39 Fed. 892, 899.

The term "needful buildings," as so used, includes all buildings required for public use, and it is now settled that land within a state may be taken by the United States by the right of eminent domain, with or without the consent of a state. And if, upon lands so taken, forts, arsenals, or other public buildings are erected for the general government, such buildings, with their appurtenances, will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed. *Newcomb v. Inhabitants of Rockport*, 66 N. E. 587, 588, 183 Mass. 74 (citing *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264).

NEEDFUL RULES.

"Needful rules," as used in *Olympia City Charter*, § 62, providing that the wards, streets, and alleys within said city limits shall be under the exclusive control of the

common council, who shall make all needful rules in regard to the improvement, repair, cleaning, etc., implies that rules will be needed; that is to say, the public use and welfare will demand such improvements and repairs. *Hutchinson v. City of Olympia*, 5 Pac. 606, 607, 2 Wash. T. 314.

Under Rev. St. § 10, subd. 15, c. 152 (Laws 1883, p. 426), clothing school boards and boards of education with power to make all needful rules where the government of the school is established within their respective jurisdiction, the rules and regulations made must be reasonable and proper, and, in the language of the statute, needful for the government, good order, and efficiency of the school, and such as will best advance the pupils in their studies, tend to their education and mental improvement, and promote their interest and welfare. A regulation that each scholar, when returning to school after recess, shall bring into the schoolroom a stick of wood for the fire, is not a needful one, under the statute. *State v. Board of Education*, 23 N. W. 102, 104, 63 Wis. 234, 53 Am. Rep. 282.

"Needful rules and regulations," as used in Const. U. S. art. 4, § 2, providing that Congress shall have power to make all needful rules and regulations respecting the territory of the United States, is to be construed to mean "laws." In *re Higbee*, 5 Pac. 693, 694, 4 Utah, 19.

NEEDING AID.

A bequest to a trustee, to be used as in his judgment he may think best, in the aid of deserving, aged native-born in a certain state, needing such aid, is not rendered indefinite by the use of the phrase "needing such aid," the fair construction being that such aged persons as needed financial assistance were to partake of the bounty—in short, the aged poor. *Fay v. Howe*, 69 Pac. 423, 424, 136 Cal. 599.

NEEDLESSLY.

Where a question was put to the jury, whether a locomotive engineer blew the whistle needlessly and recklessly, or willfully and wantonly, and the jury answered that it was needlessly blown, the word "needlessly," as used, cannot be construed to mean that it was recklessly blown. *Wabash R. Co. v. Speer*, 40 N. E. 835, 836, 156 Ill. 244.

Rev. St. § 2101, providing for the fining of any person who needlessly mutilates or kills any animal, has no reference to the lawfulness or unlawfulness of the act of killing or mutilating, except as the statute makes it unlawful, as needless; nor is it to be construed as characterizing an act which might by care have been avoided. It simply means an act done without any useful motive, in

a spirit of wanton cruelty or for the mere pleasure of destruction. *Hunt v. State*, 29 N. E. 933, 3 Ind. App. 383; *Grise v. State*, 37 Ark. 456, 461.

As used in a statute punishing cruelty to animals, the word "needlessly" related to a wanton and cruel act, and not one which was the result of necessity or reasonable cause. *Grise v. State*, 37 Ark. 456, 461.

The catching and mutilation of a dog depredating the premises of another, in a steel trap, is not a "needless torture or mutilation," within Acts 1881, c. 169, providing for the punishment of any person who "needlessly mutilates or tortures any living creature." *Hodge v. State*, 79 Tenn. (11 Lea) 528, 532, 47 Am. Rep. 307.

NEEDY.

See "Most Needy."

A person is needy who is distressed by want of the means of living, very poor, indigent, or in necessitous circumstances; and hence a person who receives relief from a fund for indigent and needy soldiers is a poor and indigent person, within the meaning of a statute providing that no persons receiving relief as a poor or indigent person can acquire a settlement in a county. *Juneau County v. Wood County*, 85 N. W. 387, 388, 109 Wis. 330.

The term "needy" may be used to characterize minor children who do not own property in their own names, although they earn their own living. *Woods v. Perkins*, 9 South. 48, 43 La. Ann. 347.

The words "needy circumstances," when applied to a person without a family, mean one whose estate, after the payment of his debts, and excluding from the estimate such part of his estate as is exempt from execution, is worth less in cash than \$500; and the same words, when applied to a person having a family, mean one whose estate, estimated as aforesaid, is worth less in cash, after the payment of his debts and the support of his family for one year, than \$1,000: provided that, when the words are applied to a married woman, her estate and that of her husband shall be estimated as aforesaid, and the amount shall determine the question whether she be in needy circumstances or not. *Bates' Ann. St. Ohio 1904*, § 720.

NEEDLE BUSINESS

Plaintiff agreed to employ defendant as manager of its needle business. Plaintiff instructed defendant to take charge of a branch of the business devoted exclusively to the making of certain kinds of needles, which defendant expressed his willingness

to do. It was necessary to set apart a room for this business, and defendant was told to superintend getting the room in order, which he did for three or four days, but afterwards denied that it was his duty to do this. It was held that such work was clearly within the terms of the employment, as a part of the needle business. *Excelsior Needle Co. v. Smith*, 23 Atl. 693, 696, 61 Conn. 56.

NEGATIVE.

The term "negative" is used in photography to designate the original plate, made sensitive by chemicals, which is printed by the sunlight through the camera. *Udderzook v. Commonwealth*, 76 Pa. (26 P. F. Smith) 340, 352.

NEGATIVE COVENANT.

The term "negative covenant," and not the word "condition," is correctly used to designate a provision in a deed that the premises thereby conveyed are not to be used for saloon purposes. *Star Brewery Co. v. Primas*, 45 N. E. 145, 147, 163 Ill. 652.

NEGATIVE EASEMENT.

See "Amenity."

NEGATIVE PLEA.

Where a defendant, instead of filing an answer to everything in the bill, denies some particular fact set up in the bill, the non-existence of which fact strips the complainant of any relief whatever under his bill, the plea is negative. *Potts v. Potts* (N. J.) 42 Atl. 1055, 1056.

NEGATIVE PREGNANT.

A negative pregnant is such a form of negative expression as may imply or carry with it an affirmative. A negative pregnant involves and admits of an affirmative implication, or at least an implication of some kind favorable to the adverse party. *Fields v. State*, 32 N. E. 780, 782, 134 Ind. 46.

Generally speaking, a denial in the precise language of the complaint is a negative pregnant with an admission that the alleged facts may have transpired on some other day or under different circumstances. *Rock Spring Coal Co. v. Salt Lake Sanitarium Ass'n*, 25 Pac. 742, 743, 7 Utah, 158; *Argard v. Parker*, 51 N. W. 1012, 1013, 81 Wis. 581.

A negative pregnant is a negative that implies an affirmative. A general denial pleaded, being the same in effect as a specific denial of each of the allegations in the whole or in the part of the pleadings so de-

ued, is a negative pregnant only where a mere specific denial would be. *Stone v. Quaaale*, 29 N. W. 326, 327, 36 Minn. 46.

Where an answer denies, in the very words of the complaint, an averment that certain property was on a particular day all destroyed by fire, such a denial is a negative pregnant with admission that it may have been destroyed on some other day, and that a part of it may have been destroyed on the day named. *Curnow v. Phoenix Ins. Co.*, 24 S. E. 74, 77, 46 S. C. 79.

NEGATIVE SERVITUDE.

The term "negative servitude" is used to designate a servitude in which the proprietor of the servient estate is barely restrained, but by which he is not obliged to suffer something to be done upon his property by another. *Rowe v. Nally*, 32 Atl. 198, 199, 81 Md. 367.

NEGATIVE TESTIMONY.

Positive testimony is that which bears directly upon the facts in the case. Negative testimony is not as to the immediate fact or occurrence, but facts from which you might infer that the act could not possibly have happened. In other words, the one is affirmative, the other negative. Therefore positive testimony is more reliable and is stronger than negative testimony. *Barclay v. Hartman* (Del.) 43 Atl. 174, 175, 2 Marv. 351.

NEGLECT.

See "Cruel Neglect"; "Culpable Neglect"; "Excusable Neglect"; "Intentional Neglect"; "Ordinary Neglect"; "Wanton Neglect"; "Willful Neglect—Willfully Neglects."

Any neglect, see "Any."

Neglect is the omission or forbearance to do a thing that can be done or that is required to be done. *Davis v. Steuben School Tp.*, 50 N. E. 1, 5, 19 Ind. App. 694; *Malone v. United States* (U. S.) 5 Ct. Cl. 486, 489.

"To neglect" and "to omit" are not synonymous terms. There may be an omission to perform an act or condition which is altogether involuntary or inadvertent. To neglect is "to omit by carelessness or design" (Webst. Dict.), not from necessity, and there can therefore be no possibility of neglecting to do that which cannot be done. *New York Guaranty & Indemnity Co. v. Gleason* (N. Y.) 53 How. Prac. 122, 125.

The term "neglect" in Immigration Act March 3, 1891, c. 551, § 6, 26 Stat. 1085 [U. S. Comp. St. 1901, p. 1296], fixing a penalty for the neglect of the agent of a vessel to detain certain immigrants unlawfully

brought to this country, is used in the popular sense of "fail or omit." *Warren v. United States* (U. S.) 58 Fed. 559, 562, 7 C. C. A. 368.

"Neglect to act," as used in a private act for dividing and allotting lands, appointing a commissioner for the purpose, empowered to declare an award within six months after the passing of the act, and providing that, if he should neglect to act, it should be lawful for the bishop of the diocese to appoint another, did not import an act to which some degree of blame must attach, but included an omission to act because of the wrongful construction of the statute. *Willoughby v. Willoughby*, 9 Adol. & E. (N. S.) 923, 933.

"It is further objected that the return of the officer is insufficient, as it does not show that the justice could appoint two appraisers. The return states that the debtor neglected to appoint. If the word 'neglect' imports something more than the word 'omit,' it must be because it imports that the party had opportunity to do the thing which he omitted to do. If he did not have such opportunity, he cannot be said to have neglected it. Unless, therefore, the officer levying the execution took those steps which the law required towards the debtor, the debtor cannot be said to have neglected to appoint. We think, therefore, that we must infer that those steps were taken." *Johnson v. Huntington*, 13 Conn. 47, 51, 52.

The term "neglect" imports a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. *Ann. Codes & St. Or.* 1901, § 2177; *Rev. St. Okl.* 1903, § 2687; *Pen. Code Ariz.* 1901, par. 7, subd. 2; *Gen. St. Minn.* 1894, § 6842, subd. 1; *Pen. Code Cal.* 1903, § 7, subd. 2; *Rev. Codes N. D.* 1899, § 7714; *Pen. Code S. D.* 1903, § 809; *Pen. Code Idaho* 1901, § 4544, subd. 2; *Pen. Code N. Y.* 1903, § 718; *Rev. St. Utah* 1898, § 4053; *Pen. Code Mont.* 1895, § 7, subd. 4.

The word "neglect," as used in Code Civ. Proc. § 572, providing that except in a case where an order of arrest can be granted only by the court, if the plaintiff unreasonably delay the trial of the action, or neglects to enter judgment therein within 10 days, if it is in his power to do so, or neglects to issue execution against the person of defendant within 10 days after the return of the execution against the property, etc., is synonymous with the word "negligence," which is defined to be the omission of that degree of care which a man of common prudence takes of his own concerns. *People v. Grant* (N. Y.) 13 Civ. Proc. R. 209, 213.

As ground of divorce.

"Neglect," in order to constitute ground for a divorce, within the meaning of a statute

authorizing the granting of divorces on that ground, must be such neglect as leaves the wife destitute, but for the charity of others. If the common necessities of life are provided by the earnings of either husband or wife, there is no such willful neglect as is contemplated by the statute. *Washburn v. Washburn*, 9 Cal. 475, 476.

Of official duty.

"Neglect," as applied to a public officer, means a failure on his part to do and perform some of the duties of his office, and when such neglect, from the gravity of the case or the frequency of the instances, becomes so serious in its character as to endanger or threaten the public welfare it is gross, within the meaning of the law, and justifies the interference of the executive upon whom is placed the responsibility of keeping the affairs of the estate in the proper condition by taking notice thereof. The term "gross neglect" is not limited only to intentional official wrongdoing. Such acts would hardly be described by the word "neglect." *Attorney General v. Jochiam*, 58 N. W. 611, 617, 90 Mich. 358, 23 L. R. A. 699, 41 Am. St. Rep. 606.

The term "neglect," in Pen. Code, § 117, making any public officer, or person holding a public trust or employment, who willfully neglects to perform any duty imposed by law, guilty of a misdemeanor, or in an indictment under such section, imports a want of such attention to the probable consequence of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. *People v. Herlihy*, 72 N. Y. Supp. 389, 392, 35 Misc. Rep. 711.

"Neglect," as used in Pol. Code, § 996, providing that an office becomes vacant upon the refusal or neglect of one who is elected or appointed to an office to file his official oath or bond within the time prescribed, imports the omission or disregard of some duty. A person cannot disregard the duty to qualify connected with his appointment to an office until he receives information of his appointment. The power to neglect a duty must necessarily be based on a knowledge of the existence of the duty. *People v. Perkins*, 26 Pac. 245, 246, 85 Cal. 509.

Code, § 711, providing that any commissioner who shall "neglect to perform any duty required of him by law" as a member of the board shall be guilty of a misdemeanor, cannot be construed to include the act of the commissioners in causing an order to be issued to the county treasurer to pay to them a greater sum as per diem and mileage than was due, for it was not a neglect to perform any duty required by law. *State v. Norris*, 16 S. E. 2, 4, 111 N. C. 652.

To constitute a neglect of official duty by a judge, there must not only be a failure, by

carelessness or design, to perform the duty to be performed, but the party failing must have the capacity to perform the acts required of him; and, where the capacity was affected by serious illness of a member of the judge's family, he was not guilty of neglect of duty, within Const. art. 4, § 48. *White v. State*, 26 South. 343, 346, 123 Ala. 577.

Under Cr. St. § 304, punishing any public officer who shall "neglect to turn over to his successor" money received by him in his official capacity, neglect is a failure to do what is required. An indictment charging that defendant failed to turn over such money is sufficient. *State v. Assmann*, 46 S. C. 554, 562, 24 S. E. 673, 675.

In professional employment.

Under a statute abolishing imprisonment for debt, except in actions for neglect in any professional employment, the neglect of an attorney to pay over money collected for his client is undoubtedly a case of neglect in professional employment. It has been repeatedly decided that the commissions allowed an attorney for collections are his compensation for his entire professional duty in the matter, and that it is so much a part of that duty to pay over the money when collected, that, if he neglect it unreasonably, he is entitled to no compensation whatever for his previous services in recovering it from the debtor. It is difficult to imagine a case of "neglect of professional employment," in the whole range of an attorney's duties, more materially affecting the interests of his client, or more seriously affecting his own prospects in business. Any other neglect, whereby a client loses, may have the palliating circumstances that it was owing to inattention, ignorance, or forgetfulness, and that the attorney gained nothing by it himself. But making use of the money of his client, or withholding it from him, after it is collected, can seldom have any of these circumstances to palliate it. The motive for such neglect, in the manifest profit of making use of another's money, although occasionally palliated by pecuniary misfortunes and pressure, may frequently tinge the nonperformance with a color of wrong something deeper than mere neglect. *Wills v. Kane* (Pa.) 2 Grant, Cas. 60, 62.

NEGLECT AND REFUSE.

The averment in a complaint that defendant had "neglected and refused to pay," etc., is equivalent to a statement that defendant failed and refused to pay. To neglect to do a thing means to omit to do it, not to do it. *Rankin v. Sisters of Mercy*, 22 Pac. 1134, 1135, 82 Cal. 88.

"Neglect or refuse," as used in a deed providing that, in case one of the parties should neglect or refuse to do certain matters

mentioned, a certain covenant therein should remain in full force, means simply shall not perform. The party, not having performed the things which he had covenanted to do, has neglected or refused to perform them, within the meaning of the covenant. *Cherry v. Heming* (N. Y.) 1 Code Rep. 31.

When used in reference to the payment of money, the word "refusal" means a failure to pay the money when demanded, while "neglect" means a failure to pay money which the party is bound to pay without demand. *Kimball v. Rowland*, 72 Mass. (6 Gray) 224, 225.

The failure of selectmen to report the laying out of a road, in writing, to a town, as required by Rev. St. 2471, so as to allow the county commissioners to act, was a neglect and refusal to lay out the road prayed for. *Inhabitants of New Marlborough v. Berkshire County Com'rs*, 50 Mass. (9 Metc.) 423, 432.

The omission of the selectmen of the town to make a written report to the town of their alteration of a town way, on a written petition for an alteration, is such a neglect to alter it as gives jurisdiction of the matter to the county commissioners, under a statute providing that, on the refusal or neglect of the selectmen to make an alteration upon petition, an appeal will lie from their decision to the county commissioners. *Inhabitants of New Marlborough v. Berkshire County Com'rs*, 50 Mass. (9 Metc.) 423, 432.

Accidental omission.

A statute provided that a party to a suit may recover 25 cents per mile for actual travel to attend the taking of a deposition, when the party "neglects or refuses to take it." Held, that the accidental omission to take the deposition, with no fault of the party, makes a case within the meaning of the phrase "neglects and refuses," as used in the statute, and there can be a recovery for the amount indicated by the statute, and that recovery is not limited to actual damages. *Robertson v. Northern R. Co.*, 3 Atl. 621, 623, 63 N. H. 544.

NEGLECT TO DEPOSIT.

The term "neglects to deposit," in Laws 1855, c. 421, which provides that when the proprietor of any hotel provides a safe for money, jewels, or ornaments of guests, and posts a notice stating the fact, the proprietor would not be liable for loss of goods which a guest neglects to deposit, means the failure to deposit after having had an opportunity and time to do so, and therefore it is not necessary to show any actual negligence or imprudence on the part of the guest. Judge Peckham, in *Bendetson v. French*, 46 N. Y.

266, said: "The statute is very broad in its language, that, if such guest shall neglect to deposit, the proprietor shall not be liable. This was evidently aimed at losses that should occur by such neglect. It could have had no reference to losses at the inn occurring before the guest had an opportunity to make such deposit, or after he had packed his trunk, locked his room, given notice for immediate departure, and delivered up the key to his room to the clerk, to have his trunk brought down." The learned judge who wrote the opinion says that there could be no neglect to deposit before there had been an opportunity to deposit. There must be a brief period after the arrival of the guest at the hotel before he can make a deposit, and during this period the statute affords the hotel keeper no protection. But in every case where the guest has an opportunity to make the deposit, and does not make it, he neglects to make it, within the meaning of the statute. Neglect does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty, or act. *Rosenplaenter v. Roessle*, 54 N. Y. 262, 266.

Under a statute providing that if a guest shall neglect to deposit his money, jewels, and ornaments in the hotel safe, the proprietor of the hotel shall not be liable for any loss thereof, where a guest presented to the hotel clerk a package 16 inches long, 10 inches wide, and 7 inches high, containing jewelry, requesting that it be put in the safe, but without informing the clerk of the contents, and on the clerk's saying there was no necessity for that, and that it would be as safe in the guest's room, he took it to his room, and it was stolen, there was a neglect to deposit. The clerk did not know that jewelry had been offered him; hence he did not refuse to receive it; and there was nothing about the package to indicate that it was not appropriately sent to the room of the guest. Simply offering a package of this size, without disclosing its contents, is not offering to deposit jewelry. *Bendetson v. French*, 46 N. Y. 266, 269, 270.

NEGLECT TO MAKE COMPLAINT.

Gen. St. tit. 20, c. 12, § 23, providing that any grand juror who, after he is sworn, shall "neglect to make seasonable complaint of any crime," means neglect with knowledge that the crime has been committed, and that a prosecution therefor is maintainable. The ordinary meaning of the word "neglect" is an omission from carelessness to do what can be done and ought to be done; and a grand juror could not be said to neglect the making of complaint, when, after investigating the subject, he became convinced that the offense could not be prosecuted. *Watson v. Hall*, 46 Conn. 204, 206.

NEGLECT TO PROSECUTE HIS APPEAL.

The words "neglect to prosecute his appeal" clearly imply that an appeal has been taken, and as used in Gen. Laws, c. 251, § 3, authorizing the Supreme Court to grant a trial in a case decided by a probate court where a party shall have neglected to prosecute his appeal, do not authorize the granting of a trial on the petition of an administrator to correct a mistake in his inventory, where no appeal has been taken. *Cronshaw v. Cronshaw*, 41 Atl. 563, 564, 21 R. I. 54.

NEGLECTED CHILD.

As used in the act relating to the juvenile court, the words "neglected child" shall mean any child who for any reason is destitute or homeless or abandoned, or dependent upon the public for support, or has not proper (parental) paternal care or guardianship, or who habitually begs or receives alms, or who is found living in any house of ill fame or with any vicious or disreputable persons, or whose home, by reason of neglect, cruelty, or depravity on the part of its parents, guardian, or other person in whose care it may be, is an unfit place for such child; and any child under the age of ten years who is found begging, peddling, or selling any article, or singing or playing any musical instrument, upon the street, or giving any public entertainment, or who accompanies or is used in aid of any person so doing. *Bates' Ann. St. Ohio* 1904, § 548-38.

NEGLIGENCE.

See "Actionable Negligence"; "Collateral Negligence"; "Comparative Negligence"; "Contributory Negligence"; "Criminal Negligence"; "Culpable Negligence"; "Gross Negligence"; "Intentional Negligence"; "Legal Negligence"; "Ordinary Negligence"; "Prior Negligence"; "Slight Negligence"; "Subsequent Negligence"; "Wanton Negligence"; "Willful Negligence"; "Without Negligence."

Any negligence, see "Any."

Negligence or otherwise, see "Otherwise."

The word "negligence" is not a mere technical term. It is an English word of well-known meaning. And the fact that, under certain circumstances, courts of law have to decide what constitutes negligence, does not destroy the popular character of the word. *Edelmann v. St. Louis Transfer Co.*, 3 Mo. App. 503, 507.

Negligence has been defined as consisting in the failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it. This definition

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was given by one of the ablest elementary writers of modern times, and has often received the approval of this court. *Kendrick v. Towle*, 27 N. W. 567, 568, 60 Mich. 363, 1 Am. St. Rep. 526.

A negligence is the juridical cause of an injury when it consists of such an act or omission on the part of a responsible human being as in ordinary natural sequence immediately results in such injury. *Zopf v. Postal Tel. Cable Co.* (U. S.) 60 Fed. 987, 988, 9 C. C. A. 308 (citing Whart. Neg. § 73); *Chalk v. Charlotte, C. & A. R. Co.*, 85 N. C. 423, 428; *Basnight v. Atlantic & N. C. R. Co.*, 111 N. C. 592, 596, 16 S. E. 323, 324 (citing Whart. Neg. § 73); *Missouri, K. & T. Ry. Co. v. Fowler*, 59 Pac. 648, 650, 61 Kan. 320.

The words "improperly, carelessly, and unlawfully" show a cause of action for negligence. The words "unlawful" and "wrongful" are synonyms, and, where counsel asked to go to the jury on the question of acts sued for being wrongful acts, he did not thereby abandon the theory of negligence, for the word itself is a definition of negligence. *Wells v. Sibley*, 9 N. Y. Supp. 343, 345, 56 Hun. 644.

In every case involving actionable negligence, there are necessarily three elements essential to its existence: First, the existence of a duty on the part of a defendant to protect the plaintiff from the injury of which he complains; second, a failure by the defendant to perform that duty; and, third, an injury to the plaintiff from such failure of the defendant. When these elements are brought together, they unitedly constitute actionable negligence. The absence of any one of these elements renders a complaint bad, or the evidence insufficient. *Faris v. Hoberg*, 134 Ind. 269, 274, 33 N. E. 1028, 39 Am. St. Rep. 261.

As act of commission or omission.

"Negligence," in its legal acceptance, includes acts of omission as well as commission. *Grant v. Moseley*, 29 Ala. 302, 305; *Elchel v. Sawyer* (U. S.) 44 Fed. 845, 847; *Johnson v. State*, 63 N. E. 607, 609, 66 Ohio St. 59, 61 L. R. A. 277, 90 Am. St. Rep. 564; *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 12 South. 156, 158, 70 Miss. 119; *Citizens' St. Ry. Co. v. Merl*, 59 N. E. 491, 493, 26 Ind. App. 284; *Houston v. Brush*, 29 Atl. 380, 386, 66 Vt. 331.

Negligence may consist as well in not doing the thing which ought to be done as in doing that which ought not to be done, when in either case it has caused loss and damage to another. *Kibele v. City of Philadelphia*, 105 Pa. 41, 44.

There is a clear distinction between active and passive negligence—between negli-

gence of commission and negligence of omission. *Callan v. Pugh*, 66 N. Y. Supp. 1118, 1120, 54 App. Div. 545.

There are two classes of negligence—active and passive. A person is equally liable for doing a negligent act which would be active negligence, or in omitting to do an act which was passive, where by such omission injury would follow. One person may do a negligent act resulting in injury, but, if the injured party stand passively by and let the act produce its natural effect, such an injured party cannot recover, as he failed to do what a reasonably prudent man under like circumstances would have done, or by doing which he could have averted the injury, or, rather, result of the negligent act. One may negligently set fire upon his own premises, and negligently permit it to escape to the adjoining premises of another, yet if the latter sat by and saw the fire destroy his property, when he could have done something, without hazard, to prevent the injury, he cannot recover. He thus becomes passively negligent in failing to do something which it was his duty to do. Therefore, in an action for damages from fire set by a railroad company, the plaintiff must show that his own negligence either active or passive, did not contribute to the injury. *Louisville, N. A. & C. R. Co. v. Carmon* (Ind.) 48 N. E. 1047, 1049

Same—Cautious and prudent man.

Negligence, in actions for personal injury, means the doing of some act which a cautious and prudent man would not do, or the neglecting to do some act which a cautious and prudent man would not neglect. *Ahern v. Oregon Telephone & Telegraph Co.*, 35 Pac. 549, 24 Or. 276, 22 L. R. A. 635.

Same—Ordinarily careful person.

Negligence may consist in the doing of something by the party charged with it which evinces want of ordinary care, or it may consist in having omitted to do something which an ordinarily careful person would have done under the same circumstances. *Lehigh & W. B. Coal Co. v. Lear* (Pa.) 9 Atl. 267, 268.

Same—Person of ordinary prudence and care.

Negligence consists in doing or omitting to do something which a person of ordinary prudence and care would not have done, or would not have omitted to do, under like or similar circumstances. *Louisville, N. A. & C. R. Co. v. Carmon* (Ind.) 48 N. E. 1047, 1049; *Missouri, K. & T. Ry. Co. of Texas v. Milam*, 50 S. W. 417, 418, 20 Tex. Civ. App. 688.

It is contended that this definition makes the negligence of the plaintiff to depend on the question whether a person of ordinary

prudence would have done the same thing. As said in *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 374: "The formula used is that frequently adopted in attempting to define negligence." It is there said: "Whether the plaintiff was negligent or not depended on the particular facts admitted or satisfactorily proved in the case." This instruction does not ignore the facts, but makes them the very groundwork of inquiry. True, "the most prudent men are not always exempt from carelessness, and, when actually negligent, the law charges the same consequences to their negligent conduct as to similar conduct in others." But there is no better standard by which to measure the acts of men, as to negligence, than to ask what persons of ordinary prudence and care would have done under the same circumstances, and such is the rule of this instruction. *Galloway v. Chicago, R. I. & P. Ry. Co.*, 54 N. W. 447, 450, 87 Iowa, 458.

Same—Ordinarily prudent person.

Negligence is the failure to do what an ordinarily prudent person would have done under the circumstances, or the doing of that which an ordinarily prudent person would not have done. *Jones v. Harris*, 40 Atl. 791, 186 Pa. 469. The surrounding circumstances include not only what existed at the time, but the reasonable possibilities of the future. Men are bound to anticipate what may reasonably happen, and provide against that. *Gilchrist v. Hartley*, 47 Atl. 972, 973, 198 Pa. 132.

An instruction that negligence is a performance of or omission of some act, with knowledge that another's property is liable to danger, which no man of ordinary prudence would perform or omit under all the circumstances existing at the time, is substantially correct and sufficient. *St. Louis, I. M. & S. Ry. Co. v. Hecht*, 38 Ark. 357, 366; *Houston & T. C. R. Co. v. Milam* (Tex.) 58 S. W. 735, 736; *Receivers of Missouri, K. & T. Ry. v. Pfluger* (Tex.) 25 S. W. 792, 793. In order to judge of the conduct of an individual under given conditions, and to determine whether the same is or is not negligence, it is necessary that the trier should be advised of the very situation in which the person charged with negligence is placed at the time, for it is in the light of such circumstances that his conduct must be judged. *Erie R. Co. v. Moore* (U. S.) 113 Fed. 269, 271, 51 C. C. A. 226.

Same—Reasonable and prudent man.

According to the generally approved definition of *Alderson, B.*, in *Blyth v. Burningham Waterworks Co.*, 11 Exch. 784, negligence is the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily reg-

ulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512, 527; *Wolff Mfg. Co. v. Wilson*, 38 N. E. 694, 696, 152 Ill. 9, 26 L. R. A. 229; *Union Pac. R. Co. v. Rollins*, 5 Kan. 167, 180; *Cleghorn v. Thompson*, 64 Pac. 605, 607, 62 Kan. 727, 54 L. R. A. 402; *Richardson v. Kler*, 34 Cal. 63, 75, 91 Am. Dec. 681 (citing *Broom, Leg. Max.* 329); *Jamison v. San Jose & S. C. R. Co.*, 55 Cal. 593, 596; *Smith v. Whittier*, 30 Pac. 529, 531, 95 Cal. 279; *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409, 424 (citing *Broom, Leg. Max.* 329); *McGraw v. Chicago, R. I. & P. Ry. Co.*, 81 N. W. 306, 59 Neb. 397; *Geist v. Missouri Pac. R. Co.*, 87 N. W. 43, 48, 62 Neb. 309; *Omaha St. Ry. Co. v. Craig*, 58 N. W. 209, 212, 213, 39 Neb. 601; *Omaha St. Ry. Co. v. Loehneisen*, 58 N. W. 535, 536, 40 Neb. 37; *Brotherton v. Manhattan Beach Imp. Co.*, 67 N. W. 479, 480, 48 Neb. 563, 33 L. R. A. 598, 58 Am. St. Rep. 709 (citing *Foxworthy v. Hastings*, 23 Neb. 772, 37 N. W. 657); *Roberts v. Boston & M. R. Co.*, 45 Atl. 94, 69 N. H. 354; *Woodward v. Griffith*, 2 Willson, Civ. Cas. Ct. App. § 360; *Elze v. Baumann*, 21 N. Y. Supp. 782, 784, 2 Misc. Rep. 72; *Ft. Smith Oil Co. v. Slover*, 24 S. W. 106, 107, 58 Ark. 168; *Crandall v. Goodrich Transp. Co. (U. S.)* 16 Fed. 75, 78; *Nitroglycerin Case*, 82 U. S. (15 Wall.) 524, 536, 21 L. Ed. 206; *Rosen v. Chicago G. W. R. Co. (U. S.)* 83 Fed. 300, 304, 27 C. C. A. 534; *Sandoval v. Territory*, 8 N. M. 573, 581, 45 Pac. 1125, 1127 (citing *Blyth v. Waterworks*, 11 Exch. 784; 2 Bouv. Law Dict.); *Lauritsen v. American Bridge Co.*, 92 N. W. 475, 476, 87 Minn. 518.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. *Wardlaw v. California R. Co. (Cal.)* 42 Pac. 1075, 1076; *Texas Cent. Ry. Co. v. Brock (Tex.)* 30 S. W. 274, 277; *International & G. N. R. Co. v. Williams*, 50 S. W. 732, 734, 20 Tex. Civ. App. 587; *Eichel v. Sawyer (U. S.)* 44 Fed. 845, 847. In other words, negligence is the failure to observe, for the protection or safety of the interests of another person, that degree of care and precaution and vigilance which the circumstances justly demand, and what is due care and diligence must be determined according to the facts and circumstances of the particular case. *Henry v. Cleveland, C. C. & St. L. R. Co.*, 67 Fed. 426, 427. The essence of the fault is either in omission or commission. *Gunter v. Graniteville Mfg. Co.*, 15 S. C. 443, 450 (citing *Whart. Neg.* § 1, p. 1); *Renneker v. South Carolina Ry. Co.*, 20 S. C. 219, 222 (citing *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506); *Dalley v. Burlington & M. R. R. Co.*, 58 Neb. 396, 400, 78 N. W. 722. The duty is dictated and

measured by the exigencies of the occasion. The latter clause of this definition the court would amend as follows: "The duty is dictated and measured by the exigencies of the occasion as they were known to exist, or should reasonably have been known or expected to exist, from other known and existent facts and circumstances, by the party charged with the fault." *Morris v. Florida Cent. & P. R. Co.*, 29 South. 541, 545, 43 Fla. 10.

Negligence is the failure to do what a reasonable and prudent person would have done under the circumstances of the situation, or doing what such person would not have done. The duty is dictated and measured by the circumstances of the occasion. *Texas & P. Ry. Co. v. Curlin*, 36 S. W. 1003, 1004, 13 Tex. Civ. App. 505.

Negligence is the failure to do what a reasonable and prudent person would do under the known circumstances of the situation, or the doing what such a person, under known existing circumstances, would not have done. The degree of care to be exercised in a given case must be in proportion to the known apparent danger of the situation. *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 12 South. 156, 158, 70 Miss. 119.

Same—Reasonable person.

Negligence is the omitting to do something that a reasonable person would do, or doing something that a reasonable person would not do. *McCaull v. Bruner*, 59 N. W. 37, 38, 91 Iowa, 214; *Drake v. Mount*, 33 N. J. Law (4 Vroom) 441, 444.

Negligence has been defined to consist in the omission to do something that a reasonable man would do, or the doing of something that a reasonable man would not do. *Cincinnati, W. & M. R. Co. v. Peters*, 80 Ind. 168, 171 (citing *Howe v. Young*, 16 Ind. 312).

Negligence is said to consist in the omitting of something that a reasonable man would do, or the doing something that a reasonable man would not do, in either case causing unintentional mischief to a third party. *State v. Manchester & L. R. R.*, 52 N. H. 528, 549.

Negligence may consist in either failing to do what, under the circumstances, a reasonable and prudent man would ordinarily have done, or not doing what he would have done. *Kearney Electric Co. v. Laughlin*, 63 N. W. 941, 946, 45 Neb. 390.

Negligence is the doing of that which, under the circumstances, a reasonable man would refrain from doing out of regard for the safety of others, or it is the failure to do that which, out of regard for the safety of others, a man of sound reason and common

sense would do. *Foster v. Union Traction Co.*, 49 Atl. 270, 199 Pa. 498.

Negligence consists of the omission or commission of some act which a reasonable or careful man would or would not do. *Vance v. City of Franklin*, 30 N. E. 149, 150, 4 Ind. App. 515.

Negligence is the doing of something which, under the circumstances, a reasonable person would not do, or the omission to do something in discharge of a legal duty which, under the circumstances, a reasonable person would do, and which act of omission or commission, as a natural consequence directly following, produces damage to another. *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190, 196; *Nuzum v. Pittsburgh, C. & St. L. Ry. Co.*, 30 W. Va. 228, 236, 4 S. E. 242, 247; *Sebrell v. Barrows*, 36 W. Va. 212, 215, 14 S. E. 996, 997.

Same—Reasonably prudent person.

Negligence is a failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what such person, under existing circumstances, would not have done. *Fuller v. Citizens' Nat. Bank (U. S.)* 15 Fed. 875, 878; *King v. City of Cleveland (U. S.)* 28 Fed. 835, 837; *Danville Ry. & Electric Co. v. Hodnett (Va.)* 43 S. E. 606, 609.

Negligence is the omission to do something which a reasonably prudent man would do under like circumstances, or the doing of something which a prudent and reasonable man would not do under particular circumstances, *McDonald v. Union Pac. R. Co. (U. S.)* 42 Fed. 579; or omitting to do that which a reasonably cautious and prudent man would do under the circumstances, *Pittsburgh, C., C. & St. L. Ry. Co. v. Carlson*, 56 N. E. 251, 253, 24 Ind. App. 559.

As the breach or omission of a legal duty.

Negligence is the breach or omission of a legal duty. *Beach, Contr. Neg.* § 6; *Donovan v. Ferris*, 60 Pac. 519, 521, 128 Cal. 48, 79 Am. St. Rep. 25.

Negligence consists in doing or omitting to do an act in violation of a legal duty or obligation. *Minor v. Sharon*, 112 Mass. 477, 487, 17 Am. Rep. 122.

Negligence consists in the commission of some lawful act in a careless manner, or in the omission to perform some legal duty to the injury of another. *Magar v. Hammond*, 67 N. Y. Supp. 63, 65, 54 App. Div. 532 (citing *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525, 529); *Willis v. Metropolitan St. Ry. Co.*, 78 N. Y. Supp. 478, 480, 76 App. Div. 340.

Negligence may be defined to be a failure to perform some act required by law, or

the doing of the act in an improper manner. *Nolan v. New York, N. H. & H. R. Co.*, 4 Atl. 106, 108, 53 Conn. 461; *Bailey v. Hartford & C. V. R. Co.*, 16 Atl. 234, 236, 56 Conn. 444.

Negligence is either the nonperformance or the inadequate performance of a legal duty. *Holl. Jur.* 93; *Schoonmaker v. Albertson & Douglass Mach. Co.*, 51 Conn. 392; *Nolan v. New York, N. H. & H. R. Co.*, 53 Conn. 461, 4 Atl. 106. This definition includes in it two subordinate ideas—the idea of duty, and the idea of the performance of duty. *O'Neil v. Town of East Windsor*, 27 Atl. 237, 238, 63 Conn. 150; *Larmore v. Crown Point Iron Co.*, 4 N. E. 752, 754, 101 N. Y. 391, 54 Am. Rep. 718; *Cullian v. Pugh*, 66 N. Y. Supp. 1118, 1120, 54 App. Div. 545; *Elster v. City of Springfield*, 30 N. E. 274, 278, 49 Ohio St. 82; *St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co. (U. S.)* 31 Fed. 755, 756; *Omaha & R. V. R. Co. v. Martin*, 15 N. W. 696, 698, 14 Neb. 295; *Lake Shore & M. S. Ry. Co. v. Kurtz*, 37 N. E. 303, 304, 10 Ind. App. 60.

Carelessness synonymous.

See, also, "Carelessness."

The terms "carelessness" and "negligence," in law, are synonyms. *Bindbeutel v. Street Ry. Co.*, 43 Mo. App. 463, 470.

The word "negligence," as used in Gen. St. c. 264, § 14, making the proprietors of railroads responsible for injuries resulting from negligence of their servants, means carelessness. *State v. Boston & M. R. R.*, 58 N. H. 408, 409.

"In common speech, the word 'negligence' is used synonymously with 'carelessness,' but it has a much broader meaning in legal parlance. Thus the failure to exercise proper skill where the law required it is negligence, though ever so much care be used in doing the act required." *St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co. (U. S.)* 31 Fed. 755, 756.

Contributory negligence distinguished.

"A clear distinction exists between negligence and contributory negligence. Negligence is contributory when, and only when, it directly and proximately induces the injury, in whole or in part. Where the negligent acts of two parties concur in producing an injury, neither being able, in the exercise of ordinary care, to avoid the consequence of the negligence of the other after it is known, neither party is liable to the other; but where one party has been negligent, and the second, not knowing of such antecedent negligence, neglects and fails to use ordinary care to prevent an injury which the antecedent negligence rendered possible, and the injury follows by reason of such failure, the

negligence of the second party is the sole proximate cause of the injury." *Bostwick v. Minneapolis & P. Ry. Co.*, 51 N. W. 781, 785, 2 N. D. 440.

Degrees of negligence.

In the civil law there are three degrees of negligence—gross fault or neglect, ordinary fault or neglect, and slight fault or neglect—and the definitions of these degrees are precisely the same with those in our own law. *Brand v. Schenectady & T. R. Co.* (N. Y.) 8 Barb. 368, 378.

The term "negligence" has different meanings in relation to different causes of action. In some cases it means a very slight absence of care and prudence; in others, the absence of reasonable care; and, again, such want of reasonable care as makes gross negligence. *Smith v. Day* (U. S.) 86 Fed. 62, 64.

Rorer, Railroads, vol. 2, pp. 1016, 1017, speaking of negligence, says: "If very little care is due from him, and he fails to bestow that little, it is called 'gross negligence'; if very great care is due, and he fails to come up to the mark required, it is called 'slight negligence'; and, if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called 'ordinary negligence.' In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply negligence." *Missouri, K. & T. Ry. Co. of Texas v. Webb*, 49 S. W. 526, 529, 20 Tex. Civ. App. 431.

Negligence is sometimes classified as gross negligence, ordinary negligence, and slight negligence; but this classification only indicates that, under the special circumstances, great care and caution are required, or only ordinary care or slight care. If the care demanded is not exercised, the case is one of negligence, and a legal liability is made out when the failure is shown. *Diamond State Iron Co. v. Gilles* (Del.) 11 Atl. 189, 193, 7 Houst. 557.

The Supreme Court of the United States, as indicated in the opinion of Mr. Justice Davis, in *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 494, 23 L. Ed. 374, has repeatedly expressed its disapprobation of attempts to fix the degree of negligence by legal definition, and defining the various degrees of negligence. Among the reasons there given in a quotation from the opinion of Mr. Justice Curtis is that the signification of such definition necessarily varies according to the circumstances. He then refers to some English cases, and says: "'Gross negligence' is a relevant term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence,' but, after all, it means the absence

of care that was necessary under the circumstances. Where there is simply an absence of that degree of care in the performance of duty which persons of extraordinary prudence are accustomed to use, the same has been designated by this court as slight negligence. Where there is a want of such care as persons of ordinary prudence observe in the performance of duty, the same has been designated by this court as ordinary negligence, that includes, not only mere inadvertence, or inattention to duty resulting in an injury to another, but also a want of the means or capacity to prevent such injury, when the same is known to be imminent. On the other hand, where a person, in the presence of imminent danger to another, has a duty to perform to prevent such other person from being injured, and, with knowledge of the danger, and with present means and capacity to prevent it, rashly, recklessly, and wantonly fails to do what he can to prevent such injury, the same has been designated by this court as gross negligence. *Lockwood v. Belle City St. Ry. Co.*, 65 N. W. 866, 870, 92 Wis. 97.

The slightest degree of negligence is the omission of the greatest degree of care and diligence. Where there has been no negligence or default, there the greatest degree of care and diligence has been used. When, therefore, it is alleged that a house was burned without the negligence of the defendant, it is tantamount to saying that it was burned notwithstanding the greatest degree of care and diligence on his part. The term "negligence" cannot be appropriated exclusively to the omission of any given degree of care and diligence. Its degrees are infinitely variable, from the omission of the greatest possible care to the very boundary of fraud. *Hodgson v. Dexter* (U. S.) 12 Fed. Cas. 283.

The treble distinction of slight, ordinary, and gross negligence is recognized by the law. Slight negligence is merely the failure to exercise great or extraordinary care. Ordinary or common negligence is the want of that degree of care which an ordinarily prudent man would ordinarily exercise under like circumstances. Gross negligence is the want of slight diligence. *Union Pac. Ry. Co. v. Henry*, 14 Pac. 1, 3, 36 Kan. 565.

In applying the rule that the plaintiff may recover in an action for negligence, notwithstanding that he was guilty of contributory negligence, where his negligence is but slight, and that of the defendant gross, the terms "slight negligence" and "gross negligence" are used in their legal sense, as defined by common-law judges and text-writers, and as expressing the extremes of negligence, of which there are no degrees. In applying the measure of slight and gross negligence, however, to the acts of the respective

parties charged to have been negligent, it is, of course, to be considered that the term 'negligence' is itself relative, and its application must depend on the situation of the parties, and the degree of care and diligence which the circumstances reasonably imposed. So that in each case where there has been contributory negligence on the part of the plaintiff, and he seeks to recover under the rule in respect to comparative negligence, the question will relate to the measure of care under the circumstances shown to have existed, imposed on the parties respectively. *Chicago, B. & Q. Ry. Co. v. Johnson*, 103 Ill. 512, 527.

As design.

See "Design."

As want of diligence.

Negligence, in law, is the want or absence of diligence. *Robinson v. Simpson* (Del.) 32 Atl. 287, 8 Houst. 398.

Negligence is the absence or failure of diligence. *Lee v. Chicago, R. I. & P. Ry. Co.*, 45 N. W. 739, 741, 80 Iowa, 172.

Negligence is variously defined. It is defined to be a want of due diligence, *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 167, 180; *Union Pac. Ry. Co. v. Henry*, 14 Pac. 1, 3, 36 Kan. 565; whether the party at fault is an individual, a private corporation, or a municipality, *Omaha St. Ry. Co. v. Craig*, 58 N. W. 209, 212, 213, 39 Neb. 601.

As doing what a prudent man would not do.

Negligence is the doing what a prudent man would not do, *Taylor v. Town of Constable*, 10 N. Y. Supp. 607, 609, 57 Hun. 371; under the circumstances, *Foxworthy v. City of Hastings*, 37 N. W. 657, 659, 23 Neb. 722; *Omaha & R. V. Ry. Co. v. Brady*, 57 N. W. 767, 770, 39 Neb. 27.

An instruction that negligence is a failure to do what "a prudent man would ordinarily do," instead of "what an ordinarily prudent man would do," is not error. *San Antonio & A. P. Ry. Co. v. Safford* (Tex.) 48 S. W. 1105.

Negligence is the want of care under the circumstances, so that plaintiff's case must also prevail or be defeated as it is determined whether the defendant was negligent in some way, and that that negligence caused the injury complained of. The fact that the plaintiff received an injury does not entitle him to recover on that fact alone. He must show not only that he received an injury, but that the defendant through some act which a prudent man would not have done, or have meant to do, caused the injury to plaintiff. *Lenich v. Beaver*, 49 Atl. 220, 199 Pa. 420.

Negligence is said to be the want of that degree of care which a prudent man under the circumstances surrounding him would observe in order to prevent accident and injury. *Drake v. Mount*, 33 N. J. Law (4 Vroom) 441, 444.

Negligence has been defined as doing that which an ordinarily careful and prudent man would not do under the existing circumstances. *O'Neill v. Chicago, R. I. & P. R. Co.*, 86 N. W. 1098, 1100, 62 Neb. 358, 362 (citing *Dailey v. Burlington & M. R. Co.*, 58 Neb. 396, 400, 78 N. W. 722).

As a fact.

Negligence, in one sense, is a quality attaching to acts depending upon and arising out of duties and relations of the parties concerned, and is as much a fact to be found by the jury as the alleged acts to which it attaches by virtue of such duties and relations. *Rowland v. Murphy*, 1 S. W. 658, 659, 66 Tex. 534 (citing *Texas & P. R. Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272).

As an inference of fact.

Negligence is not simple fact in itself, but is rather an inference from facts. *Couch v. Charlotte, C. & A. R. Co.*, 22 S. C. 557, 562; *Kaminitsky v. Northeastern R. Co.*, 25 S. C. 53, 59.

Negligence is not a conclusion to be testified to by witnesses, but an inference to be deduced from the facts and circumstances disclosed by the evidence. *Zimmer v. Fox River Valley Electric R. Co.*, 95 N. W. 957, 118 Wis. 614.

Negligence is not a fact which is susceptible of direct proof, but an inference deducible from the evidence, and is as frequently in issue, even where facts are not controverted, as where issues of fact are also presented. *Butts v. National Exchange Bank*, 72 S. W. 1083, 1084, 99 Mo. App. 168.

Negligence is almost always to be deduced as an inference of fact from the several facts and circumstances disclosed by the testimony after their connection and relation to the matter in issue have been traced, and their weight and foundation considered. *Nelson v. Chicago, M. & St. P. Ry. Co.*, 19 N. W. 52, 53, 60 Wis. 320 (citing *Hill v. City of Fond du Lac*, 56 Wis. 242, 14 N. W. 25).

Error distinguished.

See "Error."

As failure of duty.

Negligence is a violation of the obligation which enjoins care and caution in what we do. *Cook v. Potter*, 2 Mich. N. P. 146, 148 (citing *Tonawanda R. Co. v. Munger* [N. Y.] 5 Denio, 255, 267, 49 Am. Dec. 239).

Negligence is nothing more than a failure to discharge the duty resting upon one under the circumstances of the case. *Mann v. Central Vt. R. Co.*, 55 Vt. 484, 488, 45 Am. Rep. 628.

Negligence is an omission of duty. Where there is no duty, there can be no negligence. *Swineford v. Franklin County*, 73 Mo. 279, 283; *Bogatchka v. Walker* (N. Y.) 1 City Ct. R. 447, 448; *Commonwealth v. Cook*, 8 Pa. Co. Ct. R. 486, 487; *Godley v. Carson* (Pa.) 2 Phila. 138, 140; *Cleveland, C. & St. L. Ry. Co. v. Adair*, 39 N. E. 672, 677, 12 Ind. App. 569; *Chicago, St. L. & P. R. Co. v. Fenn*, 29 N. E. 790, 791, 3 Ind. App. 250; *Thiele v. McManus*, 3 Ind. App. 132, 134, 28 N. E. 327; *Mexican Nat. Ry. Co. v. Crum*, 25 S. W. 1126, 1128, 6 Tex. Civ. App. 702; *Bowden v. Derby*, 55 Atl. 417, 418, 97 Me. 536, 63 L. R. A. 223, 94 Am. St. Rep. 516.

While negligence, in the abstract, is an omission to perform a duty, still, as a fact, an omission to perform a duty may or may not be negligence in a given case. A railway company may omit to perform a duty, but the failure may not amount to negligence. *Missouri, K. & T. Ry. Co. v. Wylie* (Tex.) 26 S. W. 85, 86.

Negligence, whether on the part of the defendant or plaintiff, may be briefly defined to be the doing or failing to do some act or thing which, under the circumstances, it is the duty of the party to do or to leave undone. *Van Camp Hardware & Iron Co. v. O'Brien*, 62 N. E. 464, 466, 28 Ind. App. 152.

"Negligence," like ownership, is a complex conception. Just as the latter imports the existence of certain facts, and also the consequence (protection against all the world) which the law attaches to those facts, the former imports the existence of certain facts (conduct), and also the consequence (liability) which the law attaches to those facts. This conception involves as its main element the subordinate conceptions of a duty resting upon one person respecting his conduct towards others, a violation of such duty through heedlessness or inattention on the part of him on whom it rests, a resulting legal injury or harm to others as an effect, and the legal liability consequent thereon. Accordingly, as a legal conception, negligence has been defined as follows: A breach of duty, unintentional, and proximately producing injury to another possessing equal rights. But neither in the text-books nor judicial decisions is the word "negligence" used at all times as standing for all the elements of this entire, complex conception. *Farrell v. Waterbury Horse R. Co.*, 21 Atl. 675, 676, 60 Conn. 239.

Negligence is not capable of definition after the fashion of the exact sciences, yet

courts are under the necessity of giving the term a meaning. They cannot say that negligence does or does not exist without defining its meaning, and, when the text writer says that the term cannot be defined, he can mean no more than that the term cannot be given a universal definition. Negligence, whether on the part of plaintiff or defendant, may be defined to be the want of ordinary or reasonable care in respect to that which it is the duty of a party to do or to leave undone. *Citizens' St. R. Co. v. Hoffbauer*, 56 N. E. 54, 59, 23 Ind. App. 614.

The failure on the part of a defendant to observe some duty of care or precaution owing to the plaintiff, generally or specifically, will constitute negligence, and will give rise to a cause of action for resulting injury; but it should be established by the evidence directly, or upon clear inferences from the facts. It cannot rest upon conjecture, merely. *Holland House Co. v. Baird*, 62 N. E. 149, 151, 169 N. Y. 136.

One cannot be said to be guilty of negligence, in contemplation of law, unless he has failed to do that which it was his duty to have done, or which, under the circumstances, he could be reasonably expected to have done. Therefore, when one is charged in a plea with having done a particular act, and that he was negligent in the doing of it, it is equivalent to an averment that he failed to perform a duty that he owed in respect to it, or that he failed to do that which, under the circumstances, he could reasonably be expected to have done. *Boettger v. Scherpe & Koken Architectural Iron Co.*, 27 S. W. 466, 470, 124 Mo. 87.

The term "negligence" includes a failure to perform a defined duty. *Baker v. Westmoreland & C. Natural Gas Co.*, 27 Atl. 789, 791, 157 Pa. 593.

Where a duty is defined, a failure to perform it is negligence, and may be so declared by the court. *Newhard v. Pennsylvania R. Co.*, 26 Atl. 105, 108, 153 Pa. 417, 19 L. R. A. 563 (citing *Arnold v. Pennsylvania R. Co.*, 115 Pa. 135, 8 Atl. 213, 2 Am. St. Rep. 542).

Negligence, among workmen, is a breach of the duty which each owes to the others, and not a breach of the master's duty, if he has exercised the care that is required of him. *Brodeur v. Valley Falls Co.*, 17 Atl. 54, 55, 16 R. I. 448.

In an action against a street railway company for the death of plaintiffs' two year old child, in which defendants pleaded the contributory negligence of plaintiffs, it was said that negligence on the part of the parents must consist, in such matters, of neglect of the duty which every father and mother owed to their child, of exercising over it such protective care as its age, ca-

a given road, at a certain time, does not show on its face a reasonable necessity for its transmission on Sunday. *Western Union Telegraph Co. v. Henley*, 54 N. E. 775, 777, 23 Ind. App. 14.

Work of clergymen.

The work of clergymen is, by general concession, within the exceptions of the law prohibiting Sunday labor except of necessity. *Donovan v. McCarty*, 30 N. E. 221, 222, 155 Mass. 543.

NECESSITY (Sunday Travel).

In the statute relating to traveling on Sunday, it has been declared that the question whether it was an act of necessity or charity is to be determined, to a great extent, by considerations of moral fitness and propriety, and that in most cases it should be submitted to the jury, with proper instructions. *Smith v. Boston & M. R. R.*, 120 Mass. 490, 21 Am. Rep. 538; *Feltal v. Middlesex R. Co.*, 109 Mass. 398, 404, 12 Am. Rep. 720. It would at once be assumed by all that in great emergencies, as in the case of fire, flood, tempest, war, wrecks, accidents to man, beasts, or property, both travel and labor are lawful. *Donovan v. McCarty*, 30 N. E. 221, 222, 155 Mass. 543.

The necessity which will excuse one for traveling on Sunday in violation of a statute prohibiting such travel except in cases of necessity must be real, and not a fancied one. It is not an honest belief that a necessity for traveling exists, but the actual existence of necessity, which renders traveling on Sunday lawful. *Johnson v. Town of Irasburgh*, 47 Vt. 28, 32, 19 Am. Rep. 111.

The term "necessity or charity," in the provision of the Lord's Day act which prohibits traveling, like that which forbids the doing of any business, labor, or work, except what is done from necessity or charity, has been often said by this court to cover anything which is morally fit and proper to be done on that day under the particular circumstances of the case. *Doyle v. Lynn & B. R. Co.*, 118 Mass. 195, 197, 19 Am. Rep. 431.

Traveling on Sunday is *prima facie* not a work of necessity. *Hinckley v. Inhabitants of Penobscot*, 42 Me. 89, 92.

The term "necessity," in a statute prohibiting traveling on Sunday except from necessity or charity, does not include the act of traveling in order to reach a certain place in order to receive news from the traveler's sister, who is sick and away from home, in relation to bringing her home, in a case when the traveler has been delayed by his own private business from making the journey sooner. *Bucher v. Fitchburg R. Co.*, 131 Mass. 156, 159, 41 Am. Rep. 216.

A person traveling on the highway on the Sabbath day because she and her brother had arranged to do so some weeks before, so that her brother could have all the week to do other work in, is not traveling from necessity, within the meaning of Gen. St. c. 93, § 3, prohibiting traveling on the Sabbath day, except from necessity or charity, so as to entitle her to recover for injuries received from a defect in the highway. *Holcomb v. Town of Danby*, 51 Vt. 428, 435.

Business transactions in general.

The term "necessity" or "charity," in a statute forbidding travel on Sunday, except traveling for charity or necessity, does not characterize traveling in order to conduct negotiations between a creditor and his debtor, or for any other purpose of profit or gain. *Stanton v. Metropolitan R. Co.*, 96 Mass. (14 Allen) 485, 486.

One who travels on the Lord's Day to ascertain whether a house which he has hired, and into which he intends to move next day, has been cleaned, is not traveling from necessity, so as to entitle him to maintain an action for injuries sustained at a railroad crossing through the negligence of the servants of the railroad corporation. *Smith v. Boston & M. R. R.*, 120 Mass. 490, 492, 21 Am. Rep. 538.

Bringing home a cook is not a violation of a statute prohibiting labor on Sunday, except of necessity. *Crosman v. City of Lynn*, 121 Mass. 301, 303.

The words "necessity or charity," in the exception to the Sunday law prohibiting traveling on Sunday, except for necessity or charity, do not characterize the act of a servant in traveling to see his master, to induce the latter to change the servant's hours of work from night to day, in order that the servant may sleep better, as the traveling was merely for a matter of secular business. *Connolly v. City of Boston*, 117 Mass. 64, 65, 19 Am. Rep. 396.

It is not unlawful for a servant to ride to prepare needful food for her employer, on Sunday, within a statute prohibiting Sunday labor, except of necessity. *Crosman v. City of Lynn*, 121 Mass. 301, 303.

Carrying mail.

The word "necessity," in Acts 1791, c. 58, in which it is enacted that no traveler, etc., shall travel on the Lord's Day, except through necessity or charity, cannot be understood to mean physical necessity, for the case in which any man is physically obliged to travel can hardly be imagined, but a moral fitness or propriety of travel under the circumstances of any particular case may be deemed necessity, within this section; and, a fortiori, when the traveling is necessary to execute a lawful contract, it cannot be con-

strued as unnecessary traveling, against the prohibition of the statute. Thus it is not contrary to the statute to carry the mail on Sunday in pursuance of the contract with the Attorney General of the United States. *Commonwealth v. Knox*, 6 Mass. 76, 77.

Attending funeral.

A person may lawfully travel on the Lord's Day for the purpose of going to or returning from a funeral, and he is not required to return by the same or by the shortest route; but where, on returning from the cemetery, at the request of his companion he turned out of his way to enable her to visit a friend, and after so turning out of his way he was injured by a defect in the highway, he was not engaged in a work of necessity when so injured, and could not recover therefor. *Davis v. City of Summerville*, 128 Mass. 594, 597, 35 Am. Rep. 399.

It has been held not to be unlawful to ride to a funeral, within a statute prohibiting labor on Sunday, except work of necessity. *Horne v. Meakin*, 115 Mass. 326, 331.

Obtaining medicine.

The words "necessity or charity." in the exception in the statute prohibiting traveling on Sunday, except through necessity or charity, characterize the act of traveling by a mother to obtain medicine for her sick child. *Gorman v. City of Lowell*, 117 Mass. 65, 66.

Taking visitor home.

A woman visiting plaintiff's house informed him on the Lord's Day that she had to go home that night, a distance of some two miles. It was a cold, windy day in December, and he thereupon took her home with his horse and sleigh. While on the way the horse was injured by a defect in the highway, and plaintiff's right to recover therefor was opposed on the ground that the injury occurred while he was unlawfully traveling on Sunday. The court held that his journey was justified, on the ground of necessity, or as a deed of charity, and was therefore lawful. *Buck v. City of Biddeford*, 82 Me. 433, 19 Atl. 912.

Visiting children or parents

A journey on Sunday to visit one's children who are properly away from home is not unlawful, and section 3, c. 93, Gen. St., prohibiting traveling on that day except from necessity or charity, is no bar to a recovery for injury received on such journey by insufficiency of the highway. The necessity provided for in the exceptions to the prohibitions of the statute is a moral, and not a physical, necessity. An act which under the circumstances is morally fit and proper to be done on the Sabbath is not prohibited by the statute. Parents are under moral obligations to attend to the welfare of their chil-

dren at all times during childhood and youth. These obligations cannot be fully satisfied without personal association and acquaintance, when reasonably practicable. They are morally bound to improve all fit opportunities for the discharge of these duties. Where the parent and his children were separated by a distance of eight miles, the parent could not fully discharge his obligations to them without being where they were. Under these circumstances, it was morally proper for him to travel to them. No other facts or circumstances were necessary to show the fitness of this traveling. His duties to his children arose out of his relation to them; the propriety of the journey, out of its necessity to the discharge of his duties. *McClary v. Town of Lowell*, 44 Vt. 116, 118, 8 Am. Rep. 366.

Visiting children or parents is not a violation of a statute prohibiting Sunday labor, except of necessity. *Logan v. Mathews*, 6 Pa. (6 Barr) 417, 419.

Visiting sick.

Riding to visit a sick sister is not unlawful, within a statute prohibiting Sunday labor, except of necessity. *Cronan v. City of Boston*, 136 Mass. 384, 385.

Traveling to visit a sick friend is not unlawful, within a statute prohibiting Sunday labor, except of necessity. *Doyle v. Lynn & B. R. Co.*, 118 Mass. 195, 197, 19 Am. Rep. 431.

Walking or riding for exercise.

Walking out in the open air upon the Sabbath for exercise is not a violation of the statute prohibiting traveling on Sunday or any work except works of necessity. *O'Connell v. City of Lewiston*, 65 Me. 34, 20 Am. Rep. 673; *Davidson v. City of Portland*, 69 Me. 116, 31 Am. Rep. 253; *Hamilton v. City of Boston*, 96 Mass. (14 Allen) 475, 484. Nor is walking partly for exercise and partly to make a social call. *Barker v. City of Worcester*, 20 N. E. 474, 139 Mass. 74.

The exception in a Sunday law prohibiting work on Sunday, except works of necessity or charity, may properly be said to cover everything which is morally fit and proper, under the particular circumstances of the case, to be done upon the Sabbath. Riding upon Sunday for exercise, and for no other purpose, is not a violation of the statute. *Sullivan v. Maine Cent. R. Co.*, 19 Atl. 169, 82 Me. 196, 8 L. R. A. 427. See, also, *Nagle v. Brown*, 37 Ohio St. 7, 9.

NECKLACES.

Where a will disposed of pearls, and afterwards of necklaces, a pearl necklace would pass under the bequest of necklaces; and a subsequent bequest of pearls, without any mention of necklaces, was an alteration only of the disposition of the pearls, and would

not include the pearl necklace. *Attorney General v. Harley*, 5 Russ. 173, 182.

NEED.

A bequest that the testator's widow should have \$10 a year for spending money, if she should need it and call for it, should be construed as giving to the executor no power of a revision of her own judgment of her need of it; the expression of her wish for the money at any time being conclusive of her need of it, in the sense of the word "need" in this connection. *Conant v. Stratton*, 107 Mass. 474, 481.

Where a testator provided that all of his money should be left at interest during the natural lifetime of his wife, except that the interest should be drawn and used by her as she might need it, it was held that the word "need" was equivalent to "desire"; giving the widow the right to use and dispose of all the interest accruing during her life, without reference to her personal wants or necessities. *Gillen v. Kimball*, 34 Ohio St. 352, 363.

A promise to pay an indebtedness at any time the creditor should need it is not a conditional promise, but the term "need" is used in the sense of request, and the promise is sufficient to avoid the bar of the statute of limitations. *Cooper v. Olcott*, 1 App. D. C. 123, 131.

NEEDFUL BUILDINGS.

Const. U. S. art. 1, § 8, giving Congress power to legislate in regard to forts, arsenals, dockyards, and other needful buildings, meant such as were a necessary means employed by the government in executing its sovereign powers. *Bannon v. Burnes* (U. S.) 39 Fed. 892, 899.

The term "needful buildings," as so used, includes all buildings required for public use, and it is now settled that land within a state may be taken by the United States by the right of eminent domain, with or without the consent of a state. And if, upon lands so taken, forts, arsenals, or other public buildings are erected for the general government, such buildings, with their appurtenances, will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed. *Newcomb v. Inhabitants of Rockport*, 68 N. E. 587, 588, 183 Mass. 74 (citing *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 284).

NEEDFUL RULES.

"Needful rules," as used in Olympia City Charter, § 62, providing that the wards, streets, and alleys within said city limits shall be under the exclusive control of the

common council, who shall make all needful rules in regard to the improvement, repair, cleaning, etc., implies that rules will be needed; that is to say, the public use and welfare will demand such improvements and repairs. *Hutchinson v. City of Olympia*, 5 Pac. 606, 607, 2 Wash. T. 314.

Under Rev. St. § 10, subd. 15, c. 152 (Laws 1883, p. 426), clothing school boards and boards of education with power to make all needful rules where the government of the school is established within their respective jurisdiction, the rules and regulations made must be reasonable and proper, and, in the language of the statute, needful for the government, good order, and efficiency of the school, and such as will best advance the pupils in their studies, tend to their education and mental improvement, and promote their interest and welfare. A regulation that each scholar, when returning to school after recess, shall bring into the schoolroom a stick of wood for the fire, is not a needful one, under the statute. *State v. Board of Education*, 23 N. W. 102, 104, 63 Wis. 234, 53 Am. Rep. 282.

"Needful rules and regulations," as used in Const. U. S. art. 4, § 2, providing that Congress shall have power to make all needful rules and regulations respecting the territory of the United States, is to be construed to mean "laws." In re *Higbee*, 5 Pac. 693, 694, 4 Utah, 19.

NEEDING AID.

A bequest to a trustee, to be used as in his judgment he may think best, in the aid of deserving, aged native-born in a certain state, needing such aid, is not rendered indefinite by the use of the phrase "needing such aid," the fair construction being that such aged persons as needed financial assistance were to partake of the bounty—in short, the aged poor. *Fay v. Howe*, 69 Pac. 423, 424, 136 Cal. 599.

NEEDLESSLY.

Where a question was put to the jury, whether a locomotive engineer blew the whistle needlessly and recklessly, or willfully and wantonly, and the jury answered that it was needlessly blown, the word "needlessly," as used, cannot be construed to mean that it was recklessly blown. *Wabash R. Co. v. Speer*, 40 N. E. 835, 836, 156 Ill. 244.

Rev. St. § 2101, providing for the fining of any person who needlessly mutilates or kills any animal, has no reference to the lawfulness or unlawfulness of the act of killing or mutilating, except as the statute makes it unlawful, as needless; nor is it to be construed as characterizing an act which might by care have been avoided. It simply means an act done without any useful motive, in

a spirit of wanton cruelty or for the mere pleasure of destruction. *Hunt v. State*, 29 N. E. 933, 3 Ind. App. 383; *Grise v. State*, 37 Ark. 456, 461.

As used in a statute punishing cruelty to animals, the word "needlessly" related to a wanton and cruel act, and not one which was the result of necessity or reasonable cause. *Grise v. State*, 37 Ark. 456, 461.

The catching and mutilation of a dog depredating the premises of another, in a steel trap, is not a "needless torture or mutilation," within Acts 1881, c. 169, providing for the punishment of any person who "needlessly mutilates or tortures any living creature." *Hodge v. State*, 79 Tenn. (11 Lea) 528, 532, 47 Am. Rep. 307.

NEEDY.

See "Most Needy."

A person is needy who is distressed by want of the means of living, very poor, indigent, or in necessitous circumstances; and hence a person who receives relief from a fund for indigent and needy soldiers is a poor and indigent person, within the meaning of a statute providing that no persons receiving relief as a poor or indigent person can acquire a settlement in a county. *Juneau County v. Wood County*, 85 N. W. 387, 388, 109 Wis. 330.

The term "needy" may be used to characterize minor children who do not own property in their own names, although they earn their own living. *Woods v. Perkins*, 9 South. 48, 43 La. Ann. 347.

The words "needy circumstances," when applied to a person without a family, mean one whose estate, after the payment of his debts, and excluding from the estimate such part of his estate as is exempt from execution, is worth less in cash than \$500; and the same words, when applied to a person having a family, mean one whose estate, estimated as aforesaid, is worth less in cash, after the payment of his debts and the support of his family for one year, than \$1,000: provided that, when the words are applied to a married woman, her estate and that of her husband shall be estimated as aforesaid, and the amount shall determine the question whether she be in needy circumstances or not. *Bates' Ann. St. Ohio* 1904, § 720.

NEEDLE BUSINESS

Plaintiff agreed to employ defendant as manager of its needle business. Plaintiff instructed defendant to take charge of a branch of the business devoted exclusively to the making of certain kinds of needles, which defendant expressed his willingness

to do. It was necessary to set apart a room for this business, and defendant was told to superintend getting the room in order, which he did for three or four days, but afterwards denied that it was his duty to do this. It was held that such work was clearly within the terms of the employment, as a part of the needle business. *Excelsior Needle Co. v. Smith*, 23 Atl. 693, 696, 61 Conn. 56.

NEGATIVE.

The term "negative" is used in photography to designate the original plate, made sensitive by chemicals, which is printed by the sunlight through the camera. *Udderzook v. Commonwealth*, 76 Pa. (26 P. F. Smith) 340, 352.

NEGATIVE COVENANT.

The term "negative covenant," and not the word "condition," is correctly used to designate a provision in a deed that the premises thereby conveyed are not to be used for saloon purposes. *Star Brewery Co. v. Primas*, 45 N. E. 145, 147, 163 Ill. 652.

NEGATIVE EASEMENT.

See "Amenity."

NEGATIVE PLEA.

Where a defendant, instead of filing an answer to everything in the bill, denies some particular fact set up in the bill, the non-existence of which fact strips the complainant of any relief whatever under his bill, the plea is negative. *Potts v. Potts* (N. J.) 42 Atl. 1055, 1056.

NEGATIVE PREGNANT.

A negative pregnant is such a form of negative expression as may imply or carry with it an affirmative. A negative pregnant involves and admits of an affirmative implication, or at least an implication of some kind favorable to the adverse party. *Fields v. State*, 32 N. E. 780, 782, 134 Ind. 46.

Generally speaking, a denial in the precise language of the complaint is a negative pregnant with an admission that the alleged facts may have transpired on some other day or under different circumstances. *Rock Spring Coal Co. v. Salt Lake Sanitarium Ass'n*, 25 Pac. 742, 743, 7 Utah, 158; *Argard v. Parker*, 51 N. W. 1012, 1013, 81 Wis. 581.

A negative pregnant is a negative that implies an affirmative. A general denial pleaded, being the same in effect as a specific denial of each of the allegations in the whole or in the part of the pleadings so de-

uled, is a negative pregnant only where a mere specific denial would be. *Stone v. Quaale*, 29 N. W. 326, 327, 36 Minn. 46.

Where an answer denies, in the very words of the complaint, an averment that certain property was on a particular day all destroyed by fire, such a denial is a negative pregnant with admission that it may have been destroyed on some other day, and that a part of it may have been destroyed on the day named. *Curnow v. Phoenix Ins. Co.*, 24 S. E. 74, 77, 46 S. C. 79.

NEGATIVE SERVITUDE.

The term "negative servitude" is used to designate a servitude in which the proprietor of the servient estate is barely restrained, but by which he is not obliged to suffer something to be done upon his property by another. *Rowe v. Nally*, 32 Atl. 198, 199, 81 Md. 367.

NEGATIVE TESTIMONY.

Positive testimony is that which bears directly upon the facts in the case. Negative testimony is not as to the immediate fact or occurrence, but facts from which you might infer that the act could not possibly have happened. In other words, the one is affirmative, the other negative. Therefore positive testimony is more reliable and is stronger than negative testimony. *Barclay v. Hartman* (Del.) 43 Atl. 174, 175, 2 Marv. 351.

NEGLECT.

See "Cruel Neglect"; "Culpable Neglect"; "Excusable Neglect"; "Intentional Neglect"; "Ordinary Neglect"; "Wanton Neglect"; "Willful Neglect—Willfully Neglects."

Any neglect, see "Any."

Neglect is the omission or forbearance to do a thing that can be done or that is required to be done. *Davis v. Steuben School Tp.*, 50 N. E. 1, 5, 19 Ind. App. 694; *Malone v. United States* (U. S.) 5 Ct. Cl. 486, 489.

"To neglect" and "to omit" are not synonymous terms. There may be an omission to perform an act or condition which is altogether involuntary or inadvertent. To neglect is "to omit by carelessness or design" (Webst. Dict.), not from necessity, and there can therefore be no possibility of neglecting to do that which cannot be done. *New York Guaranty & Indemnity Co. v. Gleason* (N. Y.) 53 How. Prac. 122, 125.

The term "neglect" in Immigration Act March 3, 1891, c. 551, § 6, 26 Stat. 1085 [U. S. Comp. St. 1901, p. 1296], fixing a penalty for the neglect of the agent of a vessel to detain certain immigrants unlawfully

brought to this country, is used in the popular sense of "fail or omit." *Warren v. United States* (U. S.) 58 Fed. 559, 562, 7 C. C. A. 368.

"Neglect to act," as used in a private act for dividing and allotting lands, appointing a commissioner for the purpose, empowered to declare an award within six months after the passing of the act, and providing that, if he should neglect to act, it should be lawful for the bishop of the diocese to appoint another, did not import an act to which some degree of blame must attach, but included an omission to act because of the wrongful construction of the statute. *Willoughby v. Willoughby*, 9 Adol. & E. (N. S.) 923, 933.

"It is further objected that the return of the officer is insufficient, as it does not show that the justice could appoint two appraisers. The return states that the debtor neglected to appoint. If the word 'neglect' imports something more than the word 'omit,' it must be because it imports that the party had opportunity to do the thing which he omitted to do. If he did not have such opportunity, he cannot be said to have neglected it. Unless, therefore, the officer levying the execution took those steps which the law required towards the debtor, the debtor cannot be said to have neglected to appoint. We think, therefore, that we must infer that those steps were taken." *Johnson v. Huntington*, 13 Conn. 47, 51, 52.

The term "neglect" imports a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. *Ann. Codes & St. Or.* 1901, § 2177; *Rev. St. Okl.* 1903, § 2687; *Pen. Code Ariz.* 1901, par. 7, subd. 2; *Gen. St. Minn.* 1894, § 6842, subd. 1; *Pen. Code Cal.* 1903, § 7, subd. 2; *Rev. Codes N. D.* 1899, § 7714; *Pen. Code S. D.* 1903, § 809; *Pen. Code Idaho* 1901, § 4544, subd. 2; *Pen. Code N. Y.* 1903, § 718; *Rev. St. Utah* 1898, § 4053; *Pen. Code Mont.* 1895, § 7, subd. 4.

The word "neglect," as used in *Code Civ. Proc.* § 572, providing that except in a case where an order of arrest can be granted only by the court, if the plaintiff unreasonably delay the trial of the action, or neglects to enter judgment therein within 10 days, if it is in his power to do so, or neglects to issue execution against the person of defendant within 10 days after the return of the execution against the property, etc., is synonymous with the word "negligence," which is defined to be the omission of that degree of care which a man of common prudence takes of his own concerns. *People v. Grant* (N. Y.) 13 Civ. Proc. R. 209, 213.

As ground of divorce.

"Neglect," in order to constitute ground for a divorce, within the meaning of a statute

authorizing the granting of divorces on that ground, must be such neglect as leaves the wife destitute, but for the charity of others. If the common necessities of life are provided by the earnings of either husband or wife, there is no such willful neglect as is contemplated by the statute. *Washburn v. Washburn*, 9 Cal. 475, 476.

Of official duty.

"Neglect," as applied to a public officer, means a failure on his part to do and perform some of the duties of his office, and when such neglect, from the gravity of the case or the frequency of the instances, becomes so serious in its character as to endanger or threaten the public welfare it is gross, within the meaning of the law, and justifies the interference of the executive upon whom is placed the responsibility of keeping the affairs of the estate in the proper condition by taking notice thereof. The term "gross neglect" is not limited only to intentional official wrongdoing. Such acts would hardly be described by the word "neglect." *Attorney General v. Jochiam*, 58 N. W. 611, 617, 99 Mich. 358, 23 L. R. A. 699, 41 Am. St. Rep. 606.

The term "neglect," in Pen. Code, § 117, making any public officer, or person holding a public trust or employment, who willfully neglects to perform any duty imposed by law, guilty of a misdemeanor, or in an indictment under such section, imports a want of such attention to the probable consequence of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. *People v. Herlihy*, 72 N. Y. Supp. 389, 392, 35 Misc. Rep. 711.

"Neglect," as used in Pol. Code, § 996, providing that an office becomes vacant upon the refusal or neglect of one who is elected or appointed to an office to file his official oath or bond within the time prescribed, imports the omission or disregard of some duty. A person cannot disregard the duty to qualify connected with his appointment to an office until he receives information of his appointment. The power to neglect a duty must necessarily be based on a knowledge of the existence of the duty. *People v. Perkins*, 26 Pac. 245, 246, 85 Cal. 509.

Code, § 711, providing that any commissioner who shall "neglect to perform any duty required of him by law" as a member of the board shall be guilty of a misdemeanor, cannot be construed to include the act of the commissioners in causing an order to be issued to the county treasurer to pay to them a greater sum as per diem and mileage than was due, for it was not a neglect to perform any duty required by law. *State v. Norris*, 16 S. E. 2, 4, 111 N. C. 652.

To constitute a neglect of official duty by a judge, there must not only be a failure, by

carelessness or design, to perform the duty to be performed, but the party failing must have the capacity to perform the acts required of him; and, where the capacity was affected by serious illness of a member of the judge's family, he was not guilty of neglect of duty, within Const. art. 4, § 48. *White v. State*, 26 South. 343, 346, 123 Ala. 577.

Under Cr. St. § 304, punishing any public officer who shall "neglect to turn over to his successor" money received by him in his official capacity, neglect is a failure to do what is required. An indictment charging that defendant failed to turn over such money is sufficient. *State v. Assmann*, 46 S. C. 554, 562, 24 S. E. 673, 675.

In professional employment.

Under a statute abolishing imprisonment for debt, except in actions for neglect in any professional employment, the neglect of an attorney to pay over money collected for his client is undoubtedly a case of neglect in professional employment. It has been repeatedly decided that the commissions allowed an attorney for collections are his compensation for his entire professional duty in the matter, and that it is so much a part of that duty to pay over the money when collected, that, if he neglect it unreasonably, he is entitled to no compensation whatever for his previous services in recovering it from the debtor. It is difficult to imagine a case of "neglect of professional employment," in the whole range of an attorney's duties, more materially affecting the interests of his client, or more seriously affecting his own prospects in business. Any other neglect, whereby a client loses, may have the palliating circumstances that it was owing to inattention, ignorance, or forgetfulness, and that the attorney gained nothing by it himself. But making use of the money of his client, or withholding it from him, after it is collected, can seldom have any of these circumstances to palliate it. The motive for such neglect, in the manifest profit of making use of another's money, although occasionally palliated by pecuniary misfortunes and pressure, may frequently tinge the nonperformance with a color of wrong something deeper than mere neglect. *Wills v. Kane* (Pa.) 2 Grant, Cas. 60, 62.

NEGLECT AND REFUSE.

The averment in a complaint that defendant had "neglected and refused to pay," etc., is equivalent to a statement that defendant failed and refused to pay. To neglect to do a thing means to omit to do it, not to do it. *Rankin v. Sisters of Mercy*, 22 Pac. 1134, 1135, 82 Cal. 88.

"Neglect or refuse," as used in a deed providing that, in case one of the parties should neglect or refuse to do certain matters

mentioned, a certain covenant therein should remain in full force, means simply shall not perform. The party, not having performed the things which he had covenanted to do, has neglected or refused to perform them, within the meaning of the covenant. *Cherry v. Heming* (N. Y.) 1 Code Rep. 81.

When used in reference to the payment of money, the word "refusal" means a failure to pay the money when demanded, while "neglect" means a failure to pay money which the party is bound to pay without demand. *Kimball v. Rowland*, 72 Mass. (6 Gray) 224, 225.

The failure of selectmen to report the laying out of a road, in writing, to a town, as required by Rev. St. 2471, so as to allow the county commissioners to act, was a neglect and refusal to lay out the road prayed for. *Inhabitants of New Marlborough v. Berkshire County Com'rs*, 50 Mass. (9 Metc.) 423, 432.

The omission of the selectmen of the town to make a written report to the town of their alteration of a town way, on a written petition for an alteration, is such a neglect to alter it as gives jurisdiction of the matter to the county commissioners, under a statute providing that, on the refusal or neglect of the selectmen to make an alteration upon petition, an appeal will lie from their decision to the county commissioners. *Inhabitants of New Marlborough v. Berkshire County Com'rs*, 50 Mass. (9 Metc.) 423, 432.

Accidental omission.

A statute provided that a party to a suit may recover 25 cents per mile for actual travel to attend the taking of a deposition, when the party "neglects or refuses to take it." Held, that the accidental omission to take the deposition, with no fault of the party, makes a case within the meaning of the phrase "neglects and refuses," as used in the statute, and there can be a recovery for the amount indicated by the statute, and that recovery is not limited to actual damages. *Robertson v. Northern R. Co.*, 3 Atl. 621, 623, 63 N. H. 544.

NEGLECT TO DEPOSIT.

The term "neglects to deposit," in Laws 1855, c. 421, which provides that when the proprietor of any hotel provides a safe for money, jewels, or ornaments of guests, and posts a notice stating the fact, the proprietor would not be liable for loss of goods which a guest neglects to deposit, means the failure to deposit after having had an opportunity and time to do so, and therefore it is not necessary to show any actual negligence or imprudence on the part of the guest. Judge Peckham, in *Bendetson v. French*, 46 N. Y.

266, said: "The statute is very broad in its language, that, if such guest shall neglect to deposit, the proprietor shall not be liable. This was evidently aimed at losses that should occur by such neglect. It could have had no reference to losses at the inn occurring before the guest had an opportunity to make such deposit, or after he had packed his trunk, locked his room, given notice for immediate departure, and delivered up the key to his room to the clerk, to have his trunk brought down." The learned judge who wrote the opinion says that there could be no neglect to deposit before there had been an opportunity to deposit. There must be a brief period after the arrival of the guest at the hotel before he can make a deposit, and during this period the statute affords the hotel keeper no protection. But in every case where the guest has an opportunity to make the deposit, and does not make it, he neglects to make it, within the meaning of the statute. Neglect does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty, or act. *Rosenplaenter v. Roessle*, 54 N. Y. 262, 266.

Under a statute providing that if a guest shall neglect to deposit his money, jewels, and ornaments in the hotel safe, the proprietor of the hotel shall not be liable for any loss thereof, where a guest presented to the hotel clerk a package 16 inches long, 10 inches wide, and 7 inches high, containing jewelry, requesting that it be put in the safe, but without informing the clerk of the contents, and on the clerk's saying there was no necessity for that, and that it would be as safe in the guest's room, he took it to his room, and it was stolen, there was a neglect to deposit. The clerk did not know that jewelry had been offered him; hence he did not refuse to receive it; and there was nothing about the package to indicate that it was not appropriately sent to the room of the guest. Simply offering a package of this size, without disclosing its contents, is not offering to deposit jewelry. *Bendetson v. French*, 46 N. Y. 266, 269, 270.

NEGLECT TO MAKE COMPLAINT.

Gen. St. tit. 20, c. 12, § 23, providing that any grand juror who, after he is sworn, shall "neglect to make seasonable complaint of any crime," means neglect with knowledge that the crime has been committed, and that a prosecution therefor is maintainable. The ordinary meaning of the word "neglect" is an omission from carelessness to do what can be done and ought to be done; and a grand juror could not be said to neglect the making of complaint, when, after investigating the subject, he became convinced that the offense could not be prosecuted. *Watson v. Hall*, 46 Conn. 204, 206.

NEGLECT TO PROSECUTE HIS APPEAL.

The words "neglect to prosecute his appeal" clearly imply that an appeal has been taken, and as used in Gen. Laws, c. 251, § 3, authorizing the Supreme Court to grant a trial in a case decided by a probate court where a party shall have neglected to prosecute his appeal, do not authorize the granting of a trial on the petition of an administrator to correct a mistake in his inventory, where no appeal has been taken. *Cronshaw v. Cronshaw*, 41 Atl. 563, 564, 21 R. I. 54.

NEGLECTED CHILD.

As used in the act relating to the juvenile court, the words "neglected child" shall mean any child who for any reason is destitute or homeless or abandoned, or dependent upon the public for support, or has not proper (parental) paternal care or guardianship, or who habitually begs or receives alms, or who is found living in any house of ill fame or with any vicious or disreputable persons, or whose home, by reason of neglect, cruelty, or depravity on the part of its parents, guardian, or other person in whose care it may be, is an unfit place for such child; and any child under the age of ten years who is found begging, peddling, or selling any article, or singing or playing any musical instrument, upon the street, or giving any public entertainment, or who accompanies or is used in aid of any person so doing. *Bates' Ann. St. Ohio* 1904, § 548-38.

NEGLIGENCE.

See "Actionable Negligence"; "Collateral Negligence"; "Comparative Negligence"; "Contributory Negligence"; "Criminal Negligence"; "Culpable Negligence"; "Gross Negligence"; "Intentional Negligence"; "Legal Negligence"; "Ordinary Negligence"; "Prior Negligence"; "Slight Negligence"; "Subsequent Negligence"; "Wanton Negligence"; "Willful Negligence"; "Without Negligence."

Any negligence, see "Any."

Negligence or otherwise, see "Otherwise."

The word "negligence" is not a mere technical term. It is an English word of well-known meaning. And the fact that, under certain circumstances, courts of law have to decide what constitutes negligence, does not destroy the popular character of the word. *Edelmann v. St. Louis Transfer Co.*, 3 Mo. App. 503, 507.

Negligence has been defined as consisting in the failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it. This definition

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was given by one of the ablest elementary writers of modern times, and has often received the approval of this court. *Kendrick v. Towle*, 27 N. W. 567, 568, 60 Mich. 363, 1 Am. St. Rep. 526.

A negligence is the juridical cause of an injury when it consists of such an act or omission on the part of a responsible human being as in ordinary natural sequence immediately results in such injury. *Zoppi v. Postal Tel. Cable Co.* (U. S.) 60 Fed. 987, 988, 9 C. C. A. 308 (citing Whart. Neg. § 73); *Chalk v. Charlotte, C. & A. R. Co.*, 85 N. C. 423, 428; *Basnight v. Atlantic & N. C. R. Co.*, 111 N. C. 592, 596, 16 S. E. 323, 324 (citing Whart. Neg. § 73); *Missouri, K. & T. Ry. Co. v. Fowler*, 59 Pac. 648, 650, 61 Kan. 320.

The words "improperly, carelessly, and unlawfully" show a cause of action for negligence. The words "unlawful" and "wrongful" are synonyms, and, where counsel asked to go to the jury on the question of acts sued for being wrongful acts, he did not thereby abandon the theory of negligence, for the word itself is a definition of negligence. *Wells v. Sibley*, 9 N. Y. Supp. 343, 345, 56 Hun. 644.

In every case involving actionable negligence, there are necessarily three elements essential to its existence: First, the existence of a duty on the part of a defendant to protect the plaintiff from the injury of which he complains; second, a failure by the defendant to perform that duty; and, third, an injury to the plaintiff from such failure of the defendant. When these elements are brought together, they unitedly constitute actionable negligence. The absence of any one of these elements renders a complaint bad, or the evidence insufficient. *Faris v. Hoberg*, 134 Ind. 269, 274, 33 N. E. 1028, 39 Am. St. Rep. 261.

As act of commission or omission.

"Negligence," in its legal acceptance, includes acts of omission as well as commission. *Grant v. Moseley*, 29 Ala. 302, 305; *Elchel v. Sawyer* (U. S.) 44 Fed. 845, 847; *Johnson v. State*, 63 N. E. 607, 609, 66 Ohio St. 59, 61 L. R. A. 277, 90 Am. St. Rep. 564; *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 12 South. 156, 158, 70 Miss. 119; *Citizens' St. Ry. Co. v. Merl*, 59 N. E. 491, 493, 26 Ind. App. 284; *Houston v. Brush*, 29 Atl. 380, 386, 66 Vt. 331.

Negligence may consist as well in not doing the thing which ought to be done as in doing that which ought not to be done, when in either case it has caused loss and damage to another. *Kibele v. City of Philadelphia*, 105 Pa. 41, 44.

There is a clear distinction between active and passive negligence—between negli-

gence of commission and negligence of omission. *Callan v. Pugh*, 66 N. Y. Supp. 1118, 1120, 54 App. Div. 545.

There are two classes of negligence—active and passive. A person is equally liable for doing a negligent act which would be active negligence, or in omitting to do an act which was passive, where by such omission injury would follow. One person may do a negligent act resulting in injury, but, if the injured party stand passively by and let the act produce its natural effect, such an injured party cannot recover, as he failed to do what a reasonably prudent man under like circumstances would have done, or by doing which he could have averted the injury, or, rather, result of the negligent act. One may negligently set fire upon his own premises, and negligently permit it to escape to the adjoining premises of another, yet if the latter sat by and saw the fire destroy his property, when he could have done something, without hazard, to prevent the injury, he cannot recover. He thus becomes passively negligent in failing to do something which it was his duty to do. Therefore, in an action for damages from fire set by a railroad company, the plaintiff must show that his own negligence either active or passive, did not contribute to the injury. *Louisville, N. A. & C. R. Co. v. Carmon* (Ind.) 48 N. E. 1047, 1049

Same—Cautious and prudent man.

Negligence, in actions for personal injury, means the doing of some act which a cautious and prudent man would not do, or the neglecting to do some act which a cautious and prudent man would not neglect. *Ahern v. Oregon Telephone & Telegraph Co.*, 35 Pac. 549, 24 Or. 276, 22 L. R. A. 635.

Same—Ordinarily careful person.

Negligence may consist in the doing of something by the party charged with it which evinces want of ordinary care, or it may consist in having omitted to do something which an ordinarily careful person would have done under the same circumstances. *Lehigh & W. B. Coal Co. v. Lear* (Pa.) 9 Atl. 267, 268.

Same—Person of ordinary prudence and care.

Negligence consists in doing or omitting to do something which a person of ordinary prudence and care would not have done, or would not have omitted to do, under like or similar circumstances. *Louisville, N. A. & C. R. Co. v. Carmon* (Ind.) 48 N. E. 1047, 1049; *Missouri, K. & T. Ry. Co. of Texas v. Milam*, 50 S. W. 417, 418, 20 Tex. Civ. App. 688.

It is contended that this definition makes the negligence of the plaintiff to depend on the question whether a person of ordinary

prudence would have done the same thing. As said in *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 374: "The formula used is that frequently adopted in attempting to define negligence." It is there said: "Whether the plaintiff was negligent or not depended on the particular facts admitted or satisfactorily proved in the case." This instruction does not ignore the facts, but makes them the very groundwork of inquiry. True, "the most prudent men are not always exempt from carelessness, and when actually negligent, the law charges the same consequences to their negligent conduct as to similar conduct in others." But there is no better standard by which to measure the acts of men, as to negligence, than to ask what persons of ordinary prudence and care would have done under the same circumstances, and such is the rule of this instruction. *Galloway v. Chicago, R. I. & P. Ry. Co.*, 54 N. W. 447, 450, 87 Iowa, 458.

Same—Ordinarily prudent person.

Negligence is the failure to do what an ordinarily prudent person would have done under the circumstances, or the doing of that which an ordinarily prudent person would not have done. *Jones v. Harris*, 40 Atl. 791, 186 Pa. 469. The surrounding circumstances include not only what existed at the time, but the reasonable possibilities of the future. Men are bound to anticipate what may reasonably happen, and provide against that. *Gilchrist v. Hartley*, 47 Atl. 972, 973, 198 Pa. 132.

An instruction that negligence is a performance of or omission of some act, with knowledge that another's property is liable to danger, which no man of ordinary prudence would perform or omit under all the circumstances existing at the time, is substantially correct and sufficient. *St. Louis, I. M. & S. Ry. Co. v. Hecht*, 38 Ark. 357, 366; *Houston & T. C. R. Co. v. Milam* (Tex.) 58 S. W. 735, 736; *Receivers of Missouri, K. & T. Ry. v. Pfuger* (Tex.) 25 S. W. 792, 793. In order to judge of the conduct of an individual under given conditions, and to determine whether the same is or is not negligence, it is necessary that the trier should be advised of the very situation in which the person charged with negligence is placed at the time, for it is in the light of such circumstances that his conduct must be judged. *Erie R. Co. v. Moore* (U. S.) 113 Fed. 269, 271, 51 C. C. A. 226.

Same—Reasonable and prudent man.

According to the generally approved definition of *Alderson, B.*, in *Blyth v. Burningham Waterworks Co.*, 11 Exch. 784, negligence is the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily reg-

ulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512, 527; *Wolff Mfg. Co. v. Wilson*, 38 N. E. 694, 696, 152 Ill. 9, 26 L. R. A. 229; *Union Pac. R. Co. v. Rollins*, 5 Kan. 167, 180; *Cleghorn v. Thompson*, 64 Pac. 605, 607, 62 Kan. 727, 54 L. R. A. 402; *Richardson v. Kier*, 34 Cal. 63, 75, 91 Am. Dec. 681 (citing *Broom, Leg. Max.* 329); *Jamison v. San Jose & S. C. R. Co.*, 55 Cal. 593, 596; *Smith v. Whittier*, 30 Pac. 529, 531, 95 Cal. 279; *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409, 424 (citing *Broom, Leg. Max.* 329); *McGraw v. Chicago, R. I. & P. Ry. Co.*, 81 N. W. 306, 59 Neb. 397; *Geist v. Missouri Pac. R. Co.*, 87 N. W. 43, 48, 62 Neb. 309; *Omaha St. Ry. Co. v. Craig*, 58 N. W. 209, 212, 213, 39 Neb. 601; *Omaha St. Ry. Co. v. Loehneisen*, 58 N. W. 535, 536, 40 Neb. 37; *Brotherton v. Manhattan Beach Imp. Co.*, 67 N. W. 479, 480, 48 Neb. 563, 33 L. R. A. 598, 58 Am. St. Rep. 709 (citing *Foxworthy v. Hastings*, 23 Neb. 772, 37 N. W. 657); *Roberts v. Boston & M. R. Co.*, 45 Atl. 94, 69 N. H. 354; *Woodward v. Griffith*, 2 Willson, Civ. Cas. Ct. App. § 360; *Elze v. Baumann*, 21 N. Y. Supp. 782, 784, 2 Misc. Rep. 72; *Ft. Smith Oil Co. v. Slover*, 24 S. W. 106, 107, 58 Ark. 168; *Crandall v. Goodrich Transp. Co. (U. S.)* 16 Fed. 75, 78; *Nitroglycerin Case*, 82 U. S. (15 Wall.) 524, 536, 21 L. Ed. 206; *Rosen v. Chicago G. W. R. Co. (U. S.)* 83 Fed. 300, 304, 27 C. C. A. 534; *Sandoval v. Territory*, 8 N. M. 573, 581, 45 Pac. 1125, 1127 (citing *Blyth v. Waterworks*, 11 Exch. 784; 2 Bouv. Law Dict.); *Lauritsen v. American Bridge Co.*, 92 N. W. 475, 476, 87 Minn. 518.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. *Wardlaw v. California R. Co. (Cal.)* 42 Pac. 1075, 1076; *Texas Cent. Ry. Co. v. Brock (Tex.)* 30 S. W. 274, 277; *International & G. N. R. Co. v. Williams*, 50 S. W. 732, 734, 20 Tex. Civ. App. 587; *Eichel v. Sawyer (U. S.)* 44 Fed. 845, 847. In other words, negligence is the failure to observe, for the protection or safety of the interests of another person, that degree of care and precaution and vigilance which the circumstances justly demand, and what is due care and diligence must be determined according to the facts and circumstances of the particular case. *Henry v. Cleveland, C. C. & St. L. R. Co.*, 67 Fed. 426, 427. The essence of the fault is either in omission or commission. *Gunter v. Graniteville Mfg. Co.*, 15 S. C. 443, 450 (citing *Whart. Neg.* § 1, p. 1); *Renneker v. South Carolina Ry. Co.*, 20 S. C. 219, 222 (citing *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506); *Dalley v. Burlington & M. R. R. Co.*, 58 Neb. 396, 400, 78 N. W. 722. The duty is dictated and

measured by the exigencies of the occasion. The latter clause of this definition the court would amend as follows: "The duty is dictated and measured by the exigencies of the occasion as they were known to exist, or should reasonably have been known or expected to exist, from other known and existent facts and circumstances, by the party charged with the fault." *Morris v. Florida Cent. & P. R. Co.*, 29 South. 541, 545, 43 Fla. 10.

Negligence is the failure to do what a reasonable and prudent person would have done under the circumstances of the situation, or doing what such person would not have done. The duty is dictated and measured by the circumstances of the occasion. *Texas & P. Ry. Co. v. Curlin*, 36 S. W. 1003, 1004, 13 Tex. Civ. App. 505.

Negligence is the failure to do what a reasonable and prudent person would do under the known circumstances of the situation, or the doing what such a person, under known existing circumstances, would not have done. The degree of care to be exercised in a given case must be in proportion to the known apparent danger of the situation. *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 12 South. 156, 158, 70 Miss. 119.

Same—Reasonable person.

Negligence is the omitting to do something that a reasonable person would do, or doing something that a reasonable person would not do. *McCaull v. Bruner*, 59 N. W. 37, 38, 91 Iowa, 214; *Drake v. Mount*, 33 N. J. Law (4 Vroom) 441, 444.

Negligence has been defined to consist in the omission to do something that a reasonable man would do, or the doing of something that a reasonable man would not do. *Cincinnati, W. & M. R. Co. v. Peters*, 80 Ind. 168, 171 (citing *Howe v. Young*, 16 Ind. 312).

Negligence is said to consist in the omitting of something that a reasonable man would do, or the doing something that a reasonable man would not do, in either case causing unintentional mischief to a third party. *State v. Manchester & L. R. R.*, 52 N. H. 528, 549.

Negligence may consist in either failing to do what, under the circumstances, a reasonable and prudent man would ordinarily have done, or not doing what he would have done. *Kearney Electric Co. v. Laughlin*, 63 N. W. 941, 946, 45 Neb. 390.

Negligence is the doing of that which, under the circumstances, a reasonable man would refrain from doing out of regard for the safety of others, or it is the failure to do that which, out of regard for the safety of others, a man of sound reason and common

sense would do. *Foster v. Union Traction Co.*, 49 Atl. 270, 199 Pa. 498.

Negligence consists of the omission or commission of some act which a reasonable or careful man would or would not do. *Vance v. City of Franklin*, 30 N. E. 149, 150, 4 Ind. App. 515.

Negligence is the doing of something which, under the circumstances, a reasonable person would not do, or the omission to do something in discharge of a legal duty which, under the circumstances, a reasonable person would do, and which act of omission or commission, as a natural consequence directly following, produces damage to another. *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190, 196; *Nuzum v. Pittsburgh, C. & St. L. Ry. Co.*, 30 W. Va. 228, 236, 4 S. E. 242, 247; *Sebrell v. Barrows*, 38 W. Va. 212, 215, 14 S. E. 996, 997.

Same—Reasonably prudent person.

Negligence is a failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what such person, under existing circumstances, would not have done. *Fuller v. Citizens' Nat. Bank (U. S.)* 15 Fed. 875, 878; *King v. City of Cleveland (U. S.)* 28 Fed. 835, 837; *Danville Ry. & Electric Co. v. Hodnett (Va.)* 43 S. E. 606, 609.

Negligence is the omission to do something which a reasonably prudent man would do under like circumstances, or the doing of something which a prudent and reasonable man would not do under particular circumstances, *McDonald v. Union Pac. R. Co. (U. S.)* 42 Fed. 579; or omitting to do that which a reasonably cautious and prudent man would do under the circumstances, *Pittsburgh, C., C. & St. L. Ry. Co. v. Carlson*, 58 N. E. 251, 253, 24 Ind. App. 559.

As the breach or omission of a legal duty.

Negligence is the breach or omission of a legal duty. *Beach, Contr. Neg. § 6*; *Donovan v. Ferris*, 60 Pac. 519, 521, 128 Cal. 48, 79 Am. St. Rep. 25.

Negligence consists in doing or omitting to do an act in violation of a legal duty or obligation. *Minor v. Sharon*, 112 Mass. 477, 487, 17 Am. Rep. 122.

Negligence consists in the commission of some lawful act in a careless manner, or in the omission to perform some legal duty to the injury of another. *Magar v. Hammond*, 67 N. Y. Supp. 63, 65, 54 App. Div. 532 (citing *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525, 529); *Willis v. Metropolitan St. Ry. Co.*, 78 N. Y. Supp. 478, 480, 76 App. Div. 340.

Negligence may be defined to be a failure to perform some act required by law, or

the doing of the act in an improper manner. *Nolan v. New York, N. H. & H. R. Co.*, 4 Atl. 106, 108, 53 Conn. 461; *Bailey v. Hartford & C. V. R. Co.*, 16 Atl. 234, 236, 56 Conn. 444.

Negligence is either the nonperformance or the inadequate performance of a legal duty. *Holl. Jur. § 93*; *Schoonmaker v. Albertson & Douglass Mach. Co.*, 51 Conn. 392; *Nolan v. New York, N. H. & H. R. Co.*, 53 Conn. 461, 4 Atl. 106. This definition includes in it two subordinate ideas—the idea of duty, and the idea of the performance of duty. *O'Neill v. Town of East Windsor*, 27 Atl. 237, 238, 63 Conn. 150; *Larmore v. Crown Point Iron Co.*, 4 N. E. 752, 754, 101 N. Y. 391, 54 Am. Rep. 718; *Cullan v. Pugh*, 66 N. Y. Supp. 1118, 1120, 54 App. Div. 545; *Elster v. City of Springfield*, 30 N. E. 274, 278, 49 Ohio St. 82; *St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co. (U. S.)* 31 Fed. 755, 756; *Omaha & R. V. R. Co. v. Martin*, 15 N. W. 696, 698, 14 Neb. 295; *Lake Shore & M. S. Ry. Co. v. Kurtz*, 37 N. E. 303, 304, 10 Ind. App. 60.

Carelessness synonymous.

See, also, "Carelessness."

The terms "carelessness" and "negligence," in law, are synonyms. *Bindbeutel v. Street Ry. Co.*, 43 Mo. App. 463, 470.

The word "negligence," as used in Gen. St. c. 264, § 14, making the proprietors of railroads responsible for injuries resulting from negligence of their servants, means carelessness. *State v. Boston & M. R. R.*, 58 N. H. 408, 409.

"In common speech, the word 'negligence' is used synonymously with 'carelessness,' but it has a much broader meaning in legal parlance. Thus the failure to exercise proper skill where the law required it is negligence, though ever so much care be used in doing the act required." *St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co. (U. S.)* 31 Fed. 755, 758.

Contributory negligence distinguished.

"A clear distinction exists between negligence and contributory negligence. Negligence is contributory when, and only when, it directly and proximately induces the injury, in whole or in part. Where the negligent acts of two parties concur in producing an injury, neither being able, in the exercise of ordinary care, to avoid the consequence of the negligence of the other after it is known, neither party is liable to the other; but where one party has been negligent, and the second, not knowing of such antecedent negligence, neglects and fails to use ordinary care to prevent an injury which the antecedent negligence rendered possible, and the injury follows by reason of such failure, the

negligence of the second party is the sole proximate cause of the injury." *Bostwick v. Minneapolis & P. Ry. Co.*, 51 N. W. 781, 785, 2 N. D. 440.

Degrees of negligence.

In the civil law there are three degrees of negligence—gross fault or neglect, ordinary fault or neglect, and slight fault or neglect—and the definitions of these degrees are precisely the same with those in our own law. *Brand v. Schenectady & T. R. Co.* (N. Y.) 8 Barb. 368, 378.

The term "negligence" has different meanings in relation to different causes of action. In some cases it means a very slight absence of care and prudence; in others, the absence of reasonable care; and, again, such want of reasonable care as makes gross negligence. *Smith v. Day* (U. S.) 86 Fed. 62, 64.

Rorer, Railroads, vol. 2, pp. 1016, 1017, speaking of negligence, says: "If very little care is due from him, and he fails to bestow that little, it is called 'gross negligence'; if very great care is due, and he fails to come up to the mark required, it is called 'slight negligence'; and, if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called 'ordinary negligence.' In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply negligence." *Missouri, K. & T. Ry. Co. of Texas v. Webb*, 49 S. W. 526, 529, 20 Tex. Civ. App. 431.

Negligence is sometimes classified as gross negligence, ordinary negligence, and slight negligence; but this classification only indicates that, under the special circumstances, great care and caution are required, or only ordinary care or slight care. If the care demanded is not exercised, the case is one of negligence, and a legal liability is made out when the failure is shown. *Diamond State Iron Co. v. Giles* (Del.) 11 Atl. 189, 193, 7 Houst. 557.

The Supreme Court of the United States, as indicated in the opinion of Mr. Justice Davis, in *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 494, 23 L. Ed. 374, has repeatedly expressed its disapprobation of attempts to fix the degree of negligence by legal definition, and defining the various degrees of negligence. Among the reasons there given in a quotation from the opinion of Mr. Justice Curtis is that the signification of such definition necessarily varies according to the circumstances. He then refers to some English cases, and says: "'Gross negligence' is a relevant term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence,' but, after all, it means the absence

of care that was necessary under the circumstances. Where there is simply an absence of that degree of care in the performance of duty which persons of extraordinary prudence are accustomed to use, the same has been designated by this court as slight negligence. Where there is a want of such care as persons of ordinary prudence observe in the performance of duty, the same has been designated by this court as ordinary negligence, that includes, not only mere inadvertence, or inattention to duty resulting in an injury to another, but also a want of the means or capacity to prevent such injury, when the same is known to be imminent. On the other hand, where a person, in the presence of imminent danger to another, has a duty to perform to prevent such other person from being injured, and, with knowledge of the danger, and with present means and capacity to prevent it, rashly, recklessly, and wantonly falls to do what he can to prevent such injury, the same has been designated by this court as gross negligence. *Lockwood v. Belle City St. Ry. Co.*, 65 N. W. 866, 870, 92 Wis. 97.

The slightest degree of negligence is the omission of the greatest degree of care and diligence. Where there has been no negligence or default, there the greatest degree of care and diligence has been used. When, therefore, it is alleged that a house was burned without the negligence of the defendant, it is tantamount to saying that it was burned notwithstanding the greatest degree of care and diligence on his part. The term "negligence" cannot be appropriated exclusively to the omission of any given degree of care and diligence. Its degrees are infinitely variable, from the omission of the greatest possible care to the very boundary of fraud. *Hodgson v. Dexter* (U. S.) 12 Fed. Cas. 283.

The treble distinction of slight, ordinary, and gross negligence is recognized by the law. Slight negligence is merely the failure to exercise great or extraordinary care. Ordinary or common negligence is the want of that degree of care which an ordinarily prudent man would ordinarily exercise under like circumstances. Gross negligence is the want of slight diligence. *Union Pac. Ry. Co. v. Henry*, 14 Pac. 1, 3, 36 Kan. 565.

In applying the rule that the plaintiff may recover in an action for negligence, notwithstanding that he was guilty of contributory negligence, where his negligence is but slight, and that of the defendant gross, the terms "slight negligence" and "gross negligence" are used in their legal sense, as defined by common-law judges and text-writers, and as expressing the extremes of negligence, of which there are no degrees. In applying the measure of slight and gross negligence, however, to the acts of the respective

parties charged to have been negligent, it is, of course, to be considered that the term 'negligence' is itself relative, and its application must depend on the situation of the parties, and the degree of care and diligence which the circumstances reasonably imposed. So that in each case where there has been contributory negligence on the part of the plaintiff, and he seeks to recover under the rule in respect to comparative negligence, the question will relate to the measure of care under the circumstances shown to have existed, imposed on the parties respectively. *Chicago, B. & Q. Ry. Co. v. Johnson*, 103 Ill. 512, 527.

As design.

See "Design."

As want of diligence.

Negligence, in law, is the want or absence of diligence. *Robinson v. Simpson* (Del.) 32 Atl. 287, 8 Houst. 398.

Negligence is the absence or failure of diligence. *Lee v. Chicago, R. I. & P. Ry. Co.*, 45 N. W. 739, 741, 80 Iowa, 172.

Negligence is variously defined. It is defined to be a want of due diligence, *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 167, 180; *Union Pac. Ry. Co. v. Henry*, 14 Pac. 1, 3, 36 Kan. 565; whether the party at fault is an individual, a private corporation, or a municipality, *Omaha St. Ry. Co. v. Craig*, 58 N. W. 209, 212, 213, 89 Neb. 601.

As doing what a prudent man would not do.

Negligence is the doing what a prudent man would not do, *Taylor v. Town of Constable*, 10 N. Y. Supp. 607, 609, 57 Hun, 371; under the circumstances, *Foxworthy v. City of Hastings*, 37 N. W. 657, 659, 23 Neb. 722; *Omaha & R. V. Ry. Co. v. Brady*, 57 N. W. 767, 770, 39 Neb. 27.

An instruction that negligence is a failure to do what "a prudent man would ordinarily do," instead of "what an ordinarily prudent man would do," is not error. *San Antonio & A. P. Ry. Co. v. Safford* (Tex.) 48 S. W. 1105.

Negligence is the want of care under the circumstances, so that plaintiff's case must also prevail or be defeated as it is determined whether the defendant was negligent in some way, and that that negligence caused the injury complained of. The fact that the plaintiff received an injury does not entitle him to recover on that fact alone. He must show not only that he received an injury, but that the defendant through some act which a prudent man would not have done, or have meant to do, caused the injury to plaintiff. *Lenich v. Beaver*, 49 Atl. 220, 199 Pa. 420.

Negligence is said to be the want of that degree of care which a prudent man under the circumstances surrounding him would observe in order to prevent accident and injury. *Drake v. Mount*, 33 N. J. Law (4 Vroom) 441, 444.

Negligence has been defined as doing that which an ordinarily careful and prudent man would not do under the existing circumstances. *O'Neill v. Chicago, R. I. & P. R. Co.*, 86 N. W. 1098, 1100, 62 Neb. 358, 362 (citing *Dailey v. Burlington & M. R. Co.*, 58 Neb. 396, 400, 78 N. W. 722).

As a fact.

Negligence, in one sense, is a quality attaching to acts depending upon and arising out of duties and relations of the parties concerned, and is as much a fact to be found by the jury as the alleged acts to which it attaches by virtue of such duties and relations. *Rowland v. Murphy*, 1 S. W. 658, 659, 66 Tex. 534 (citing *Texas & P. R. Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272).

As an inference of fact.

Negligence is not simple fact in itself, but is rather an inference from facts. *Couch v. Charlotte, C. & A. R. Co.*, 22 S. C. 557, 562; *Kaminsky v. Northeastern R. Co.*, 25 S. C. 53, 59.

Negligence is not a conclusion to be testified to by witnesses, but an inference to be deduced from the facts and circumstances disclosed by the evidence. *Zimmer v. Fox River Valley Electric R. Co.*, 95 N. W. 957, 118 Wis. 614.

Negligence is not a fact which is susceptible of direct proof, but an inference deducible from the evidence, and is as frequently in issue, even where facts are not controverted, as where issues of fact are also presented. *Butts v. National Exchange Bank*, 72 S. W. 1083, 1084, 99 Mo. App. 168.

Negligence is almost always to be deduced as an inference of fact from the several facts and circumstances disclosed by the testimony after their connection and relation to the matter in issue have been traced, and their weight and foundation considered. *Nelson v. Chicago, M. & St. P. Ry. Co.*, 19 N. W. 52, 53, 60 Wis. 320 (citing *Hill v. City of Fond du Lac*, 56 Wis. 242, 14 N. W. 25).

Error distinguished.

See "Error."

As failure of duty.

Negligence is a violation of the obligation which enjoins care and caution in what we do. *Cook v. Potter*, 2 Mich. N. P. 146, 148 (citing *Tonawanda R. Co. v. Munger* [N. Y.] 5 Denio, 255, 267, 49 Am. Dec. 239).

Negligence is nothing more than a failure to discharge the duty resting upon one under the circumstances of the case. *Mann v. Central Vt. R. Co.*, 55 Vt. 484, 488, 45 Am. Rep. 628.

Negligence is an omission of duty. Where there is no duty, there can be no negligence. *Swineford v. Franklin County*, 73 Mo. 279, 283; *Bogatchka v. Walker* (N. Y.) 1 City Ct. R. 447, 448; *Commonwealth v. Cook*, 8 Pa. Co. Ct. R. 486, 487; *Godley v. Carson* (Pa.) 2 Phila. 138, 140; *Cleveland, C. C. & St. L. Ry. Co. v. Adair*, 39 N. E. 672, 677, 12 Ind. App. 569; *Chicago, St. L. & P. R. Co. v. Fenn*, 29 N. E. 790, 791, 3 Ind. App. 250; *Thiele v. McManus*, 3 Ind. App. 132, 134, 28 N. E. 327; *Mexican Nat. Ry. Co. v. Crum*, 25 S. W. 1126, 1128, 6 Tex. Civ. App. 702; *Bowden v. Derby*, 55 Atl. 417, 418, 97 Me. 536, 63 L. R. A. 223, 94 Am. St. Rep. 516.

While negligence, in the abstract, is an omission to perform a duty, still, as a fact, an omission to perform a duty may or may not be negligence in a given case. A railway company may omit to perform a duty, but the failure may not amount to negligence. *Missouri, K. & T. Ry. Co. v. Wylie* (Tex.) 26 S. W. 85, 86.

Negligence, whether on the part of the defendant or plaintiff, may be briefly defined to be the doing or failing to do some act or thing which, under the circumstances, it is the duty of the party to do or to leave undone. *Van Camp Hardware & Iron Co. v. O'Brien*, 62 N. E. 464, 466, 28 Ind. App. 152.

"Negligence," like ownership, is a complex conception. Just as the latter imports the existence of certain facts, and also the consequence (protection against all the world) which the law attaches to those facts, the former imports the existence of certain facts (conduct), and also the consequence (liability) which the law attaches to those facts. This conception involves as its main element the subordinate conceptions of a duty resting upon one person respecting his conduct towards others, a violation of such duty through heedlessness or inattention on the part of him on whom it rests, a resulting legal injury or harm to others as an effect, and the legal liability consequent thereon. Accordingly, as a legal conception, negligence has been defined as follows: A breach of duty, unintentional, and proximately producing injury to another possessing equal rights. But neither in the text-books nor judicial decisions is the word "negligence" used at all times as standing for all the elements of this entire, complex conception. *Farrell v. Waterbury Horse R. Co.*, 21 Atl. 675, 676, 60 Conn. 239.

Negligence is not capable of definition after the fashion of the exact sciences, yet

courts are under the necessity of giving the term a meaning. They cannot say that negligence does or does not exist without defining its meaning, and, when the text writer says that the term cannot be defined, he can mean no more than that the term cannot be given a universal definition. Negligence, whether on the part of plaintiff or defendant, may be defined to be the want of ordinary or reasonable care in respect to that which it is the duty of a party to do or to leave undone. *Citizens' St. R. Co. v. Hoffbauer*, 56 N. E. 54, 59, 23 Ind. App. 614.

The failure on the part of a defendant to observe some duty of care or precaution owing to the plaintiff, generally or specifically, will constitute negligence, and will give rise to a cause of action for resulting injury; but it should be established by the evidence directly, or upon clear inferences from the facts. It cannot rest upon conjecture, merely. *Holland House Co. v. Baird*, 62 N. E. 149, 151, 169 N. Y. 136.

One cannot be said to be guilty of negligence, in contemplation of law, unless he has failed to do that which it was his duty to have done, or which, under the circumstances, he could be reasonably expected to have done. Therefore, when one is charged in a plea with having done a particular act, and that he was negligent in the doing of it, it is equivalent to an averment that he failed to perform a duty that he owed in respect to it, or that he failed to do that which, under the circumstances, he could reasonably be expected to have done. *Boettger v. Scherpe & Koken Architectural Iron Co.*, 27 S. W. 466, 470, 124 Mo. 87.

The term "negligence" includes a failure to perform a defined duty. *Baker v. Westmoreland & C. Natural Gas Co.*, 27 Atl. 789, 791, 157 Pa. 593.

Where a duty is defined, a failure to perform it is negligence, and may be so declared by the court. *Newhard v. Pennsylvania R. Co.*, 26 Atl. 105, 108, 153 Pa. 417, 19 L. R. A. 563 (citing *Arnold v. Pennsylvania R. Co.*, 115 Pa. 135, 8 Atl. 213, 2 Am. St. Rep. 542).

Negligence, among workmen, is a breach of the duty which each owes to the others, and not a breach of the master's duty, if he has exercised the care that is required of him. *Brodeur v. Valley Falls Co.*, 17 Atl. 54, 55, 16 R. I. 448.

In an action against a street railway company for the death of plaintiffs' two year old child, in which defendants pleaded the contributory negligence of plaintiffs, it was said that negligence on the part of the parents must consist, in such matters, of neglect of the duty which every father and mother owed to their child, of exercising over it such protective care as its age, ca-

capacity, and the danger to which it may be exposed, render reasonably necessary. *Houston City St. R. Co. v. Dillon*, 22 S. W. 1066, 1067, 8 Tex. Civ. App. 303.

Negligence on the part of a carrier is the violation of the obligation which enjoined care and caution in what he did. *McDonnell v. New York Cent. & H. R. Co.*, 54 N. Y. Supp. 747, 748, 35 App. Div. 147.

Negligence consists in (1) a legal duty to use due care; (2) a breach of that duty; and (3) the absence of distinct intention to produce the precise damage, if any, which actually follows. *Bindbeutel v. Street Ry. Co.*, 43 Mo. App. 463, 470 (citing *Shear. & R. Neg.*).

Same—Legal duty.

"Negligence," in a legal sense, is the omission of some duty imposed by law. *Bill v. Smith*, 39 Conn. 206, 210; *Fritz v. Jenner*, 31 Atl. 80, 166 Pa. 202; *McDonald v. Union Pac. R. Co.* (U. S.) 42 Fed. 579, 581.

Negligence is the failure on the part of defendant to perform a legal duty that it owed to the plaintiff or the party injured. *Geno v. Fall Mountain Paper Co.*, 35 Atl. 475, 476, 68 Vt. 568; *Brehmer v. Lyman*, 42 Atl. 613, 614, 71 Vt. 98; *Toledo, St. L. & K. C. R. Co. v. Hauck*, 35 N. E. 573, 575, 8 Ind. App. 369; *Callan v. Pugh*, 66 N. Y. Supp. 1118, 1120, 54 App. Div. 545.

Negligence, in a general sense, is any omission to perform a duty imposed by law for the protection of one's own person or property, or the person or property of another. *Galveston, H. & S. A. Ry. Co. v. Gormley*, 91 Tex. 393, 399, 43 S. W. 877, 66 Am. St. Rep. 894; *Fordyce v. Culver*, 22 S. W. 237, 239, 2 Tex. Civ. App. 569; *Toncray v. Dodge County*, 51 N. W. 235, 237, 33 Neb. 802.

Negligence is the omission to perform a statutory duty. *Woodward v. Griffith* (Tex.) 2 Willson, Civ. Cas. Ct. App. §§ 360, 362.

Negligence implies the nonobservance of, or omission to perform, a duty which is prescribed by law, or which arises from the situation of the parties, or circumstances surrounding a transaction. *Kelley v. Michigan Cent. R. Co.*, 31 N. W. 904, 905, 65 Mich. 186, 8 Am. St. Rep. 876.

Wharton, in *Whart. Neg.* § 3, says: "Negligence, in its civil relation, is such an inadvertent imperfection by a responsible human agent in the discharge of a legal duty as immediately produces, in an ordinary and legal sense, a damage to another. One of the constitutional elements of negligence, therefore, is a duty imperfectly discharged." *Cleveland, C. & St. L. Ry. Co. v. Adair*, 39 N. E. 672, 677, 12 Ind. App. 569;

Salmon v. Delaware, L. & W. R. R. Co., 38 N. J. Law (9 Vroom) 5, 11, 20 Am. Rep. 356.

Negligence, when applied to carriers of passengers, means the absence, in the performance of a duty imposed by law for the protection of others, of that high degree of care, in acting or refraining from acting, which very cautious, prudent, and competent persons usually exercise under the same or similar circumstances. *Houston & T. C. R. Co. v. Dotson*, 38 S. W. 642, 643, 15 Tex. Civ. App. 73.

Negligence is where a person neglects or omits to do that which by law he is obliged to do, and the legal obligation of a master to take ordinary care for the prevention of harm to his servant does not result from any determination peculiar to the contract for personal service, but from the general rule. Every one is, in his acts and conduct, bound to be duly careful to avoid doing hurt to others. *Garnett v. Phoenix Bridge Co.* (U. S.) 96 Fed. 192, 194.

Disregard by an employer of the provisions of the statute relating to the safety of his servants is not simply negligence on the part of the master, but is a tort, for it involves the direct violation of a positive law. *Boyd v. Brazill Block Coal Co. (Ind.)* 50 N. E. 368, 372.

Same—Noncontractual duty.

"Negligence is the inadvertent failure to use ordinary care in observing or performing a noncontractual duty implied by law." The unlawful conduct or neglect of an attorney in carrying out a contract for his services does not constitute negligence, but is a breach of contract. *Barkley v. Williams*, 64 N. Y. Supp. 318, 319, 30 Misc. Rep. 687.

In 16 Am. & Eng. Enc. Law, 389, actionable negligence is defined as "the inadvertent failing of a legally responsible person to use ordinary care, under the circumstances, in observing or performing a noncontractual duty implied by law, which failure is the proximate cause of injury to a person to whom the duty is due." *Pickens v. South Carolina & G. R. Co.*, 32 S. E. 567, 569, 54 S. C. 498.

Same—Knowledge of duty.

Negligence consists in omitting to do what a person ought to do. It is of the essence of negligence that the party charged should have knowledge that there was a duty for him to perform, or he must have omitted to inform himself as to what his duty was in a given case. *Sherman v. Western Transp. Co.* (N. Y.) 62 Barb. 150.

As failure to exercise care justly demanded by circumstances.

Negligence is defined by Cooley on Torts as, in a legal sense, no more or less than

the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and diligence which the circumstances justly demand, whereby such other person suffers injury. *Tully v. Philadelphia, W. & B. R. Co.* (Del.) 47 Atl. 1019, 1020, 2 Pennewill, 537, 82 Am. St. Rep. 425; *Id.*, 50 Atl. 95, 96, 3 Pennewill, 455; *Diamond State Iron Co. v. Giles* (Del.) 11 Atl. 189, 193, 7 Houst. 557; *Chicago, B. & Q. R. Co. v. Wymore*, 58 N. W. 1120, 1121, 40 Neb. 645; *Barrett v. Southern Pac. Co.*, 27 Pac. 666, 667, 91 Cal. 296, 25 Am. St. Rep. 186; *St. Louis, I. M. & S. Ry. Co. v. Hecht*, 38 Ark. 357, 366; *St. Louis, I. M. & S. Ry. Co. v. Lewis*, 30 S. W. 765, 766, 60 Ark. 409; *Cherokee & P. Coal & Mining Co. v. Britton*, 45 Pac. 100, 105; 3 Kan. App. 292; *Downey v. Gemini Min. Co.*, 68 Pac. 414, 24 Utah, 431, 91 Am. St. Rep. 798; *Wencker v. Missouri, K. & T. R. Co.*, 70 S. W. 145, 169 Mo. 592.

Negligence, when applied to torts, is a negative quality, as it denotes the want of such reasonable care, prudence, skill, or vigilance in the interest of others, and for their protection against injury, as the circumstances or occasion demand. There are degrees of diligence, such as slight or gross, but these are not indicated by the terms "active" and "passive"; and the nature of the act, whether of omission or commission, should not make any difference in the degree of care, precaution, skill, or vigilance that should be required in a given case. The want of proper exercise of these conditions when the circumstances require it will create liability when injury results. *Cederson v. Oregon R. & Nav. Co.*, 62 Pac. 637, 646, 38 Or. 343.

As failure to use greatest care.

Negligence is the failure to exercise the greatest or most extraordinary care, although the party has in fact exercised great care, and all the care required of him in the particular instance. *Chicago, K. & N. Ry. Co. v. Brown*, 24 Pac. 497, 499, 44 Kan. 384.

Negligence, as between common carriers and passengers, is the lack of the utmost care for the safety of their passengers. *Knauff v. San Antonio Traction Co.* (Tex.) 70 S. W. 1011, 1012.

As failure to provide against ordinary occurrences.

Negligence consists in the failure to provide against the ordinary occurrences of life, and the fact that the provision made is insufficient as against an event such as may happen once in a lifetime, or perhaps twice in a century, does not make out a case of negligence upon which an action in damages will lie. As a matter of law, owners of logs were not guilty of negligence per se in permitting such logs to lie in a lake, where they

were subsequently dashed by an extraordinary storm—the equal of which, in fury and destructiveness, had never been but once known or heard of in the country—against a revetment, to its injury. *New Orleans & N. E. R. Co. v. McEwen & Murray*, 22 South. 675, 680, 49 La. Ann. 1184, 38 L. R. A. 134.

Fault implied.

Negligence implies fault, and cannot be predicated of a lawful and customary use of one's own premises. *Montgomery v. Muskegon Booming Co.*, 50 N. W. 729, 731, 88 Mich. 633, 26 Am. St. Rep. 308.

Foreseeing effect.

Judge Gaines, in *Texas & P. Ry. Co. v. Bigham*, 38 S. W. 162, 163, 90 Tex. 223, says: "As applied to the law of negligence, the rule is that a party should not be held responsible for the consequences of an act which ought not reasonably to have been foreseen. In other words, it ought not to be deemed negligence to do or fail to do an act, when it was not anticipated, and should not have been anticipated, that it would result in injury to any one. To require this is to demand of human nature a degree of care incompatible with the prosecution of the ordinary avocations of life. It would seem that there is neither a legal nor a moral obligation to guard against that which cannot be foreseen, and, under such circumstances, the duty of foresight should not be arbitrarily imputed." To make the servants of a railway company negligent in injuring a person who was struck by a horse hurled from a railroad track by the engine, it was not necessary for them to have foreseen exactly how their act of negligence in striking the horse would operate to the injury of another, or upon whom the result of their negligence would fall. It is sufficient, if they negligently struck the horse, that the circumstances surrounding them at the time were such that ordinarily prudent persons, similarly situated, would have reasonably anticipated that personal injury to some one would be the result of their negligence. *Texas & P. Ry. Co. v. Short* (Tex.) 58 S. W. 56, 57.

An essential element of negligence is a knowledge of facts which render foresight possible, and the circumstances necessary to be known before the liability for the consequence of an act or omission will be imposed must be such as would lead a prudent man to apprehend danger. All are bound to foresee what experience will teach them is likely to follow from the existence of a given state of facts. In a given case, action must be dictated by experience. Where there is no knowledge of facts which would lead to an apprehension of danger, there can be no imputation of foresight or blameworthiness, and these two ingredients are necessary to

constitute negligence. A person is not called upon to use that degree of care against an improbable result which he would be bound to use against a probable one. A man is not bound to ward against a result which cannot be reasonably expected to occur, and negligence cannot be attributed to him for failing to do so. So, as to inferring a consequence or result from the state of the atmosphere, the presence of steam, and the force and direction of the wind, whereby a man lost his hand by placing it between car buffers. That is not the usual, ordinary, or natural consequence of steam. *Hope v. Fall Brook Coal Co.*, 38 N. Y. Supp. 1040, 1043, 3 App. Div. 70.

As ignorance.

The word "negligence" implies in itself that there is not necessarily ignorance by the one who is guilty of it. *Alexandria Min. & Exploring Co. v. Painter*, 28 N. E. 113, 115, 1 Ind. App. 587.

Negligence, in a servant, may consist, and often does, in failing to know, as well as failing to do, and such is always the case where it is the duty of the servant to inform himself and to know. *Hewitt v. Flint & P. M. R. Co.*, 34 N. W. 659, 669, 67 Mich. 61.

It is of the essence of negligence that the party charged should have knowledge that there was a duty for him to perform, or he must have omitted to inform himself as to what his duty was, in a given case. Knowledge is presumed in a great number of cases, and the party will not be permitted to prove that he had not knowledge of his duty. Every man is presumed to know the law, and hence, when the law imposes a duty on a man, it presumes that he knew of it, and it will not permit him to prove that he did not. When the specified duty is not imposed by either the statute or the common law, the party alleging negligence must show that the accused was cognizant of the duty he is charged with having neglected. *Sherman v. Western Transp. Co.* (N. Y.) 62 Barb. 150.

Incompetency distinguished.

There is a difference between incompetency, so called, and negligence. There is certainly a difference between the ability to perform work and negligence in performing it. *Olsen v. North Pacific Lumber Co.* (U. S.) 100 Fed. 384, 386, 40 C. C. A. 427.

"Negligence" and "incompetency" are not convertible terms, for the most competent may sometimes be negligent, and evidence of acts of former incompetency furnishes no legitimate ground of presumption that a party was negligent on the occasion of subsequent injury. *City Council of Baltimore v. War*, 27 Atl. 85, 86, 77 Md. 593.

The term "negligence" does not necessarily include incompetency, since a competent man may at times be negligent. *Texas Cent. Ry. Co. v. Rowland*, 22 S. W. 134, 136, 3 Tex. Civ. App. 158.

Intent distinguished.

The difference between "intent" and "negligence," in a legal sense, is ordinarily nothing but the difference in the probability, under the circumstances known to the actor, and according to common experience, that a certain consequence or class of consequences will follow from a certain act. *White v. Duggan*, 2 N. E. 110, 111, 140 Mass. 18, 54 Am. Rep. 437 (citing *Commonwealth v. Pease*, 137 Mass. 576).

The term "negligence" is used by courts and by text-writers with some indefiniteness of meaning. Sometimes it is applied to an act, and sometimes to the consequences of an act, and at other times to an act and its consequences taken together. In the first of these instances, the word is correlative to "diligence"; in the second, to "intention." In this sense it is practically synonymous with "heedlessness" or "carelessness"—the not taking notice of matters relevant to the business in hand, of which notice might and ought to have been taken. 2 Steph. Cr. Law, p. 123; 1 Aust. Jur. p. 440. In civil proceedings, acts, including omissions, apart from their consequences, are indifferent. It is only when an act occasions injury to another that the person doing the act becomes liable in damages to the person injured by the act. In such cases the act and its consequences are blended together, and the term "negligent injury," or simply "negligence," is applied. It is an essential ingredient of actionable negligence that the injury be the result of inadvertence or inattention. Negligence signifies a want of care in the performance of an act, by one having no positive intention to injure the person complaining of it. Where such an intention exists, the injury ceases to be merely a negligent one, and becomes one of violence or fraud; i. e., a malicious one. *Pitkin v. New York & N. E. R. Co.*, 30 Atl. 772, 773, 64 Conn. 482.

Some law writers, some judges, and some courts habitually use the terms "intentional negligence," "willful negligence," and "malicious negligence"; but most of them very properly repudiate such expressions, as contradictory and absurd. The distinguishing characteristic of negligence is inadvertence or absence of any intent to injure. *Lockwood v. Belle City St. Ry. Co.*, 65 N. W. 866, 870, 92 Wis. 97.

Alderson, B., defines negligence to be either the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do, in either case causing mischief to a third

person, not intentional, for then it would not be negligence. *Union Pac. R. Co. v. Rollins*, 5 Kan. 167, 180 (citing *Blythe v. Birmingham Waterworks Co.*, 36 Eng. Law & Eq. 506).

When there is a particular intention to injure, or a degree of willful and wanton recklessness which authorizes the presumption of an intention to injure generally, the act ceases to be merely negligent, and becomes one of violence or fraud. In negligence there is no purpose to do a wrongful act or to omit the performance of a duty. *Gardner v. Heartt* (N. Y.) 3 Denio, 232, 236; *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512, 527.

Negligence is not designed and intentional mischief, although it may be cogent evidence of such fact. *Jacksonville S. E. Ry. Co. v. Southworth*, 25 N. E. 1093, 1094, 135 Ill. 250; *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512, 527 (citing *Tonawanda R. Co. v. Munger* [N. Y.] 5 Denio, 267, 49 Am. Dec. 239); *Moses v. Southern Pac. R. Co.*, 23 Pac. 498, 500, 18 Or. 385, 8 L. R. A. 135.

Laches synonymous.

Negligence is but another name for laches. *United States v. Winona & St. P. R. Co.* (U. S.) 67 Fed. 969, 971, 15 C. C. A. 117.

Malice distinguished.

Negligence is distinguished from malice, in that it arises from a failure of purpose, while malice arises from an evil purpose. *People v. Camp*, 21 N. Y. Supp. 741, 745, 66 Hun, 531 (citing *Whart. Cr. Law*, 126).

Misfeasance distinguished.

As used in reference to a carriers' liability, negligence takes place in the course of the performance of a contract, and misfeasance is an act done in contravention of it. *Lamont v. Nashville & C. R. Co.* (9 Heisk.) 58, 65.

Negligence is strictly misfeasance, not malfeasance. In the case of negligence there is no positive intention to do a wrongful act. Negligence is evidence of fraud, but it is not fraud. *Gardner v. Heartt* (N. Y.) 3 Denio, 232, 236.

As a question of fact or law.

Negligence is peculiarly a question for the jury. *Louisville, E. & St. L. C. R. Co. v. Berry*, 35 N. E. 565, 566, 9 Ind. App. 63.

Negligence is a question of fact to be determined by the jury upon all or the weight of the evidence. *Union Pac. Ry. Co. v. Mertes*, 58 N. W. 105, 106, 39 Neb. 448; *Galveston, H. & S. A. Ry. Co. v. Waldo* (Tex.) 32 S. W. 783, 784; *Atchison, T. & S. F. R.*

Co. v. Morrow, 45 Pac. 956, 961, 4 Kan. App. 199.

Negligence is generally understood to be a mixed question of law and fact. *Couch v. Charlotte, C. & A. R. Co.*, 22 S. C. 557, 562; *King v. City of Cleveland* (U. S.) 28 Fed. 835, 837; *Fuller v. Citizens' Nat. Bank* (U. S.) 15 Fed. 875, 878; *McMurtry v. Louisville, N. O. & T. Ry. Co.*, 7 South. 401, 402, 67 Miss. 601; *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190, 196.

Negligence is, generally speaking, a question of fact, and, as such, must be submitted to and determined by the jury. It sometimes becomes a question of law, but this only in rare instances. When this occurs, it depends upon the circumstances of each particular case. *Allen v. Florence & C. C. Ry. Co.*, 61 Pac. 491, 492, 15 Colo. App. 213.

Negligence is ordinarily a question for the jury, but only when the facts would authorize a jury to infer it. *Hope v. Fall Brook Coal Co.*, 38 N. Y. Supp. 1040, 1043, 3 App. Div. 70.

Negligence is, in general, a conclusion from the facts in evidence, to be drawn by the jury under instructions from the court, and is always so when the facts or conclusions rest in doubt. When the inferences to be drawn from the testimony are not clear and uncontrovertible, and men of ordinary judgment and discretion might differ as to its significance, it is the exclusive province of the jury to pass upon the question involved. *Siebrecht v. Pennsylvania R. Co.*, 48 N. Y. Supp. 3, 5, 21 Misc. Rep. 615; *Whitcher v. Boston & M. R. Co.*, 46 Atl. 740, 742, 70 N. H. 242.

The term "negligence" includes a failure to perform a defined duty, and may be so determined by the court. But when the measure of duty is not unvarying, where a higher degree of care is demanded in some circumstances than under others, and where both the duty and the extent of the performance are to be ascertained as facts, a jury alone may determine what is negligence, and whether it has been proved. *Baker v. Westmoreland & C. Natural Gas Co.*, 27 Atl. 789, 791, 157 Pa. 593; *Delaware, L. & W. R. Co. v. Jones*, 18 Atl. 330, 331, 128 Pa. 308; *Schum v. Pennsylvania R. Co.*, 107 Pa. 8, 11, 52 Am. Rep. 468; *Holmes v. Allegheny Traction Co.*, 25 Atl. 640, 641, 153 Pa. 152; *Warner v. Baltimore & O. R. Co.*, 18 Sup. Ct. 68, 71, 167 U. S. 467, 42 L. Ed. 239 (citing *Pennsylvania R. Co. v. White*, 88 Pa. 331, 333).

When the facts are clear and undisputed, and when no other inference than that of negligence can be drawn from them, the court is not required to submit the question to the jury, but may himself make the inference. The same act which would be negligence in

an adult may not be such if done by a child, but the child is required to exercise the same degree of care that would be expected from children of his age, or which children of his age would ordinarily exercise; and the court has full authority, as a rule, to determine what this degree of care is. Children as well as adults should use the prudence and discretion which persons of their years ordinarily have, and they cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless. *Studer v. Southern Pac. Co.*, 53 Pac. 942, 943, 121 Cal. 400, 66 Am. St. Rep. 39.

Negligence is always a question for the jury when there is a reasonable doubt either as to the facts, or inferences of fact to be drawn from the testimony. *Gates v. Pennsylvania R. Co.*, 26 Atl. 598, 599, 154 Pa. 566; *Pennsylvania R. Co. v. Peters*, 9 Atl. 317, 318, 116 Pa. 206; *Pennsylvania R. Co. v. White*, 88 Pa. 327, 331; *Same v. State*, 61 Md. 108, 117; *Warner v. Baltimore & O. R. Co.*, 18 Sup. Ct. 68, 71, 168 U. S. 339, 42 L. Ed. 491; *McGrath v. Hudson River R. Co.* (N. Y.) 32 Barb. 144, 147.

Negligence, in one sense, is a quality attaching to acts dependent upon and arising out of the duties and relations of the parties concerned, and is as much a fact to be found by a jury as the alleged acts to which it attaches by virtue of such duties and relations. *Townley v. Chicago, M. & St. P. Ry. Co.*, 11 N. W. 55, 57, 53 Wis. 626; *Kaples v. Orth*, 61 Wis. 531, 533, 21 N. W. 633; *Kutcher v. Goodwillie*, 67 N. W. 729, 730, 93 Wis. 448; *Stadler v. Grieben*, 21 N. W. 629, 634, 61 Wis. 500.

Negligence may, for convenience, be divided into two classes—that which the law declares to be negligence, and that to be found from the facts in the given case. Whenever the law imposes a duty, and the infraction causes damage to some other person, upon proof of an infraction of the law and the resultant damage the negligence would be a matter of law; but, where the facts do not show an infraction of a positive statute, then the question of whether a certain act was negligence becomes a matter of fact, to be determined from the proof by the jury, and the judge would not have any authority to declare that the doing of certain acts not prescribed by statute was negligence unless there was overwhelming, uncontradicted proof of negligence. *San Antonio & A. P. Ry. Co. v. Long*, 23 S. W. 499, 500, 4 Tex. Civ. App. 497.

For any given state of facts the law determines the duty, the failure or neglect in the performance of which is negligence. Whether the duty has been performed or not, or whether properly or improperly performed, is a question of fact. *Schoonmaker v. Al-*

berton Machinery Co., 51 Conn. 387. The idea of the performance of duty suggests a further subdivision. What is the standard by which the performance of a duty is to be measured? When may it be said that a duty has been performed adequately or inadequately? And may it be a question of law, or is it a question of fact? Doubtless there may be instances in which the law, either in terms, or by the general agreement of the judgments of men, fixes definitely the standard up to which performance must fully come in order to escape the charge of negligence. In such instances the standard of duty, being determinate, and so the same under all circumstances, may be applied, as matter of law, by the court to the facts found in the case. *Empire Transp. Co. v. Wamsutta Oil Co.*, 63 Pa. 14, 3 Am. Rep. 515. In most cases the measure of duty itself varies according to the circumstances which the case presents. The standard, then, is that of a reasonable man. What would a reasonable man of ordinary prudence have done under the circumstances as they existed in the case? In these instances both the measure of duty and the extent of performance must be ascertained as facts. *O'Neill v. Town of East Windsor*, 27 Atl. 237, 238, 63 Conn. 150.

The question of negligence is generally one of fact for the jury. It is only where the facts and the inferences to be drawn therefrom are such that reasonable minds must reach the same conclusion that the question is ever considered one of law for the court. There is no fixed standard in the law by which the court is enabled to say arbitrarily in each case where the line can be drawn between negligence and ordinary care. What may be deemed care in one case may under different circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. *Tacoma Ry. & Power Co. v. Hays* (U. S.) 110 Fed. 496, 499, 49 C. C. A. 115.

Negligence is always a question for the jury. When the evidence upon material points is conflicting, and even when the facts are undisputed, if they are of such a character that different minds might draw different conclusions from them, the case should be submitted to the jury. Nor can negligence be conclusively established, as a matter of law, upon a state of facts upon which clear-minded men of ordinary intelligence might well differ as to the inferences to be drawn from them; and, when the question of negligence arises upon even a conceded state of facts, from which reasonable men might arrive at different conclusions, or if the inferences to be drawn from the evidence are not certain or interpretable, the question of negligence cannot be passed on by the court. *Lamb v. Missouri Pac. Ry. Co.*, 48 S. W. 659, 663, 147 Mo. 171.

Negligence is a question of fact for the jury, and not a question of law. It is the opposite of care and prudence; the omission to use the reasonable means necessary to avoid injury to others, and is not a legal question, but one of fact, to be proved like any other question. *Chicago & A. Ry. Co. v. Pennell*, 94 Ill. 448, 455.

Whether the care exercised by a railroad company to avoid collisions at crossings is reasonable, or whether, by the omission of such precautionary measures as were proper, or as they had accustomed travelers on the highway to expect, the railroad company has been guilty of negligence, is a question of fact, to be determined by the jury upon all the circumstances of the case. *Pennsylvania R. Co. v. Miller* (U. S.) 99 Fed. 529, 531, 39 C. C. A. 642.

As relative term.

Negligence is neither more nor less than a failure of duty. *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440, 449; *Ashman v. Flint & P. M. R. Co.*, 51 N. W. 645, 647, 90 Mich. 567; *Salmon v. Delaware, L. & W. R. R. Co.*, 38 N. J. Law (9 Vroom) 5, 11, 20 Am. Rep. 356; *Lake Shore & M. S. Ry. Co. v. Kurtz*, 37 N. E. 303, 304, 10 Ind. App. 60; *Citizens' St. Ry. Co. v. Merl*, 59 N. E. 491, 493, 28 Ind. App. 284; *Galveston, H. & S. A. Ry. Co. v. Brown*, 63 S. W. 305, 306, 95 Tex. 2; *Thomas v. Missouri Pac. Ry. Co.*, 18 S. W. 980, 985, 109 Mo. 187; *Ledig v. Germania Brewing Co.*, 25 Atl. 870, 153 Pa. 298; *Emry v. Roanoke Navigation & Water Power Co.*, 16 S. E. 18, 111 N. C. 94, 17 L. R. A. 699; *Miller v. Union Pac. R. Co.* (U. S.) 17 Fed. 67, 68; *The St. Georg* (U. S.) 104 Fed. 898, 901, 44 C. C. A. 246; *Rosen v. Chicago G. W. Ry. Co.* (U. S.) 83 Fed. 300, 304, 27 C. C. A. 534; *United States v. Keller* (U. S.) 19 Fed. 633, 637; *Sherman v. Western Transp. Co.* (N. Y.) 62 Barb. 150; *Tonawanda R. Co. v. Munger* (N. Y.) 5 Denio, 255, 266, 49 Am. Dec. 239; *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512, 527; *Jacksonville S. E. Ry. Co. v. Southworth*, 25 N. E. 1093, 1094, 135 Ill. 250; *Little Rock & Ft. S. Ry. Co. v. Lawton*, 18 S. W. 543, 545, 55 Ark. 428, 15 L. R. A. 434, 29 Am. St. Rep. 48; *Holmes v. Irwin*, 25 N. W. 334, 335, 18 Neb. 313; *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 167, 180; *Schoonmaker v. Albertson & Douglass Mach. Co.*, 51 Conn. 387, 392.

Negligence, in law, is a relative term. *Kelley v. Michigan Cent. R. Co.*, 31 N. W. 904, 905, 65 Mich. 186, 8 Am. St. Rep. 876. In the abstract, it is a nullity. It does not and it cannot, in the nature of things, exist. It is metaphysically impossible to evolve a concept of negligence apart from the facts which give rise to it, and independently of some imposed or implied correlative duty. The duty must be essentially related to the particular circumstances, and a variance in the circumstances necessarily begets either a modifica-

tion of the duty, or else extinguishes it altogether. *Baltimore City Pass. Ry. Co. v. Nugent*, 38 Atl. 779, 781, 86 Md. 349, 39 L. R. A. 161. It depends on the degree of care necessary in a given case. *Taylor v. Town of Constable*, 10 N. Y. Supp. 607, 609, 57 Hun, 371. Thus he who approaches a railroad crossing approaches a place of danger, and he must look and listen, for he is bound to anticipate a possible harm, but one who passes along a sidewalk has a right to presume it to be safe. He is not called upon to anticipate danger, and is not negligent for not being on his guard. *McGuire v. Spence*, 91 N. Y. 303, 305, 43 Am. Rep. 668. What might be negligence under some circumstances, or at some time or place, may not be so under other circumstances, or at another time and place. Reasonable and proper care must have reference to surrounding circumstances. *King v. City of Cleveland* (U. S.) 28 Fed. 835, 837; *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475, 482 (citing *Davis v. Chicago & N. W. R. Co.*, 17 N. W. 406, 412, 58 Wis. 646, 46 Am. Rep. 667). These may often demand a higher or lower degree of care and diligence of a party. *Fuller v. Citizens' Nat. Bank of Gallon* (U. S.) 15 Fed. 875, 878.

Negligence is a relative term, more or less. *Eichel v. Sawyer* (U. S.) 44 Fed. 845, 847. It cannot always be defined arbitrarily, applicable indifferently to every state of facts. It cannot always be determined abstractly. *Carter v. Kansas City Cable Ry. Co.* (U. S.) 42 Fed. 37, 38.

Negligence is always a relative question. *Lusby v. Atchison, T. & S. F. R. Co.* (U. S.) 41 Fed. 181, 184.

Negligence is a relative, not absolute, term. *Gorman v. Budlong*, 49 Atl. 704, 706, 23 R. I. 169, 55 L. R. A. 118, 91 Am. St. Rep. 629. It is not even an object of simple apprehension apart from the circumstances out of which it grows. As these circumstances necessarily vary in their relations to each other under different surroundings, they inevitably change their original signification and import. Hence it is intrinsically true that those things which would not under one condition constitute negligence would, on the other hand, under a different, though not necessarily an opposite, condition, most unequivocally indicate its existence. *Cooke v. Baltimore Traction Co.*, 31 Atl. 327, 328, 80 Md. 551.

Negligence is never absolute or intrinsic, but is always relative to the existing circumstances, *Stanfield v. Anderson* (Ariz.) 43 Pac. 221, 222, of time, place, or person. *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409, 424 (citing *Broom, Leg. Max.* 329); *Richardson v. Kier*, 34 Cal. 63, 75, 91 Am. Dec. 681; *Jamison v. St. Joe & S. C. R. Co.*, 55 Cal. 593, 596; *Union Pac. R. Co. v. Rollins*, 5 Kan. 167, 180; *Elster v. City of Springfield*, 30 N. E. 274, 278, 49 Ohio St. 82.

or manner, *Dicken v. Liverpool Salt & Coal Co.*, 23 S. E. 582, 41 W. Va. 511.

The term "negligence" is relative, and its application depends upon the situation of the parties, and the degree of care and vigilance which the circumstances confronting them reasonably imposed. *St. Louis, I. M. & S. Ry. Co. v. Lewis*, 30 S. W. 765, 766, 60 Ark. 409; *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512, 521. That degree is not the same in all cases, but may vary according to the danger involved in the want of vigilance. All the surrounding or attendant circumstances must be taken into account when the question involved is one of negligence. *Diamond State Iron Co. v. Gilles (Del.)* 11 Atl. 189, 193, 7 Houst. 557.

Negligence is a relative term, depending upon the circumstances under which the injury was received, and the occupation which resulted in the particular injury, and the care for his personal safety. *New Jersey Express Co. v. Nichols*, 33 N. J. Law (4 Vroom) 434, 440, 97 Am. Dec. 722.

Negligence is want of ordinary care under the circumstances, and the standard is therefore necessarily variable. No fixed rule of duty can be formed, which can apply to all cases. A course of conduct justly regarded as resulting in the exercise of ordinary care under some circumstances would exhibit the grossest degree of negligence under other circumstances. The opportunity for deliberation and action, the degree of danger, and many other considerations of a like nature, affect the standard of care which may be reasonably required in a particular case. *Schum v. Pennsylvania R. Co.*, 107 Pa. 8, 11, 52 Am. Rep. 468.

No fixed rule of duty applicable to all cases, can be established. The opportunity for deliberation, the degree of danger, and many other considerations of like nature affect the standard of care which may be reasonably required in the particular case. *Pennsylvania R. Co. v. Coon*, 3 Atl. 234, 241, 111 Pa. 430.

It is impossible to make any cast-iron rule that will apply to every transaction in life, and to say to do that is negligence, because the positions which people occupy are so different, and their surroundings are so various, that it must depend on the circumstances as they then exist. *Ledig v. Germania Brewing Co.*, 25 Atl. 870, 153 Pa. 298.

What constitutes such negligence or want of care and prudence as will render a party liable for an injury resulting to another from an act not unlawful in itself depends upon the circumstances of each particular case. *Bizzell v. Booker*, 16 Ark. 308, 320, 327.

The Supreme Court of the United States has indicated in an opinion of Mr. Justice

Davis, in *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 494, 23 L. Ed. 374, and has repeatedly expressed its disapprobation of attempts to fix the degree of negligence by legal definition. Among the reasons there given, in a quotation from the opinion of Mr. Justice Curtice, is that the signification of such definition necessarily varies according to the circumstances. *Lockwood v. Belle City St. Ry. Co.*, 65 N. W. 866, 870, 92 Wis. 97.

Negligence, as a question of fact, must of necessity vary with the circumstances of each particular case. *Karle v. Kansas City, St. J. & C. B. R. Co.*, 55 Mo. 476, 483.

"Negligence" and "gross negligence" are relative terms. An act under certain circumstances might be simply negligent. The same act under other circumstances might be grossly negligent. Undoubtedly a carrier would be charged with greater care in handling valuable glass than in handling ironware, or in transporting a package of gold than one of brass. So what might be slight negligence in a telegraph operator in transmitting a message of apparent slight importance might be gross negligence in transmitting one of apparent great importance. *Pegram v. Western Union Tel. Co.*, 2 S. E. 256, 257, 97 N. C. 57.

The definitions of negligence which have been attempted imply that a higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business, which involve little or no risk of injury to person or property. While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say, in general terms, that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. This would require, in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to provide against the escape of gas therefrom, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of leaks that might occur from the deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in business. *United Oil Co. v. Roseberry*, 69 Pac. 588, 590, 30 Colo. 177 (quoting *Koelsch v. Philadelphia Co.*, 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653).

Recklessness distinguished.

See "Reckless — Recklessly — Recklessness."

As want of care.

"Negligence" means a want of care. "Ordinary negligence" means a want of ordi-

ary care. Negligence by omission—by leaving undone what ought to have been done—may be defined thus: Failing to do what a man of ordinary prudence would or should have done under the circumstances. *Oliver v. Columbia, N. & L. R. Co.*, 43 S. E. 307, 321, 65 S. C. 1.

Negligence has very often been defined to be the absence of care under the circumstances. *Philadelphia, W. & B. R. Co. v. Laver*, 3 Atl. 874, 877, 112 Pa. 414, 17 Wkly. Notes Cas. 384, 385.

Negligence is the want of care required by the circumstances. It may lie in omission or commission—in the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or in doing what such a person, under the existing circumstances, would not have done. *McCloskey v. Obautauqua Lake Ice Co.*, 34 Atl. 287, 288, 174 Pa. 34.

Negligence is the omission of care. *Smith v. New York Cent. R. Co. (N. Y.)* 29 Barb. 132, 138; *Atchison, T. & S. F. R. Co. v. Morrow*, 45 Pac. 956, 961, 4 Kan. App. 199.

Negligence signifies a want of care in the performance of an act by one having no positive intention to injure the person complaining of it. *Beers v. Boston & A. R. Co.*, 34 Atl. 541, 544, 67 Conn. 417, 32 L. R. A. 535, 52 Am. St. Rep. 293 (citing *Pitkin v. New York & N. E. R. Co.*, 30 Atl. 772, 64 Conn. 482).

Same—Person of common sense and prudence.

Negligence may be described as the want of that care which men of common sense and common prudence ordinarily exercise in like employments. *O'Brien v. Philadelphia, W. & B. R. Co. (Pa.)* 3 Phila. 76, 78.

"Negligence" means without exercising that degree of care which a person of ordinary common sense and prudence, under like circumstances and in the performance of a like act, would have exercised. *Flesh v. Lindsay*, 21 S. W. 907, 909, 115 Mo. 1, 37 Am. St. Rep. 374.

Same—Person of great care and prudence.

The degree of care required is in proportion to the nature and requirements of the business, and is such as would ordinarily be exercised by persons of great care and prudence under similar circumstances, and the want of such care is negligence. *Missouri, K. & T. Ry. Co. v. Russell*, 28 S. W. 1042, 8 Tex. Civ. App. 578.

Same—Man of ordinary care and prudence.

Negligence is a question of ordinary care. It is the caution and vigilance which

reasonable men exercise under like circumstances, or, as it is aptly expressed in *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570, it is "that degree of care which persons of ordinary care and prudence are accustomed to use and employ under the same or similar circumstances, in order to conduct the enterprise in which they are engaged to a safe and successful termination." It would be rather extreme doctrine to say that a passenger on a caboose attached to a freight train on its approach to a station, actuated by natural curiosity to look out and observe towns and surroundings, in the absence of any windows permitting an outlook, would be heedless of his own personal safety simply because he got upon his feet under such circumstances, unless it can be maintained that the habit of such cars on approaching stations was to stop so suddenly and violently as to make it perilous for a passenger to be upon his feet at all at such times, and that this fact was known to the plaintiff. *Lusby v. Atchison, T. & S. F. R. Co. (U. S.)* 41 Fed. 181, 184.

Negligence means the absence of that degree of care and vigilance which persons of ordinary prudence and care would exercise under the same or similar circumstances. *Meadows v. Truesdell (Tex.)* 56 S. W. 932.

While negligence is neither more nor less than a failure of duty, it is a well-recognized fact that, in law, no one can be guilty of negligence who uses, in his acts or in his omissions to act, the care and prudence that would have been exercised under like circumstances by an ordinarily careful and prudent man. *Ashman v. Flint & P. M. R. Co.*, 51 N. W. 645, 647, 90 Mich. 567.

"Negligence" means the failure to exercise the care usually exercised by parties of ordinary caution and prudence in like circumstances. *Helfenstein v. Medart*, 36 S. W. 863, 866, 136 Mo. 595.

Negligence exists when one has failed to exercise that care which persons of ordinary prudence and caution would exercise under like circumstances. *Huntington County Com'rs v. Bonebrake*, 45 N. E. 470, 472, 146 Ind. 311.

Same—Man of ordinary prudence.

Negligence means the failure to exert the degree of care and caution in order to avoid danger which would be exercised by a man of ordinary prudence under like circumstances. *Morris v. State*, 33 S. W. 539, 35 Tex. Cr. R. 313.

Negligence consists in a want of that reasonable care which would be exercised by a person of ordinary prudence under all the existing circumstances; *Little Rock & Ft. S. Ry. Co. v. Atkins*, 46 Ark. 423, 430; in view of the probable danger of injury, *Young v.*

Detroit, G. H. & M. Ry. Co., 23 N. W. 67, 69, 56 Mich. 430; Galveston, H. & S. A. R. Co. v. Eitzen (Tex.) 39 S. W. 625, 626; Galveston, H. & S. A. Ry. Co. v. Waldo (Tex.) 32 S. W. 783, 784; Gratiot v. Missouri Pac. Ry. Co. (Mo.) 19 S. W. 31, 34.

By the term "negligence" is meant the want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances. *Wilkins v. St. Louis, I. M. & S. Ry. Co.*, 13 S. W. 893, 894, 895, 101 Mo. 93; *Louisville, E. & St. L. C. R. Co. v. Berry*, 35 N. E. 565, 566, 9 Ind. App. 63; *Galveston, H. & S. A. Ry. Co. v. Simon* (Tex.) 54 S. W. 309, 310; *Missouri, K. & T. Ry. Co. of Texas v. Webb*, 49 S. W. 526, 529, 20 Tex. Civ. App. 431 (citing *Gulf, C. & S. F. Ry. Co. v. Hodges*, 13 S. W. 64, 65, 76 Tex. 90); *Studer v. Southern Pac. Co.*, 53 Pac. 942, 943, 121 Cal. 400, 66 Am. St. Rep. 39; *City of Baltimore v. Holmes*, 39 Md. 243, 249; *Western Md. R. Co. v. Stanley*, 61 Md. 266, 276, 48 Am. Rep. 96.

In determining whether there was negligence, the material inquiry is, was there any failure to exercise ordinary care; was anything done or omitted which a person of ordinary prudence under like circumstances would not have done or omitted; and, if so, was the injury caused thereby, or did such failure contribute thereto? If the injury was occasioned by slight want of ordinary care, when it would not have resulted but for that, then it is as much the outcome of negligence as though caused by some grave and wanton disregard of duty. So, where any want of ordinary care, however slight, contributes to the injury, as an efficient cause thereof, recovery cannot be had. *Jerolman v. Chicago G. W. Ry. Co.*, 78 N. W. 855, 856, 108 Iowa, 177.

Negligence in managing and restraining domestic animals is the absence of such methods and means of care as would be employed by men of ordinary prudence. *Chicago, St. L. & P. R. Co. v. Fenn*, 29 N. E. 790, 791, 3 Ind. App. 250.

Same—Man of ordinary and reasonable prudence.

Where a train was standing on a highway, and many persons were passing between the cars, going to a fire, in determining whether the employes were guilty of negligence in moving the train, the court, in his charge to the jury, defined negligence to be the failure to use such care as men of ordinary and reasonable prudence would have used under the circumstances. *San Antonio & A. P. Ry. Co. v. Green* (Tex.) 49 S. W. 672, 673.

"Negligence," says Mr. Justice Mercur in delivering the opinion of the court in *Fritsch v. City of Allegheny*, 10 Norris, 226, 'is the absence of proper care, caution, and

diligence—of such care, caution, and diligence as, under the circumstances, reasonable and ordinary prudence would require to be exercised." *Kibele v. City of Philadelphia*, 105 Pa. 41, 44.

Same—Ordinary man.

A definition of negligence in a charge as a failure to exercise that degree of care which persons ordinarily exercise under like circumstances, though somewhat meager, seems to fairly express the generally accepted legal meaning of the term. *Patry v. Chicago, St. P., M. & O. Ry. Co.*, 52 N. W. 312, 313, 82 Wis. 408.

The use of the expression "such care as an ordinary man," or "an ordinary business man," would use, in an instruction defining the degree of diligence and care required of a railroad company to avoid liability on a charge of negligence, and in determining the question of contributory negligence, is improper. *Houston & T. C. Ry. Co. v. Smith*, 13 S. W. 972, 77 Tex. 179.

Same—Ordinary careful and prudent person.

Negligence is a want or absence of that degree of care which an ordinary careful and prudent person would exercise under the circumstances. *Larsh v. City of Des Moines*, 38 N. W. 384, 385, 74 Iowa, 512.

Same—Ordinarily prudent man in his own affairs.

Negligence is the lack of that care which an ordinarily prudent man would exercise in the management of his own affairs, *Texas & P. R. Co. v. Gorman*, 21 S. W. 158, 2 Tex. Civ. App. 144; under the circumstances of the given case, *Missouri, K. & T. Ry. Co. v. Webb*, 49 S. W. 526, 529, 20 Tex. Civ. App. 431.

Negligence is the want of such care as a prudent man takes of his own affairs. *Trout v. Virginia & T. R. R. (Va.)* 23 Grat. 619, 630.

The term "negligence" imports a want of such attention to the nature or probable consequences of the act or omission referred to as a prudent man ordinarily bestows in acting in his own concerns. *Ann. Codes & St. Or.* 1901, § 2177; *Rev. St. Okl.* 1903, § 2687; *Pen. Code Ariz.* 1901, par. 7, subd. 2; *Gen. St. Minn.* 1894, § 6842, subd. 1; *Pen. Code Cal.* 1903, § 7, subd. 2; *Rev. Codes N. D.* 1899, § 7714; *Pen. Code S. D.* 1903, § 809; *Pen. Code Idaho* 1901, § 4544, subd. 2; *Pen. Code N. Y.* 1903, § 718; *Rev. St. Utah* 1893, § 4053; *Pen. Code Mont.* 1895, § 7, subd. 2.

Same—Ordinarily prudent person.

Negligence is the absence of such care as an ordinarily prudent person would take under the circumstances and surroundings of

any given case. *Weaver v. Iselin*, 29 Atl. 49, 52, 161 Pa. 386.

Same—Prudent, careful, diligent, or skillful man.

It is conceded by all the authorities that the standard by which to determine whether a person has been guilty of negligence is the conduct of a prudent, careful, diligent, or skillful man in the particular situation. *Big Torts*, 289.

Negligence is the want of proper care, caution, and diligence—such care, caution, and diligence as, under the circumstances, a man of ordinary and reasonable prudence would exercise. *McCully v. Clarke*, 40 Pa. 402, 80 Am. Dec. 584. Negligence is the failure to exercise that degree of care and caution which a man of ordinary diligence would exercise under the circumstances of a particular case. *Cleghorn v. Thompson*, 64 Pac. 605, 607, 62 Kan. 727, 54 L. R. A. 402 (citing *Gravelle v. Minneapolis & St. L. R. Co.* [U. S.] 10 Fed. 711).

Same—Prudent and just man.

Negligence is the absence of such care and regard for the rights of others as a prudent and just man would and should have shown in the same situation. *Collins v. Charters Valley Gas Co.*, 18 Atl. 1012, 1014, 131 Pa. 143, 6 L. R. A. 280, 17 Am. St. Rep. 791.

Same—Reasonable and provident person.

Negligence is the failure to do what a reasonable and provident person would ordinarily have done under the circumstances. *Neininger v. Cowan* (U. S.) 101 Fed. 787, 791, 42 C. C. A. 20.

Same—Reasonable and prudent person.

Negligence is the absence of that degree of care which a reasonable and prudent person would exercise under given circumstances. *Pittsburgh, C. & St. L. Ry. Co. v. Bennett*, 35 N. E. 1033, 1040, 9 Ind. App. 92.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation—the omission to use means reasonably necessary to avoid injury to others. *Bradley v. Ohio River & C. Ry. Co.*, 36 S. E. 181, 183, 128 N. C. 735.

In *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563, 67 N. W. 479, 33 L. R. A. 598, 58 Am. St. Rep. 709, it is said that negligence may consist in the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do. *Geist v. Missouri Pac. R. Co.*, 87 N. W. 43, 48, 62 Neb. 309.

Negligence is a want of that care and prudence which reasonable, careful, and pru-

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dent men will take under the same circumstances to avoid accident or injury to others. *Holmes v. Allegheny Traction Co.*, 25 Atl. 640, 641, 153 Pa. 152.

Same—Reasonably prudent and cautious man.

Negligence may be defined to be the want of such care as reasonably prudent men generally would use. Though it were better to omit the word "generally," still its use does not invalidate the definition in an instruction. *San Antonio & A. P. Ry. Co. v. Belt*, 59 S. W. 607, 610, 24 Tex. Civ. App. 281.

"Negligence" means a failure to exercise such caution and care as a reasonably prudent and cautious person would usually exercise with reference to a similar matter in similar circumstances. *Gulf, C. & S. F. Ry. Co. v. Pendery*, 36 S. W. 793, 794, 14 Tex. Civ. App. 60.

Negligence is the want of such care or circumspection as a reasonably prudent man takes in similar cases. *Robinson v. Simpson* (Del.) 32 Atl. 287, 8 Houst. 398.

Same—Required by circumstances.

Negligence is the absence of care according to the circumstances. *McKelvey v. Twenty-Third St. Ry. Co.*, 26 N. Y. Supp. 711, 712, 5 Misc. Rep. 424; *Warner v. Baltimore & O. R. Co.*, 18 Sup. Ct. 68, 71, 168 U. S. 339, 42 L. Ed. 491 (citing *Pennsylvania R. Co. v. White*, 88 Pa. 327, 333); *The Columbia* (U. S.) 61 Fed. 220, 9 C. C. A. 455; *Foster v. Union Traction Co.*, 49 Atl. 270, 199 Pa. 498; *O'Toole v. Pittsburgh & L. E. R. Co.*, 27 Atl. 737, 738, 158 Pa. 99, 22 L. R. A. 606, 38 Am. St. Rep. 830; *Vanesse v. Catsburg Coal Co.*, 28 Atl. 200, 201, 159 Pa. 403; *Merriman v. Phillipsburg Borough*, 28 Atl. 122, 123, 158 Pa. 78; *Borough of Easton v. Neff*, 102 Pa. 474, 478, 48 Am. Rep. 213; *Stokes v. Ralpho Tp.*, 40 Atl. 958, 961, 187 Pa. 333; *Delaware, L. & W. R. Co. v. Jones*, 18 Atl. 330, 331, 128 Pa. 308; *City of Altoona v. Lotz*, 7 Atl. 240, 242, 114 Pa. 238, 60 Am. Rep. 346; *Pennsylvania R. Co. v. Peters*, 9 Atl. 317, 318, 116 Pa. 206; *Fritz v. Jenner*, 31 Atl. 80, 166 Pa. 292; *Gates v. Pennsylvania R. R.*, 26 Atl. 598, 599, 154 Pa. 566; *Pennsylvania R. Co. v. State*, 61 Md. 108, 117; *St. Louis, I. M. & S. R. Co. v. Hecht*, 38 Ark. 357, 366; *Jones v. Carey* (Del.) 31 Atl. 976, 977, 9 Houst. 214; *Bacon v. Casco Bay Steamboat Co.*, 37 Atl. 328, 330, 90 Me. 46. This is equivalent to a statement that the nature and extent of the peril to be guarded against, and the extent of the calamity to be suffered in case of failure, are always to be considered in determining the degree of care to be exercised in any given case. *Willey v. Allegheny City*, 12 Atl. 453, 456, 118 Pa. 490, 4 Am. St. Rep. 608.

Negligence is the absence of that measure of care which circumstances require.

Jackson Tp. v. Wagner, 17 Atl. 903, 904, 127 Pa. 184, 14 Am. St. Rep. 833; Nugent v. Philadelphia Traction Co., 37 Atl. 206, 207, 181 Pa. 160.

Negligence is the failure to observe, for the protection of another's interests, such care, protection, and vigilance as the circumstances justly demand, and the want of which causes him injury. Jacksonville St. Ry. Co. v. Chappell, 21 Fla. 175, 184; City of Terre Haute v. Hudnut, 112 Ind. 542, 545, 13 N. E. 686; Brown v. Congress & B. St. Ry. Co., 49 Mich. 153, 157, 13 N. W. 494.

Whatever name we give it, negligence is failure to bestow the care and skill which the situation demands. Maslin v. Baltimore & O. R. Co., 14 W. Va. 180, 206, 35 Am. Rep. 748.

Actionable negligence exists from an omission to perform the duty of observing due care according to the circumstances to prevent injury to the person or property of one who has the right to expect that duty will be performed. Caniff v. Blanchard Navigation Co., 66 Mich. 638, 644, 33 N. W. 744, 11 Am. St. Rep. 541.

Negligence is the absence of the care required by the circumstances. When the measure of care is fixed, there is no question as to the circumstances. The question of negligence, or absence thereof, is for the court; and when the circumstances are in dispute, or such that the measure of care cannot be fixed, it is for the jury to determine its measure, and, from the facts found, to draw the conclusion of due care or of negligence. Menner v. Delaware & Hudson Canal Co., 7 Pa. Super. Ct. 135, 139.

In speaking of an alleged legal distinction between gross and ordinary negligence, the court observes that, strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party, and which he fails to perform, than of the amount of inattention, carelessness, and stupidity which he exhibits; and therefore, by whatever name it may be called, it is under such name a failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply negligence. Atchison & N. R. Co. v. Washburn, 5 Neb. 117, 120.

Same—Required by duty.

The failure to exercise such care, prudence, and forethought as duty requires to be given or exercised under the circumstances is negligence. Heckman v. Evenson, 73 N. W. 427, 429, 7 N. D. 173 (citing Brotherton v. Manhattan Beach Imp. Co., 48 Neb. 563, 67 N. W. 479, 33 L. R. A. 598, 58 Am. St. Rep. 709); Roberts v. Boston & M. R. Co., 45 Atl. 94, 69 N. H. 354; Geist v. Missouri Pac. R. Co., 87 N. W. 43, 48, 62 Neb. 309; Omaha St.

Ry. Co. v. Loehneisen, 58 N. W. 535, 536, 40 Neb. 37.

Legally speaking, negligence is the want of that care which the law requires us to exercise—which it exacts as a duty. This care may be due to one individual, and not to another; and therefore negligence in fact is not always negligence in law, for, unless a party can show that some duty to him is violated, he shows no legal negligence. Tower v. Providence & W. R. Co., 2 R. I. 404, 409.

Negligence constituting a cause of action is an omission by a responsible person to use that degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury. San Antonio & A. P. R. Co. v. Vaughn, 23 S. W. 745, 749, 5 Tex. Civ. App. 191. And such as, in a natural and continuous sequence, causes unintended damage to the latter. Shear. & R. Neg. § 3; Mexican Nat. Ry. Co. v. Crum, 25 S. W. 1126, 1128, 6 Tex. Civ. App. 702; Louisville, E. & St. L. C. R. Co. v. Bean, 36 N. E. 443, 9 Ind. App. 240.

Negligence is the violation of the duty of taking care—such care as the circumstances impose. Dicken v. Liverpool Salt & Coal Co., 23 S. E. 582, 41 W. Va. 511.

"Negligence is a violation of the obligation which enjoins care and caution in what we do." Carroll v. New York & New Haven R. Co., 11 N. Y. Leg. Obs. 144, 150. But this duty is relative, and, where it has no existence between particular parties, there can be no such thing as negligence, in the legal sense of the term. A man is under no obligation to be cautious and circumspect towards a wrongdoer. Tonawanda R. Co. v. Munger (N. Y.) 5 Denio, 255, 266, 49 Am. Dec. 239.

The term "negligence" has been variously defined, but, after all, means nothing more or less than the absence of care according to the nature of the duty and the exigencies of the case. Elze v. Baumann, 21 N. Y. Supp. 782, 784, 2 Misc. Rep. 72.

Negligence consists in the failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it. In making out negligence, the first requisite is to show the existence of a duty which has been neglected. Flint & P. M. Ry. Co. v. Stark, 38 Mich. 714, 717.

As want of due, proper, and ordinary care.

Negligence is the want of due care. Matulys v. Philadelphia & R. Coal & Iron Co., 50 Atl. 823, 825, 201 Pa. 70.

The failure to use due care is in itself negligence. Nudd v. Borough of Lansdowne 42 Atl. 474, 475, 190 Pa. 89.

Negligence is defined to be the want of due care or the failure to do that which under the law and circumstances is required. *City of Weir v. Herbert*, 51 Pac. 582, 6 Kan. App. 596.

Negligence is a negative principle. It is a want or absence of due care. It is not the negligence itself that causes the injury, but it is leaving something undone, whereby something else comes in and causes the injury. Negligence, then, must always, of necessity, be more or less remote. It, of course, has various degrees or shades of remoteness. *Union Pac. R. Co. v. Rollins*, 5 Kan. 167, 180.

Negligence ordinarily is the want of due and proper care. *Parker v. South Carolina & G. Ry. Co.*, 26 S. E. 669, 671, 48 S. C. 364.

Negligence is simply a want of proper care under the circumstances. *Nolder v. McKeesport, W. & D. Ry. Co.*, 50 Atl. 948, 201 Pa. 169; *Holmes v. Allegheny Traction Co.*, 25 Atl. 640, 641, 153 Pa. 152; *Turton v. Powelton Electric Co.*, 39 Atl. 1053, 1054, 185 Pa. 406.

If a man exercise due and ordinary care, he is not negligent. *Drake v. Mount*, 33 N. J. Law (4 Vroom) 441, 444.

As want of ordinary care.

Negligence is the want of ordinary care. *Texas & P. Ry. Co. v. Buckalew (Tex.)* 34 S. W. 165, 166; *Texas Cent. Ry. Co. v. Rowland*, 22 S. W. 134, 136, 3 Tex. Civ. App. 158; *San Antonio & A. P. Ry. Co. v. Gillum (Tex.)* 30 S. W. 697, 699; *Receivers of Missouri, K. & T. Ry. v. Pfleger (Tex.)* 25 S. W. 792, 793; *San Antonio St. Ry. Co. v. Watzlavzick (Tex.)* 28 S. W. 115, 116; *Houston & T. C. R. Co. v. Milam (Tex.)* 58 S. W. 735, 736; *San Antonio & A. P. Ry. Co. v. Manning*, 50 S. W. 177, 178, 20 Tex. Civ. App. 504; *Knopf v. Philadelphia, W. & B. R. Co. (Del.)* 46 Atl. 747, 748, 2 Pennewill, 392; *Quinn v. Johnson Forge Co. (Del.)* 32 Atl. 858, 860, 9 Houst. 338; *Adams v. Wilmington & N. C. Electric Ry. Co. (Del.)* 52 Atl. 264, 265, 3 Pennewill, 512; *Couch v. Charlotte, C. & A. R. Co.*, 22 S. C. 557, 562; *Bridger v. Asheville & S. R. Co.*, 25 S. C. 24, 31; *Stanley v. Union Depot Ry. Co.*, 21 S. W. 832, 834, 114 Mo. 606; *Lamb v. Missouri Pac. Ry. Co.*, 48 S. W. 659, 662, 147 Mo. 171; *Casper v. Dry Dock, E. B. & B. R. Co.*, 48 N. Y. Supp. 352, 354, 23 App. Div. 451; *Wellman v. Borough of Susquehanna Depot*, 31 Atl. 566, 167 Pa. 239; *O'Brien v. Philadelphia, W. & B. R. Co. (Pa.)* 3 Phila. 76, 78; *Johnson v. State*, 63 N. E. 607, 609, 66 Ohio St. 59, 61 L. R. A. 277, 90 Am. St. Rep. 564; *Miller v. Union Pac. R. Co. (U. S.)* 17 Fed. 67, 68; *Western & A. R. Co. v. Bussey*, 23 S. E. 207, 212, 95 Ga. 584; *Gorman's Adm'r v. Louisville Ry. Co. (Ky.)* 72 S. W. 760, 761; *Mills v. Louisville*

& N. R. Co., 76 S. W. 29, 31, 25 Ky. Law Rep. 488; *McLaughlin v. Louisville Electric Light Co.*, 18 Ky. Law Rep. 693, 699, 37 S. W. 851, 34 L. R. A. 812; *Decker v. McSorley*, 93 N. W. 808, 809, 116 Wis. 643; *Simonton v. Loring*, 68 Me. 164, 166, 28 Am. Rep. 29.

Negligence is a want of ordinary care under the circumstances. *Pennsylvania R. Co. v. Coon*, 3 Atl. 234, 241, 111 Pa. 430, 17 Wkly. Notes Cas. 137, 140; *Schum v. Pennsylvania R. Co.*, 107 Pa. 8, 11, 52 Am. Rep. 468; *Weaver v. Iselin*, 29 Atl. 49, 52, 161 Pa. 386; *Lehigh & Wilkesbarre Coal Co. v. Lear (Pa.)* 9 Atl. 267, 268; *Illinois Cent. R. Co. v. Coleman (Ky.)* 59 S. W. 13, 14; *Jerolman v. Chicago G. W. Ry. Co.*, 78 N. W. 855, 856, 108 Iowa, 177.

Negligence is the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would exercise under similar circumstances. *Knopf v. Philadelphia, W. & B. R. Co. (Del.)* 46 Atl. 747, 748, 2 Pennewill, 392; *Murphy v. Hughes (Del.)* 40 Atl. 187, 188, 1 Pennewill, 250.

Negligence is the failure to use ordinary care; that is to say, such care as a person of common prudence would exercise under the circumstances. *Miller v. Union Pac. R. Co. (U. S.)* 17 Fed. 67, 68.

As want of reasonable care.

The word "negligence" has very different meanings in relation to different causes of action known to the law. In some cases it means a very slight absence of care and prudence; and again, such a want of care as makes gross negligence. The words "without any negligence," in Acts 1838, c. 244, making a railroad company responsible in damages for property injured by fire caused by an engine on the road, unless it appears that the injury has been done without any negligence on its part, must be construed with reference to the class of cases to which the act refers, and therefore mean without any negligence occasioned by the want of reasonable care. *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242, 256, 59 Am. Dec. 72.

Negligence is a want of that reasonable care which would be exercised by a person of ordinary prudence under all the circumstances, in view of the probable danger of injury. *Passamaneck's Adm'r v. Louisville Ry. Co.*, 98 Ky. 195, 203, 32 S. W. 620.

As want of reasonable and ordinary care.

Negligence is the failure to exercise reasonable or ordinary care to avoid injury to others. It is a question of fact to be determined like all other questions of fact. *Fiske v. Forsyth Dyeing, Laundrying & Bleaching Co.*, 57 Conn. 118, 119, 17 Atl. 356.

As want of care and caution.

Negligence is an omission of care and caution in what we do. *Morris v. Brown*, 18 N. E. 722, 724, 111 N. Y. 318, 7 Am. St. Rep. 751.

As want of ordinary care and caution.

Negligence is the failure to exercise ordinary care and caution. *Gawlack v. Michigan Cent. R. Co.*, 11 Ohio Cir. Ct. R. 59, 64, 5 O. C. D. 313.

As want of care and diligence.

"Negligence is the want of care and diligence, and the degree of one is in inverse proportion to the degree of the other." *Hodgson v. Dexter* (U. S.) 12 Fed. Cas. 283.

"The standard to test the question of negligence is the common experience of mankind, and implies generally the want of that care and diligence which ordinarily prudent men would use to prevent injury under the circumstances of the particular case." *Southern Cotton Press & Mfg. Co. v. Bradley*, 52 Tex. 587, 599.

As want of ordinary care and diligence.

A failure to exercise ordinary care and diligence is negligence. *Martin v. Texas & P. Ry. Co.*, 26 S. W. 1052, 1053, 87 Tex. 117.

As want of care and prudence.

Negligence, according to the definition of this court in *Great Western R. Co. v. 1859 v. Haworth et al.*, 39 Ill. 346, 353, is the opposite of care and prudence—the omission to use the means reasonably necessary to avoid injury to others. *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512, 522.

Same—Man of ordinary intelligence.

Negligence is the want of that care and prudence which a man of ordinary intelligence would exercise under all the circumstances of the given case. *Harris v. Union Pac. R. Co.* (U. S.) 13 Fed. 591, 592; *Vass v. Town of Waukesha*, 63 N. W. 280, 282, 90 Wis. 337.

Negligence is the failure to exercise that degree of caution which a man of ordinary intelligence would exercise under the circumstances of a particular case. The degree of care which is required of a man is measured by the circumstances by which he is surrounded—by the nature of the duties in the performance of which he is engaged. What would be ordinary care and prudence under one set of circumstances might be negligence under another set of circumstances—as, for example, if a person is traveling along the public highway with his vehicle at an ordinary rate of speed, and no unusual circumstances to excite caution or induce care, in that case a very slight degree

of care may be considered sufficient; while, on the other hand, if he is engaged in coupling cars on a railroad, where there are a great number of cars and engines, the very nature of his employment requires greater care and attention than would be required under other circumstances. *Gravelle v. Minneapolis & St. L. R. Co.* (U. S.) 10 Fed. 711, 713.

Negligence is the want of ordinary care and prudence—such ordinary care and prudence as a man of common intelligence would exercise under the circumstances. *Ross v. Chicago, M. & St. P. R. Co.* (U. S.) 8 Fed. 544.

As want of ordinary care and prudence.

Negligence is the want of ordinary care and prudence; that is, such care as men of ordinary care and prudence exercise in matters of like kind, under like circumstances and surroundings, to avoid injury to others. *Atchison, T. & S. F. R. Co. v. Morrow*, 45 Pac. 956, 961, 4 Kan. App. 199.

As want of prudence.

Negligence is the opposite of prudence, and acts habitually done by prudent persons cannot be logically characterized as negligent. It is a fact widely known that prudent persons, as occasion may require, cross railroad tracks at other places than public crossings, and the mere fact that one may cross at such places would not make it negligence, though, were he to do so when a train was approaching, without looking and listening, it would doubtless be an act of negligence. *Galveston, H. & S. A. Ry. Co. v. Ryon*, 70 Tex. 56, 59, 7 S. W. 687, 690.

As an unintentional wrongful act.

"Negligence" is frequently used to express the cause of action where a party seeks redress for injury from an unintentional wrongful act. In the nomenclature of the common law, this is called "a cause of action enforceable by the action of trespass on the case"—"trespass," as signifying a passing over or beyond our right (that is, a transgression or wrongful act); "trespass on the case," as signifying a form of action devised to cover all cases where an actionable wrong is claimed under the particular circumstances of the stated case. "Negligence," so used, is a comparatively modern term of art, denoting a class of actions grouped under one head for the purpose of study and treatment. It covers the injury received; the act done, positive or negative; the proximate relation of the act to the injury; the legal rule of liability applicable to the case stated; and the application of that rule. The numerous definitions of actionable negligence attempt to state briefly and comprehensively the conditions essential to all of this group of actions.

"Negligence" is also used to denote the conception of moral blame or fault imputed to a person legally liable for the consequences of an unintentional act. *Nolan v. New York, N. H. & H. R. Co.*, 39 Atl. 115, 125, 70 Conn. 159, 43 L. R. A. 305. See, also, *Gardner v. Heartt* (N. Y.) 3 Denio, 232, 236.

As want of proper attention, care, or skill.

Negligence is the absence of proper attention, care, or skill. *Gardner v. Heartt* (N. Y.) 3 Denio, 232, 236.

As wrongful conduct springing from inadvertence.

Negligence, strictly so called, is wrongful conduct which springs from inadvertence to any extent, whether of active or passive character. *Bolin v. Chicago, St. P., M. & O. Ry. Co.*, 84 N. W. 446, 448, 108 Wis. 338, 8 Am. St. Rep. 911.

Willfulness distinguished.

Negligence is negative in its nature, implying the omission of duty, and excludes the idea of willfulness. *Cleveland, C. C. & St. L. Ry. Co. v. Tartt* (U. S.) 64 Fed. 823, 826, 12 C. C. A. 618.

Wharton says: "Negligence necessarily excludes a condition of mind which is capable either of designing an injury to another, or of agreeing that an injury should be received by another. To contributory negligence, therefore, the maxim, 'Volenti non fit injuria,' does not apply, because a negligent person exercises no will at all. The moment he wills to do the injury, or to combine in doing the injury, then he ceases to be negligent, and the case becomes one of malice or fraud." *Raming v. Metropolitan St. Ry. Co.*, 57 S. W. 268, 273, 157 Mo. 477.

Beach, *Cont. Neg.* § 62, points out very clearly the difference between negligence and wantonness, as follows: "The distinction between these two grades of fault is suggested in a famous New York decision, in which Beardsley, J., says negligence, even when gross, is but an omission of duty. It is not designed and intentional mischief. Notwithstanding the confusion in the use of these terms in the earlier cases, there is a somewhat settled and determined meaning for each of them as they are used by the judges at present. By 'negligence' is meant ordinary negligence—a term the significance of which is reasonably well fixed. By 'gross negligence' is meant exceeding negligence—that which is mere inadvertence in a superlative degree. It is the designation of the intensive, and not vituperative. By 'willful negligence' is meant not strictly negligence at all, to speak exactly, since negligence implies inadvertence, and whenever there is an exercise of the will in a particular di-

rection there is an end of inadvertence, but, rather, an intentional failure to perform a manifest duty, which is important to the person injured, in preventing the injury, in reckless disregard of the consequences as affecting the life or property of another. Such conduct is not negligent in any proper sense, and the term 'willful negligence,' if these words are to be interpreted with scientific accuracy, is a misnomer." *Holwerson v. St. Louis & S. Ry. Co.*, 57 S. W. 770, 777, 157 Mo. 216.

Law writers have classified negligence by such distinguishing names as "slight," "ordinary," and "gross." To these the courts have added the term "willful." Since "negligence" means inadvertence or carelessness—words implying an absence of thought, care, or intention—it has been said that the term "willful negligence" is a misnomer. Nevertheless the term has come to have a well-settled signification in the law. When a person charged with an important duty voluntarily does or omits something in respect of such duty, indicating a reckless or wanton disregard of consequences to the right of personal safety of another, his conduct is characterized as "willful negligence." *Victor Coal Co. v. Muir*, 38 Pac. 378, 385, 20 Colo. 320, 26 L. R. A. 435, 46 Am. St. Rep. 299.

Negligence involves the absence of willful injury, and is an unintended breach of duty, resulting in injury to the property or person of another. *The Strathdon* (U. S.) 89 Fed. 374, 378.

The terms "negligence" and "willfulness" are incompatible. Negligence arises from inattention, thoughtlessness, or heedlessness, while willfulness cannot exist without purpose or design. No purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such degree as to become willfulness. *Brooks v. Pittsburg, C. C. & St. L. R. Co.*, 62 N. E. 694, 697, 158 Ind. 62 (quoting *Parker v. Pennsylvania Co.*, 134 Ind. 673, 679, 34 N. E. 504, 23 L. R. A. 552); *Linton Coal & Mining Co. v. Persons*, 43 N. E. 651, 653, 15 Ind. App. 69; *Dull v. Cleveland, C. C. & St. L. Ry. Co.*, 52 N. E. 1013, 1014, 21 Ind. App. 571.

NEGLIGENCE, DEFAULT, OR MISCONDUCT.

"Negligence, default or misconduct," as used in a bill of lading exempting the railroad company from liability from its negligence, default, or misconduct in loading, unloading, conveyance, and otherwise, is to be construed as only including risks likely to arise from the nature of the freight, and from delays, casualties, and defaults occurring during a loading, transportation, un-

loading, and delivering a thing, and not to include "risks not incident to the ordinary transaction of business, and in no way likely to be incurred by the company, using ordinary care in the management of its affairs." *Hawkins v. Great Western R. R. Co.*, 17 Mich. 57, 62, 97 Am. Dec. 179.

NEGLIGENCE IN PROSECUTION.

Mistake as to the form of remedy is not negligence in prosecution of the suit, within the intent of a statute (2 Rev. St. p. 77, § 218) providing that if, after the commencement of an action, "the plaintiff fall therein from any cause, except negligence in the prosecution, * * * a new action may be brought within five years," etc. *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 172, 79 Am. Dec. 468.

"Negligence in its prosecution," as used in Code, § 2537, which provides that if, after the commencement of an action, the plaintiff fall therein for any cause except "negligence in its prosecution," and a new suit be brought within six months thereafter, the second suit shall be deemed a continuation of the first, would include a case where the attorneys employed to prosecute the suit had inadvertently mislaid papers, by reason of which they failed to do that which the law requires to be done. Intent is not a necessary ingredient of negligence, as the term is above used. Any failure through inattention, inadvertence, or forgetfulness would come within the meaning of the phrase. *Clark v. Stevens*, 7 N. W. 591, 592, 55 Iowa, 361.

NEGLIGENCE PER SE.

The omission to do what the law requires, or the failure to do anything in a manner prescribed by law, is negligence per se. *St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co.* (U. S.) 31 Fed. 755, 756.

After quoting an observation to the effect that there is a difference between negligence per se without regard to the surrounding circumstances, and negligence as a matter of law in view of all the circumstances, the court says: "This seems to be a refinement without substantial basis; a distinction without a difference. It seems at first blush to be somewhat ambiguous. What is the difference between negligence per se and negligence as a matter of law in view of all the circumstances? The ambiguity, however, disappears by putting the proposition in another form, and in a form, too, which does not change its significance. Negligence as a matter of law in view of all the circumstances is simply negligence as a matter of fact under the law, in view of all the circumstances, in a concrete case. That is to say, the court, sitting as a jury, finds the fact of negligence from all the circumstances, and then

declares the law upon the fact thus found. That the fact of negligence may be admitted, or may clearly appear from undisputed facts, does not render it any the less a fact as contradistinguished from law, and, when the court finds and declares it, it proceeds as a jury, and not as a court." *Gratiot v. Missouri Pac. Ry. Co.* (Mo.) 19 S. W. 31, 33.

While it may be conceded that to permit dry grass and weeds to accumulate on a railroad right of way is not negligence per se, yet the accumulation may be to such an extent, at such a season of the year, and in such proximity to the track that a jury would be justified in holding the company guilty of negligence. In the case of *Kesee v. Chicago & N. W. R. Co.*, 30 Iowa, 78, 6 Am. Rep. 643, the court laid down this rule: "To allow the dry grass, weeds, and other combustible matter and natural accumulations of the soil to remain on the right of way is not negligence per se, but there may be such peculiar or unusual circumstances in a given case as to amount to negligence; in fact, where such circumstances exist, they are proper to be submitted to the jury for the purpose of establishing the fact of negligence." *White v. Missouri Pac. Ry. Co.*, 1 Pac. 611, 612, 31 Kan. 280.

Fast driving upon a street is negligence per se, whether in violation of a city ordinance or not. *Robinson v. Simpson* (Del.) 32 Atl. 287, 8 Houst. 398.

Failure to look for an approaching car before attempting to cross a railway track is negligence per se. *Moser v. Union Traction Co.*, 55 Atl. 15, 16, 205 Pa. 481.

Conditions which render a railroad crossing dangerous do not authorize a departure from the rule which requires a person approaching it to stop, look, and listen before driving upon it, and the nonobservance of the rule is negligence per se. *Decker v. Lehigh Val. R. Co.*, 37 Atl. 570, 181 Pa. 463.

As omission of acts required by statute or ordinance.

The omission of specific acts of diligence prescribed by statute or by a valid municipal ordinance is negligence per se. *Central Railroad & Banking Co. v. Smith*, 3 S. E. 397, 78 Ga. 694.

Failure by a railroad company to observe the regulations of city ordinances in relation to the speed of trains, keeping headlights, and ringing the bell, is negligence per se, as are all violations of an express law. *Karle v. Kansas City, St. J. & C. B. R. Co.*, 55 Mo. 476, 483.

Failure of a railroad to have a flagman at a crossing, as required by a city ordinance, is negligence per se where injuries result to one from such omission. *Murray v. Missouri*

Pac. R. Co., 13 S. W. 817, 819, 101 Mo. 236, 20 Am. St. Rep. 601.

The violation of an ordinance regulating the speed of railroad trains in a city is negligence per se, although in New York and Pennsylvania it is held that the violation of a statute or ordinance of such kind is not negligence as matter of law, but only some evidence of negligence. *Jackson v. Kansas City, Ft. S. & M. R. Co.*, 58 S. W. 32, 38, 157 Mo. 621, 80 Am. St. Rep. 650.

Failure to perform statutory duties imposed on a mining corporation for the safety of its servants is negligence per se. *Diamond Block Coal Co. v. Cuthbertson (Ind.)* 67 N. E. 558, 559 (citing *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121; *Pennsylvania Co. v. Stegemeler*, 118 Ind. 305, 20 N. E. 843, 10 Am. St. Rep. 136).

NEGLIGENT.

The term "negligent" imports a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. *Rev. Codes N. D. 1899, § 7714; Pen. Code S. D. 1903, § 809; Gen. St. Minn. 1894, § 6842, subd. 1; Pen. Code Idaho 1901, § 4544, subd. 2; Pen. Code N. Y. 1903, § 718; Rev. St. Utah 1898, § 4053; Pen. Code Mont. 1895, § 7, subd. 2; Ann. Codes & St. Or. 1901, § 2177; Pen. Code Cal. 1903, § 7, subd. 2; Pen. Code Ariz. 1901, par. 7, subd. 2; Rev. St. Okl. 1903, § 2687.*

"Negligent" ordinarily means careless, heedless, liability to omit what ought to be done. "Incompetent" signifies either ignorance of how to do a thing perfectly, or that mental make-up or acquired habit which renders one neglectful, careless, and incompetent, though possessing sufficient knowledge and experience to do with reasonable care and skill the work in hand. The inattention and carelessness refers, in such circumstances, not to the particular act, but to the general character, so as to affect, in fact, the capacity of the person for the work he is employed to do. Citing *Maitland v. Gilbert Paper Co.*, 72 N. W. 1124, 97 Wis. 476, 65 Am. St. Rep. 137. And hence an allegation in a petition that a fellow servant was negligent in the performance of certain acts is not equivalent to an allegation that the fellow servant was incompetent. *Kliefoth v. Northwestern Iron Co.*, 74 N. W. 356, 357, 98 Wis. 495.

An allegation and proof that persons are negligent and careless is not an allegation nor proof that they were incompetent. A competent person may be careless, and an incompetent person may, as far as his knowledge or skill goes, be careful. *Kelly v. Cable Co.*, 34 Pac. 611, 613, 13 Mont. 411.

The failure, in a count charging the construction of a boom in a negligent, unskillful, and unlawful manner, to use the word "wrongful," does not render the count defective, as the words "negligent" and "unlawful" fully supply its place. *Pickens v. Coal River Boom & Timber Co.*, 41 S. E. 400, 401, 51 W. Va. 445, 90 Am. St. Rep. 819.

The use of the word "negligent," as applied to the conduct of defendant in a statement of claim for breach of contract, does not convert the action into one ex delicto, but the term may be used in setting up a breach of contract, as aptly as in alleging the violation of public duty. *Corry v. Pennsylvania R. Co.*, 10 Pa. Super. Ct. 232, 239.

NEGLIGENT CONSTRUCTION.

By "negligent construction," as applied to a railroad crossing, we mean such an improper construction of the crossing, whether arising from negligence, indifference, or methods of economy, as necessarily increases the danger of using the public highway. *Edwards v. Atlantic Coast Line R. Co.*, 39 S. E. 730, 731, 129 N. C. 78.

NEGLIGENT ESCAPE.

A "negligent escape" necessarily implies some neglect of duty or default of the sheriff. Where by statute a sheriff was obliged to give a prisoner the liberties of the prison upon due security being given, the fact that a prisoner allowed such liberties was seen at large by the sheriff beyond the liberties of the prison, and that the sheriff made no effort to restrain him, would not constitute a negligent escape. Had the sheriff had any power under the statute to restrain the prisoner, it would have constituted a voluntary escape rather than a negligent escape, but, this not being the case, it constituted neither. *Tillman v. Lansing (N. Y.)* 4 Johns. 45, 48.

In an action under a statute of North Carolina which gives debt against a sheriff who shall willfully or negligently suffer a debtor taken in execution to escape, the court said: "There are at the common law two kinds of escape; the one willful, or 'voluntary,' as it is oftener called; the other negligent. Whether before or after the judgment, the common law gave an action on the case for an escape of either kind. The difference, and the only difference, between the consequences of voluntary and negligent escapes of a debtor in execution, was that in the former case the sheriff could not retake the party, whereas in the latter he might; and if he did so upon fresh pursuit, and subsequently kept the party in safe custody, the recaption formed a defense to an action afterwards brought." The same rule applies under the statute. Nothing could purge a voluntary escape, when prosecuted either at the common law or un-

der the statute, and, in both, recaption before action brought for a negligent escape was a bar. An escape is voluntary when it is by the consent or default of the officer; all other escapes are negligent. *Adams v. Turrentine*, 30 N. C. 147, 151, 152.

NEGLIGENT HOMICIDE.

Pen. Code, art. 579, defines "negligent homicide" as causing the death of another negligently and carelessly in the performance of a lawful act. *Anderson v. State*, 11 S. W. 33, 27 Tex. App. 177, 181, 3 L. R. A. 644, 11 Am. St. Rep. 189.

NEGLIGENT PER SE.

In order that an act shall be deemed negligent per se, it must have been done contrary to the statutory duty, or must appear so opposed to the dictates of common prudence that we can say without hesitation or doubt that no careful person would have committed it. *Missouri Pac. Ry. Co. v. Lee*, 70 Tex. 496, 7 S. W. 857; *Campbell v. Trimble*, 75 Tex. 270, 12 S. W. 863; *Gulf, C. & S. F. Ry. Co. v. Anderson*, 76 Tex. 244, 13 S. W. 196; *Calhoun v. Gulf, C. & S. F. Ry. Co.*, 84 Tex. 226, 19 S. W. 341; *Garteliser v. Galveston, H. & S. A. Ry. Co.*, 2 Tex. Civ. App. 230, 21 S. W. 631; *San Antonio & A. P. Ry. Co. v. Long*, 4 Tex. Civ. App. 497, 23 S. W. 499. Failure of the employé of a railroad company to comply with certain rules of the company was held not to be negligence per se, the court remarking that such a rule could not be given the force of the statute. *San Antonio & A. P. Ry. Co. v. Connell*, 66 S. W. 246, 248, 27 Tex. Civ. App. 533.

NEGLIGENT SUPERVISION.

"Negligent supervision," as used in an instruction that an architect is liable for loss caused by his negligent supervision of the work, means a failure in the manner and to the extent that he has agreed to supervise. There is no negligence in not doing what a man has not undertaken to do. *Brown v. Burr*, 28 Atl. 828, 831, 160 Pa. 458.

NEGLIGENTLY.

The term "negligently" imports a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. *Rev. Codes N. D.* 1899, § 7714; *Pen. Code S. D.* 1903, § 809; *Pen. Code Idaho* 1901, § 4544, subd. 2; *Pen. Code N. Y.* 1903, § 718; *Rev. St. Utah* 1898, § 4053; *Pen. Code Mont.* 1895, § 7, subd. 2; *Ann. Codes & St. Or.* 1901, § 2177; *Rev. St. Okl.* 1903, § 2637; *Pen. Code Cal.* 1903, § 7, subd. 2; *Pen. Code Ariz.* 1901, par. 7, subd. 2; *Gen. St. Minn.* 1894, § 6842, subd. 1.

"Negligently" means without exercising that degree of care which a person of ordinary common sense and prudence, under like circumstances and in the performance of a like act, would have exercised. *Flesh v. Lindsey*, 21 S. W. 907, 909, 115 Mo. 1, 37 Am. St. Rep. 374.

As used in a complaint against a railway company for injuries, alleging that a car was negligently loaded, the term "negligently" should be construed as an allegation of the fact, and not as a conclusion. It is generally sufficient without stating the particular circumstances or details which go to make up the negligence complained of. The term "negligently" is not a mere conclusion of law, unless all the force is taken out of it by the further statement of the particular facts or omissions which constitute the negligence. In order, however, for such further statement to have this effect, it must affirmatively appear that the further statement is so specific as to put the court in the possession of all the exact details which go to make up the negligence. *Rogers v. Truesdale*, 58 N. W. 688, 689, 57 Minn. 126.

NEGLIGENTLY GUILTY.

In an action to recover a forfeiture provided by law in case a property owner shall "intentionally make a false statement in regard to his property," a verdict of "guilty not criminally but negligently" means that the defendant made the false statement not intentionally but negligently, and is equivalent to a verdict of not guilty, since the statute declares no penalty for a negligent false statement. *State v. Wolfrum*, 60 N. W. 799, 800, 88 Wis. 481.

NEGOTIABLE.

"Negotiable" means that which is capable of being transferred by a sale, an indorsement, or delivery. *Walker v. Ocean Bank*, 19 Ind. 247, 250.

The term "negotiable," as applied to contracts, means primarily the capability of being transferred by indorsement and delivery, so as to give the indorser a right to sue thereon in his own name. *Anderson v. Portland Flouring Mill Co.*, 60 Pac. 839, 842, 37 Or. 483, 50 L. R. A. 235, 82 Am. St. Rep. 771.

The word "negotiable," as used in the proviso in a bank charter that no note, bill, or bond shall be negotiable at the bank unless so expressed on the face of such note, bill, or bond, means that no such note, bill, or bond may be passed by assignment or indorsement to vest the property therein in the bank unless it is expressed on the face of the note that it is to be negotiable at the bank.

United States v. Fay (Ala.) 9 Port. 465, 469.

The term "negotiable" is one of classification, and does not of necessity imply anything more than that the paper possesses the negotiable quality, and Comp. Laws Mich. § 5775, providing "that the assignee of any bond, note or other chose in action not negotiable under existing laws which has been or may be hereafter assigned may sue and recover the same in his own name," etc., does not apply to an unindorsed promissory note to the order of the payee; for, while it is true that paper payable to order and not yet indorsed is sometimes said not to be negotiable until the indorsement is made, by this is meant only that the indorsement is a necessary ceremony of the process of negotiating it. Robinson v. Wilkinson, 38 Mich. 299, 301.

The term "negotiable," in its enlarged signification, applies to any written security which may be transferred by indorsement or delivery so as to vest in the indorsee the legal title, so as to enable him to maintain a suit thereon in his own name. In this sense of the term a bond, under the statute concerning bonds and notes, may be said to be "negotiable," and in this sense is the term understood when the bond executed in New York is payable in Missouri. In that sense it would enable a bona fide holder for a valuable consideration to retain it or its proceeds against all claims of the payee. Odell v. Gray, 15 Mo. 337, 342, 55 Am. Dec. 147.

A note providing that it shall be "negotiable at the Bank of Washington" does not mean that it is payable at that bank, and it is not necessary to demand payment there in order to charge an indorser. Beeding v. Thornton (U. S.) 3 Fed. Cas. 63.

Negotiable paper distinguished.

"Negotiable" is defined as that which is capable of being transferred by assignment; a thing the title to which may be transferred by a sale and indorsement or delivery. There is a distinction to be made between the terms "negotiable" and "negotiable paper" or "commercial paper." The fact that a thing is negotiable does not necessarily cause a transferee thereof to take it free from equities. Vietor v. Johnson, 24 Atl. 173, 148 Pa. 583.

NEGOTIABLE INSTRUMENT.

As effect, see "Effect."

A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer. Civ. Code Mont. 1895, § 8991; Rev. St. Utah 1898, § 1553; Civ. Code Cal. 1908, § 3087; Rev. St. Wyo. 1899, § 2329; Rev. Codes N. D. 1899, § 4853; Civ. Code S. D. 1903, § 2168;

Rev. St. Okl. 1903, § 3592; Stadler v. First Nat. Bank, 56 Pac. 111, 113, 115, 22 Mont. 190, 74 Am. St. Rep. 532; Outcalt v. Collier, 58 Pac. 642, 644, 8 Okl. 473; Flagg v. School Dist No. 70 of Barnes County, 58 N. W. 499, 4 N. D. 30, 52 L. R. A. 363; Hegeler v. Comstock, 45 N. W. 331, 333; 1 S. D. 138, 8 L. R. A. 393.

There are six classes of negotiable instruments, viz., bills of exchange, promissory notes, bank notes, checks, bonds, certificates of deposit. Civ. Code, § 3095; Barstow v. Savage Min. Co., 1 Pac. 349, 351, 64 Cal. 388, 49 Am. Rep. 705.

No instruments are negotiable but regular promissory notes and bills of exchange. An instrument under seal, though in the form of a promissory note, is not negotiable unless expressly made so by statute. Helfer v. Alden, 3 Minn. 332 (Gil. 232, 234).

A negotiable instrument is one which runs to order or bearer, is payable in money for a certain definite sum on demand, at sight or in a certain time, or upon the happening of an event which must occur, and payable absolutely, and not upon a contingency. Hatch v. First Nat. Bank, 47 Atl. 908, 909, 94 Me. 348, 80 Am. St. Rep. 401.

To constitute negotiable paper, it is essential that it carry with it a personal credit given to the drawer or indorser, and that it be not confined to any future fund. Under Civ. Code, § 3088, a negotiable instrument must be made payable in money only, and without any conditions not certain of fulfillment, and under Civ. Code, § 3093, a negotiable instrument must not contain any other contract than such as is specified in the article, and an instrument is not negotiable if it has any condition not certain of fulfillment, so that a provision for the payment of an attorney's fees in case of foreclosure was a contingency rendering the note nonnegotiable. Meyer v. Weber, 65 Pac. 1110, 1112, 133 Cal. 681.

The term "negotiable instrument" has a definite signification in the law merchant, and the meaning of the term has not been changed by the Code. The principal importance which is to be attached to the question of negotiability arises from the rule of law which subjects all nonnegotiable bills and notes to any equities which may exist between prior parties, even when they are transferred before due to a bona fide purchaser for value. Hegeler v. Comstock, 45 N. W. 331, 333, 1 S. D. 138, 8 L. R. A. 393.

Daniel (Neg. Inst. vol. 1, p. 1) says: "An instrument is called 'negotiable' when the legal title to the instrument itself, and the whole amount of money expressed on its face, may be transferred from one to another by indorsement and delivery by the holder."

or by delivery only." *Herlow v. Orman*, 6 Pac. 935, 937, 3 N. M. (Johns.) 291.

An instrument providing for the payment of exchange on a point other than the place of payment, in addition to principal and interest, is not a negotiable instrument under the statute defining a "negotiable instrument" as a written promise or request for the payment of a certain sum of money to order or bearer, since the amount of exchange is uncertain. *Flagg v. School Dist. No. 70 of Barnes County*, 58 N. W. 499, 4 N. D. 30, 25 L. R. A. 363.

The fact that a bond payable at a fixed date contains a provision that the obligor may redeem the same before maturity at any date when the semiannual interest is due does not render the bond so uncertain as to time and amount as to deprive it of its negotiable quality. *Union Loan & Trust Co. v. Southern California Motor Road Co.* (U. S.) 51 Fed. 840, 848.

Bill of lading.

See "Bill of Lading."

Bottomry bond.

A "bottomry bond," in a qualified sense, is a negotiable instrument, and an assignee may maintain a suit thereon in the admiralty in his own name; but it is not a "negotiable instrument" in the broad sense in which that term is employed as applied to bills of exchange and promissory notes. *Burke v. The M. P. Rich* (U. S.) 4 Fed. Cas. 741, 744.

Certificate of deposit.

See "Certificate of Deposit."

Certificate of stock.

See "Certificate of Stock."

County or school warrant.

County warrants are not "negotiable instruments" as defined by the law merchant. *Garfield Tp. v. Crocker*, 65 Pac. 273, 63 Kan. 272.

County warrants are not negotiable instruments, and are not intended to circulate as negotiable or commercial securities. In most states the law authorizing the issue of county warrants contemplates that they will be satisfied from the ordinary county revenue, or be absorbed in the payment of county taxes. *Board of Com'rs of Grand County v. King* (U. S.) 67 Fed. 202, 207, 14 C. C. A. 421.

A county warrant is not a commercial paper. Its primary object is to provide means for drawing money from the treasury, rather than to obtain a loan of money, or even to evidence the indebtedness of the

county. *National Life Ins. Co. of Montpelier v. Dawes County* (Neb.) 93 N. W. 187, 188.

A county warrant is a mere certificate of indebtedness, which, although negotiable in form, does not partake of the character of negotiable paper so far as to estop the county from availing itself of any offense it may have against it, even in the hands of a bona fide purchaser for value without notice. *Union Pac. R. Co. v. Buffalo County Com'rs*, 4 N. W. 53, 56, 9 Neb. 449 (citing *School Dist. No. 2 of Dixon County v. Stough*, 4 Neb. 357, 359).

The term "negotiable," as applied to a written instrument, is frequently used in a broad sense to describe any written security which may be transferred so as to vest the legal title. In such sense an order for the payment of school funds may be regarded as a negotiable instrument. *Shakspear v. Smith*, 20 Pac. 294, 296, 77 Cal. 638, 11 Am. St. Rep. 327.

Draft or order.

To constitute a negotiable draft or order, it must be a written order from one party to another for the payment of a certain sum of money, and that absolutely, and without any contingency that would embarrass its circulation to a third party, or his order, or bearer. *White v. Cushing*, 34 Atl. 164, 165, 88 Me. 339, 32 L. R. A. 590, 51 Am. St. Rep. 402.

Letter of credit.

Letters of credit and commercial guaranties are not negotiable instruments. *Birckhead v. Brown* (N. Y.) 5 Hill, 634, 646.

Municipal bonds.

To render a written promise to pay money negotiable, in the law merchant, it is essential that it shall be an unconditional promise to pay a certain sum of money at some future time which is sure to arrive, or, as is more frequently said, there must be "certainty as to the fact of payment." If, by the terms of the contract, the sum promised to be paid, or a portion thereof, may never become payable, as where the sum promised is not to be paid unconditionally and at all events, but only out of a special fund derived from certain sales which may never prove adequate to meet the demand in full, the instrument, according to the great weight of authority, cannot be deemed negotiable, and entitled, in the hands of a third party, to the immunities which belong to that class of instruments. *Husband v. Epling*, 81 Ill. 174, 25 Am. Rep. 273. We have no reason to suppose, and it has never been decided, that *Con. St. Neb. § 2968*, which defines "negotiable instruments" as "all bonds, promissory notes, bills of exchange,

foreign and inland, drawn in any sum or sums of money certain, and made payable to any person or order or assign, shall be negotiable by endorsement thereon, so as absolutely to transfer and vest the property thereof in each and every endorsee successively, but nothing in this section shall be construed to make negotiable any such bond, note, bill of exchange, drawn payable to any person or persons alone, and not payable to order, bearer, or assign. Provided that all such bonds, promissory notes and bills of exchange, made payable to bearer, shall be transferable by delivery without endorsement thereon"—was designed to modify the doctrine aforesaid in any respect, or to declare that an instrument might be negotiable even though it was uncertain as to payment. The statute, like any other statute of similar character, was designed to place the bonds and promissory notes on the same plane of negotiability as foreign bills of exchange, provided they possess the requisite words of negotiability, and contain an unconditional promise to pay a certain sum of money at some future time which is sure to arrive. Now, while the obligations in suit acknowledge an indebtedness on the part of the county of Washington to a certain amount, yet the promise made to pay this indebtedness is not a promise to pay it unconditionally and at all events, but is a promise to pay it only out of a fund to be raised by a levy of one mill per dollar on the taxable property of the county, which fund is to be apportioned pro rata among all of the obligations, and applied first to the interest, and next to the indebtedness. It is obvious that the special fund out of which the final indebtedness is to be paid may never be adequate to pay it, and, as the record discloses, 28 years' experience demonstrates that the fund is inadequate, and that the debt is yearly increasing instead of diminishing. Under these circumstances the obligations in suit cannot be regarded as negotiable bonds. *Washington County v. Williams* (U. S.) 111 Fed. 801, 806, 49 C. C. A. 621.

A municipal bond, issued under the authority of law, for the payment at all events to a named person or order of a fixed sum of money at a designated time therein limited, being indorsed in blank, is a "negotiable instrument" within the law merchant. *Polleys v. Black River Imp. Co.*, 5 Sup. Ct. 369, 370, 113 U. S. 81, 28 L. Ed. 938.

Promissory note.

See "Promissory Note."

Railroad bond.

Negotiable railroad bonds payable to bearer are intended to pass from hand to hand in all the money markets of the world. It is the understanding of the commercial

world that the purchaser of such bonds may safely rely on the title evidenced by possession as the true title, and that in the absence of fraud, or negligence so gross as to justify the inference of fraud, the title of a bona fide purchaser for value before maturity, in the usual course of business, acquires a good title thereto, although they may have been stolen; and, in a suit by the purchaser of such, the burden of proof that he did not acquire them in good faith is upon the defendant. So where negotiable railroad bonds, perfect in form, payable to bearer, were placed by the company in the hands of its president to sell or exchange for its benefit, they are valid in the hands of a purchaser in good faith before maturity, though they were disposed of by the president for his own benefit after consolidation of the company with other companies, and though at the time of the purchase two of the semiannual interest coupons attached to each bond were past due. *Long Island Loan & Trust Co. v. Columbus, C. & I. C. Ry. Co.* (U. S.) 65 Fed. 455, 459.

Savings bank passbook.

A savings bank passbook is not negotiable paper, and its possession constitutes of itself no evidence of a right to draw money thereon. *Beaver v. Beaver*, 6 N. Y. Supp. 580, 589, 53 Hun, 258.

A passbook used by a depositor in a savings bank is not negotiable paper such as to justify the payment of the amount of the deposit to one having possession of the passbook. *Smith v. Brooklyn Sav. Bank*, 4 N. E. 123, 101 N. Y. 58, 54 Am. Rep. 653.

Sealed note.

A sealed note, though made payable at a chartered bank within the state, is not a "negotiable instrument" within the meaning of the statute regulating negotiable paper. *Lewis v. Wilson* (Ind.) 5 Blackf. 370.

U. S. bonds or notes.

The bonds and treasury notes of the United States, payable to holder or bearer at a definite time, are negotiable commercial paper, and their transferability is subject to the commercial law of other paper of that character. The fact that the holder of such notes had an option to convert them into other bonds does not change their character. "That this option was to be exercised by the holder, and not by the United States, is all that saves them from losing their character as negotiable paper, and if they had been absolutely payable in other bonds, or in bonds or money, at the option of the maker, they would not be promissory notes, and they can lay claim to no other form of negotiable instrument." *Vermilye v. Adams Exp. Co.*, 88 U. S. (21 Wall.) 138, 144, 22 L. Ed. 609.

Warehouse receipt.

Warehouse receipts are by statute negotiable instruments in New York, and an indorsement transfers the merchandise for which they are given on the surrender of the receipt. *Brooks v. Hanover Nat. Bank* (U. S.) 26 Fed. 301, 302.

Warehouse receipts given for chattels placed in the possession of a warehouseman for storage purposes are not, in a technical sense, "negotiable instruments." The principle applied in all the cases is that the delivery of a warehouse receipt is a symbolic delivery of the property itself; that it has the same effect as a delivery of the property, and can have no greater; and that a transfer of the warehouse receipt by the person in possession of it gives no higher title than would the transfer of the property by the same person. *Burton v. Curyea*, 40 Ill. 320, 326, 327, 89 Am. Dec. 350.

In the absence of statutory provision to that effect, warehouse receipts are not "negotiable instruments" in a commercial sense, so as to bind the maker to the assignee in all cases. The holder of such a receipt takes no better title, and occupies no better position, than if the goods themselves were held by him. A receipt given by a warehouseman for property placed with him for storage is not, in a technical sense, like a bill of exchange, a "negotiable instrument," but it merely stands in the place of the property it represents, and a delivery of the receipt has the same effect in transferring title as the delivery of the property. *Solomon v. Bushnell*, 3 Pac. 677, 678, 11 Or. 277, 50 Am. Rep. 475.

The object and intent of Act 1878, p. 949, § 5, declaring warehouse receipts negotiable unless the words "nonnegotiable" are printed in red across their face as required by section 8, seems to be that the warehouseman holds property embraced in such an instrument as the property of any individual who, after its issuance, returns it to him indorsed by the person for and on account of whom it was originally stored. By proper indorsement such a receipt carries with it the absolute title to the property mentioned therein, as much so as the transfer by indorsement of a certificate of deposit of a bank. *Bishop v. Fulkerth*, 10 Pac. 122, 124, 68 Cal. 607.

NEGOTIABLE NOTE.

The word "negotiable," when applied to a note payable to order, means to bind or order its payment. *Lowrie v. Zunkel*, 49 Mo. App. 153, 156.

A note is negotiable if it is delivered out by the maker for a consideration received or agreed to be received or delivered for circulation. When it has been actually indorsed it possesses the character of negotiability. A

bill is properly said to be "negotiable" when it is passed into the hands of the payee or indorser or other holder for value, who thereby acquires the title thereto. *Shipman v. Bank of the State of New York*, 13 N. Y. Supp. 475, 486, 59 Hun, 621.

A note is not negotiable, within a statute defining "negotiable notes" as notes "for value received negotiable and payable without defalcation," unless the note contains such words, and a note promising to pay a certain sum "for value received without defalcation" is nonnegotiable under such statute. *Austin v. Blue*, 6 Mo. 265, 266.

A note wherein the obligor promises to pay R. or order \$200, with interest, is not a negotiable note within a statute providing that every note for the payment of money, expressed on the face thereof to be "for value received, negotiable and payable," shall be negotiable in like manner as inland bills of exchange. *Beatty v. Anderson*, 5 Mo. 447, 449.

A note which is not paid at maturity does not cease to be "negotiable by the law merchant," within the meaning of Act Cong. March 3, 1875, § 1, providing that no suit founded on contract shall be maintained in a federal court in favor of an assignee, unless maintainable therein before the assignment was made, except in cases of promissory notes negotiable by the law merchant. *Cross v. Allen*, 12 Sup. Ct. 67, 69, 141 U. S. 528, 35 L. Ed. 843.

Notes, to be negotiable, must be payable "to order" or "to bearer," or some other language of like import must be incorporated in them. *Ellis v. Hahn*, 68 S. W. 336, 29 Tex. Civ. App. 395.

The Revision of 1866 provides that a note shall be negotiable which is "payable to any person or his order or to the bearer * * * (or according to the custom of merchants and the law relating to inland bills of exchange)." The Revision of 1875 contains the same definition, except that the words in parentheses are omitted. Held, that the Legislature intended to make no change in the meaning of the statute, the words being omitted because they were unnecessary, and that under either Revision a note was not negotiable which was made payable to E., the words "or order" or "or bearer" being omitted. *Curtiss v. Hazen*, 14 Atl. 771, 773, 56 Conn. 146.

Notes which, by their terms, are payable on or about a fixed time or a specified event, are, it is true, uncertain as to the time at which they become payable, but there is no uncertainty as to the time when they become absolutely due, and paper of this character is regarded by the courts as negotiable. *City Nat. Bank v. Gunter Bros.*, 72 Pac. 842, 843, 67 Kan. 227 (citing *Woodbury*

v Roberts, 59 Iowa, 348, 13 N. W. 312, 44 Am. Rep. 685).

One of the essential elements of negotiable paper is certainty as to the amount to be paid. So strictly have the courts adhered to this rule that it has been held that a bill of exchange for the payment of a certain sum with exchange is not negotiable. The agreement in a mortgage to pay all the taxes and assessments levied upon said premises, and all taxes and assessments levied upon the holder of the mortgage for and on account of the same, will not render the note which it is given to secure nonnegotiable. *Garnett v. Meyers*, 91 N. W. 400, 401, 65 Neb. 280.

A "negotiable promissory note," within the meaning of the negotiable instruments act, is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. *Ann. Codes & St. Or.* 1901, § 4586.

NEGOTIABILITY.

"Negotiability" is a technical term, derived from the usage of merchants and bankers in transferring, primarily, bills of exchange, and afterwards promissory notes. At common law no contract was assignable so as to give an assignee a right to enforce it by suit in his own name. To this rule bills of exchange, and promissory notes payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called "negotiation." It is a mercantile business transaction, and the capability of being thus transferred so as to give the indorsee a right to sue on the contract in his own name is what constitutes negotiability. *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557, 562, 25 L. Ed. 892.

In *Cota v. Buck*, 48 Mass. (7 Metc.) 588, 41 Am. Dec. 464, it was said by Shaw, C. J., the true test of the negotiability of a note seems to be whether the undertaking of the promisor is to pay the amount at all events at some time which must certainly come, and not out of a particular fund or upon a contingent event. A note does not lose negotiability by a provision that the indebtedness could be extended by a new note. *Annis-ton Loan & Trust Co. v. Stickney*, 19 South. 63, 65, 108 Ala. 146, 31 L. R. A. 234.

NEGOTIATE.

To "negotiate" means to conclude by bargain, treaty, or agreement; and a town committee authorized to "negotiate" a certain case will not be deemed to have exceed-

ed their authority in entering into a contract requiring the town to support a certain pauper. *Inhabitants of Palmer v. Ferry*, 72 Mass. (6 Gray) 420, 423.

"Negotiate for," as used in a contract by a sublessee that he would not before a certain date "negotiate for" any lease of the premises, except under his lessor, means to converse in arranging the terms of a contemplated contract, and does not include a promise to negotiate at a future time. *Smith v. Coe*, 55 N. Y. 678, 679.

"Negotiating" is a general word, coming from the Latin, and signifying to carry on negotiations concerning, and so to conduct business, to conclude a contract, or to transfer or arrange; and the two expressions "discount" and "negotiate," taken together, in the national banking law giving banks the powers necessary to carry on the business of banking by discounting and negotiating notes, etc., have a broader sense than the word "discount" alone, and seem to have been used designedly by Congress to authorize these fiscal agencies to invest their surplus in promissory notes, bills of exchange, and other evidences of debt, so as to make it remunerative. *Newport Nat. Bank v. Board of Education of Newport (Ky.)* 70 S. W. 186, 24 Ky. Law Rep. 876.

Delivery included.

"Negotiated," when applied to a note, means more than indorsement merely, and includes delivery. *Lowrie v. Zunkel*, 49 Mo. App. 153, 156.

As exchange.

To "negotiate" means to transfer, to sell, to pass, to procure by mutual intercourse and agreement with another, to arrange for, to settle by dealing and management; and under U. S. Rev. St. § 5136, giving national banks power to negotiate promissory notes, drafts, and other evidences of debt, a national bank can agree with a customer to exchange for him nonregistered United States bonds for registered bonds. The exchange of the bonds would, in a broad sense, have been a "negotiation" of them, and it would, as commonly understood, have been a legitimate business for a bank to do. The bonds are moneyed securities, and collection or exchange of them is a fiscal transaction, in no sense foreign to the business of banking. *Yerkes v. National Bank*, 69 N. Y. 382, 386, 25 Am. Rep. 208.

As indorse.

"The power to 'negotiate' a bill or note is the power to indorse and deliver it to another, so that the right of action thereon shall pass to the indorsee or holder." As used in Act Cong. June 3, 1864, § 8, authorizing national banks to "negotiate" promissory notes, etc., it does not include the sell-

ing of railroad bonds for third parties on commission. *Weckler v. First Nat. Bank*, 42 Md. 581, 592, 20 Am. Rep. 95.

As procure agreement.

"Negotiate" means not only to transfer, to sell, to pass, but to procure by mutual intercourse an agreement with another. *First Nat. Bank v. Sherburne*, 14 Ill. App. 560, 568.

As put in circulation.

Under 2 Rev. St. (9th Ed.) p. 1851, § 5, providing that notes made payable to the order of the maker, if negotiated by the maker, shall be as valid as if payable to bearer, a note may be said to be "negotiated" when it is delivered by the maker for a consideration, or for circulation. *Odell v. Clyde*, 53 N. Y. Supp. 61, 62, 23 Misc. Rep. 734 (citing *Central Bank v. Lang*, 14 N. Y. Super. Ct. [1 Bosw.] 202; *Plets v. Johnson* [N. Y.] 3 Hill, 112; *Irving Nat. Bank v. Alley*, 79 N. Y. 536).

"Negotiation" means the act by which a bill of exchange or promissory note is put into circulation by being passed by one of the original parties to another person. *Walker v. Ocean Bank*, 19 Ind. 247, 250.

"Negotiating," as used in Rev. St. U. S. § 5136, authorizing national banks to carry on the business of negotiating promissory notes, indicates not an act of purchase, but one of transfer, whereby the negotiated paper is passed from the holder or owner and put in circulation. *First Nat. Bank of Rochester v. Pierson*, 24 Minn. 140, 141, 31 Am. Rep. 341.

As transfer for value.

To "negotiate" a bill means to transfer it for value. *Blakiston v. Dudley*, 12 N. Y. Super. Ct. (5 Duer) 373, 377.

An instrument is "negotiated" when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery. *Negotiable Instrument Law*, § 30; *Rev. Codes N. D.* 1899, § 1043.

NEGOTIATION.

"Negotiation" as used in reference to negotiable paper, is defined as the act by which a bill of exchange or promissory note is put in circulation by being passed by one of the original parties to another person. *Odell v. Clyde*, 57 N. Y. Supp. 126, 38 App. Div. 333.

"Negotiation," when applied to a bill or note, includes every mode of transfer, whether of sale or discount, by indorsement

or delivery. *Whitworth v. Adams* (Va.) 5 Rand. 333, 415.

"Negotiation" means the transfer of negotiable paper by indorsement and delivery. It is a mercantile, business transaction. *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557, 562, 25 L. Ed. 892.

As compromise.

"Negotiation," as used in a contract by which a person is to conduct negotiations between two companies looking to a settlement of differences between them, excludes the idea of actual resort to hostile litigation, the same as "compromise" does. To "compromise" is to adjust a dispute by mutual concession; to "negotiate" means substantially the same thing; to effect something, or an effort to effect something, by treaty or agreement. *Attrill v. Patterson*, 58 Md. 226, 245.

NEGOTIUM.

The Romans, to whom we are indebted for many of the principles of agency, in the early stages of their laws used the term "negotium" (to transact business, or to treat concerning purchases) in describing the relation of agency. *Kingman & Co. v. Silvers*, 37 N. E. 413, 416, 13 Ind. App. 80.

NEGRO.

As citizens, see "Citizen."

As white person, see "White Person."

"Negro" does not include a person who has less than one-fourth of African blood. *McPherson v. Commonwealth* (Va.) 23 Grat. 939, 940.

A person having one-fourth of African blood is not a white person, but a mulatto or negro. *Gentry v. McMinnis*, 33 Ky. (3 Dana) 382, 385, 386.

Where a statute prohibited marriage between white persons and free negroes, the word "negroes" includes only persons of color within the third degree. *State v. Melton*, 44 N. C. 49, 50.

In the construction of statutes, the term "negro" includes every person having one-eighth or more negro blood. *Rev. St. Fla.* 1892, § 1.

The term "negro," as used in the chapter requiring railroad companies to provide separate coaches for the accommodation of white and negro passengers, includes every person of African descent, as defined by the statutes of this state. *Pen. Code Tex.* 1895, art. 1010; *Rev. St. Tex.* 1895, art. 4510.

The term "negro," as used in the article prohibiting the intermarriage of white

persons and negroes, includes also a person of mixed blood descended from negro ancestry from the third generation, inclusive, although one ancestor of each generation may have been a white person. Pen. Code Tex. 1895, art. 347.

Black person not synonymous.

"Negro" is not synonymous with the term "black person," since the former does not include all black persons, as does the latter. *People v. Hall*, 4 Cal. 399, 403.

Colored person synonymous.

"Negro," as used in Acts 1877-78, c. 7, § 8, providing that any white person who shall intermarry with a negro, and any negro who shall intermarry with a white person, shall be punished, etc., does not mean only a full-blooded African, but is synonymous with "colored person" as used in Code, c. 103, § 2, providing that every person having one-fourth or more of negro blood shall be deemed a colored person. *Jones v. Commonwealth*, 80 Va. 538, 542.

Mulatto.

A "negro" means a black man descended from the black race of Southern Africa, and in common parlance does not include a mulatto. *Felix v. State*, 18 Ala. 720, 726.

The term "negro," within a meaning of the Code, includes mulatto. Civ. Code Ala. 1896, § 2.

Under Code, § 2, cl. 2, evidence that a white woman intermarried with a "mulatto" was not a variance, where the indictment charged that she intermarried with a "negro." *Linton v. State*, 88 Ala. 216, 219, 7 South. 261, 262.

As slave.

"Negroes," within the meaning of a statute requiring mortgages of negroes' goods or chattels to be recorded, means slaves. *Ex parte Leland* (S. C.) 1 Nott & McC. 460, 462.

NEGROES.

A covenant to pay a certain number of dollars in money or "negroes" is not satisfied by the tender of one negro only. *Johnson v. Butler*, 7 Ky. (4 Bibb) 97, 98.

NEIGHBORHOOD.

See "Farming Neighborhood"; "Immediate Neighborhood."

"Neighborhood," as applied to place, signifies nearness as opposed to remoteness. Whether a place is in the neighborhood of another place depends upon no arbitrary rule of distance or topography. One house may

be said to be in the neighborhood of another house, and not structurally adjoin it." *Langley v. Barnstead*, 63 N. H. 246, 247; *Territory v. Lannon*, 22 Pac. 495, 496, 9 Mont. 1; *State v. Meek* (Wash.) 67 Pac. 76, 77; *Wilson v. Ford*, 60 N. E. 876-879, 190 Ill. 614.

The term "neighborhood" does not express any definite idea of distance. A few feet, or several hundred yards, or even a greater distance from an object would be in its neighborhood. *Schmidt v. Kansas City Distilling Co.*, 2 S. W. 417, 90 Mo. 284, 59 Am. Rep. 16.

"Neighborhood" is defined as dwelling near; a place near; adjoining district; the inhabitants who live in the vicinity of each other. *Borough of Madison v. Morristown Gaslight Co.* (N. J.) 54 Atl. 439, 440.

The term "neighborhood," in a grant of common to the neighborhood of a certain town, is insufficient in describing the grantees, unless the limits of the neighborhood are defined. *Thomas v. Inhabitants of Marshfield*, 27 Mass. (10 Pick.) 364, 366.

The term "neighborhood" may be said to be a comprehensive term. One man's neighborhood may be a small hamlet, while the neighborhood of another may be a county or state. As the word is used in *Ballinger's Ann. Codes & St. § 2927*, providing that the county commissioners of each county shall appoint at least one suitable person for each village or neighborhood where spirituous liquors are sold in less quantities than a gallon, whose duty it shall be to inspect all liquors so sold, the use of the term "neighborhood" does not render the statute so indefinite as not to be susceptible of enforcement, but as so used it would seem that the county commissioners were left to exercise their own discretion and judgment as to what specific portion of the county's territory they shall determine to be a neighborhood for the purpose of inspection as provided by the statute. *State v. Meek*, 67 Pac. 76, 77, 26 Wash. 405.

The appraisers of property alleged to have been wrongfully seized by a constable and sold under execution, who lived in a well-settled country from a mile to a mile and a quarter from the property levied on, are prima facie "from the neighborhood," within the statutory requirement. A neighborhood is an adjoining or surrounding district. Whether a place is in the vicinity or in the neighborhood of another place depends on no arbitrary rule of distance or topography. A neighborhood of an individual will, of course, cover a larger space in a sparsely settled country than in a city. *State, to Use of McClenden, v. Jungling*, 22 S. W. 688, 689, 116 Mo. 162.

"Neighborhood," as used in Revision, § 3362, providing that in a sale under appraisal two disinterested householders of the

neighborhood should be selected as appraisers, is a relative and indefinite term. In a very sparsely settled community a person residing in a town 35 miles distant might be of the neighborhood, but *prima facie* he is not. *Woods v. Cochrane*, 38 Iowa, 484, 485.

In construing a decree in partition, directing the sale of the premises, and requiring that notices thereof be published and posted in at least five places in the neighborhood in which the premises are situated, the court held that where the notice was posted at the courthouse, 18 miles from the premises, and at post offices and banks, a distance of from 5 to 20 miles, but there was no notice at a post office in a village within 1½ miles of the premises, the notice of sale was insufficient. *Wilson v. Ford*, 190 Ill. 614, 60 N. E. 876, 879.

In the statute (Rev. St. §§ 4358, 4359) making railroads liable for disease communicated to any animal or carried in the neighborhood or along the line upon which diseases are commonly removed from one part of the state to another, the term "neighborhood" means a place near, the vicinity or adjoining district. *Coyle v. Chicago & A. R. Co.*, 27 Mo. App. 584, 593.

"Farming neighborhood," as used in an averment that plaintiff owned the water rights in a creek appertaining to the riparian land on both sides within certain defined limits, and that its purpose was to take water therefrom to supply a certain farming neighborhood, was an indefinite phrase, since it might be proper to call a couple of houses a "neighborhood," and the averments failed to show that the purpose was for the use of the public. *Leiso Water Co. v. Baker*, 30 Pac. 537, 538, 95 Cal. 262.

All property affected.

In the case of an operating nuisance, every part is in the "neighborhood" which is affected by it. *State v. Luce* (Del.) 32 Atl. 1076, 1077, 9 Houst. 396.

In considering the question as to whether two pieces of property situated about one mile from each other can be considered as in the vicinity or neighborhood of each other, or as constituting adjoining premises, within the meaning of the rule that the keeping of gunpowder upon private premises may be a nuisance when, in case of explosion, it would be liable to injure persons or property of those residing in the vicinity, neighborhood, or upon adjoining premises, the court says that where property is injured, directly and without any intervening cause, by the force of an explosion, it is legally within the "neighborhood" or vicinity of the scene of the explosion, and that adjoining premises may, in contemplation of law, be defined in the same way. *St. Marys Woolen Mfg. Co.*

v. Bradford Glycerine Co., 7 O. C. D. 582, 585.

As county, district, or township.

A "neighborhood," within the meaning of a statute requiring a jury to be selected from neighboring freeholders, is the vicinage or district. "The word 'neighborhood,' in common parlance and in common use, has no fixed limitation as to distance. Sometimes persons living within 2 or 3 miles are alone regarded as neighbors, while in other instances persons who live within 8 or 10 miles of each other are so considered. If it is to be confined to the small circle with whom the defendant or plaintiff is in the habit of exchanging acts of kindness, it would often be impossible to obtain 24 freeholders from among them." *Rice v. Sims* (S. C.) 3 Hill, 5, 7.

The word "neighborhood" is not synonymous with "territory" or "district," but is a collective noun with a suggestion of proximity, and refers to the units which make up its whole, as well as to the region which comprehends those units, and whether a particular district is a "neighborhood" is a question of fact. One of the definitions given in the *Century Dictionary* is a district or locality, especially when considered with relation to its inhabitants or other interests. *Lindsay Irrigation Co. v. Mehrrens*, 32 Pac. 802, 803, 97 Cal. 676.

As interpreted by Blackstone, the requirement that jurors be of the "visne or neighborhood" means the county where the act is committed. *People v. Powell*, 25 Pac. 481, 483, 87 Cal. 348, 11 L. R. A. 75.

"Neighborhood," within Act 1859, providing that when a public road is laid out the surveyors shall assess damages, etc., on the owners of any land in the neighborhood of the road, etc., means lands in the neighborhood which are also in the township, since an assessment by the surveyors on lands in another township than that in which the assessment is made could not be enforced. *Abrey v. Cannon*, 83 N. J. Law (4 Vroom) 218, 222.

Park or public place.

"Neighborhood," as used in Rev. St. 1879, § 1527, providing a penalty for disturbing the peace of a neighborhood, means a vicinity wherein the inhabitants are regarded as neighbors, and does not apply to a park or other public place where people are assembled. *State v. Hughes*, 82 Mo. 86, 89.

As range of acquaintanceship or business.

The "neighborhood" in which the neighbors and acquaintances of a person must reside in order to testify as to his general reputation means the neighborhood in which

the party resides, which includes where he moves and circulates and transacts his business, and attends church and stores, and mixes generally with the people in the usual calls of life, and is best known, not extending to any great number of miles, and not extending beyond the same immediate section of his residence, and such acquaintances must be within that limit. *State v. Henderson*, 1 S. E. 225, 239, 29 W. Va. 147.

In construing an inquiry into the reputation of a witness in the neighborhood in which he lived, the court said: "With regard to the meaning of the terms 'neighbors,' 'neighborhood,' and 'immediate neighborhood,' I would say, in reference to the present objection, that they were coextensive with the range of the witness's frequent intercourse with his fellow citizens, which from the evidence included the county of Allegheny." *Chess v. Chess* (Pa.) 1 Pen. & W. 32, 40, 21 Am. Dec. 350.

A man's "neighborhood," within the meaning of the rule that evidence of character must come from the neighborhood of the person whose character is called in question, "is not necessarily defined to the particular locality in which he resides, but is coextensive to the extent of territory occupied by those with whom he associates and frequently comes in contact. One man's neighborhood may be a small hamlet, while the neighborhood of another may be a county or state." *Peters v. Bourneau*, 22 Ill. App. 177, 179.

As same place or town.

"Neighborhood," as used in reference to the general usages of merchants in a person's neighborhood to charge interest, means the same town or place where such person carried on business, and not a different town or place. *Esterly v. Cole*, 3 N. Y. (3 Comst.) 502, 505.

Single house.

"Neighborhood or family," as used in Cr. Code, § 112, imposing a fine upon any person who, at late and unusual hours of the night, maliciously or willfully disturbs the peace or quiet of "any neighborhood or family" by loud or unusual noises or by tumultuous or offensive carriage, should be construed to include a woman living alone in her own house, and an unlawful disturbance of her in the nighttime is strictly a disturbance of her "neighborhood" and her "family." *Noe v. People*, 39 Ill. 96, 97.

As valley of stream.

"Neighborhood," in Sess. Laws 1861, p. 67, § 1, providing that all persons having claims "on the bank, margin or neighborhood" of any stream of water, creek, or river shall be entitled to use the water thereof,

includes all lands in the immediate valley of the stream. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 451.

Vicinity distinguished.

"Vicinity" does not denote so close a connection as "neighborhood." A neighborhood is a more immediate vicinity. *Mock v. City of Muncie* (Ind.) 32 N. E. 718, 719; *Wilson v. Ford*, 190 Ill. 614, 624, 60 N. E. 876, 879.

The word "neighborhood" means a place near; vicinity; adjoining district. "Neighborhood" is Anglo-Saxon, "vicinity" is Latin. "Vicinity" does not denote so close a connection as "neighborhood." A neighborhood is a more immediate vicinity. The houses directly adjoining a square are in the "neighborhood" of that square; those which are somewhat further removed are in the "vicinity" of the square. *Coyle v. Chicago & A. R. Co.*, 27 Mo. App. 584, 593.

NEIGHBORING.

Where the owner of a block of ground in the city of New York divided it into lots, and sold the lots from time to time to different individuals, and the conveyances of the lots contained mutual covenants against the erection of any manufactory, trade, or business which might be in any wise offensive to the neighboring inhabitants, "neighboring inhabitants" means the owners of other lots in the block. *Barrow v. Richard* (N. Y.) 8 Paige, 351, 359, 35 Am. Dec. 713.

NEPHEW.

The word "nephew," as generally used, means the children of a brother or sister. In *re Hunt's Estate*, 6 N. Y. Supp. 186, 188, 53 Hun. 466; *Cromer v. Pinckney* (N. Y.) 3 Barb. Ch. 460, 475; In *re Root's Estate*, 40 Atl. 818, 819, 187 Pa. 118.

Where legacies or devises are given to "a child or children" of some person named, or to "nephews," these words mean, *prima facie*, legitimate children or nephews. *Lyon v. Lyon*, 34 Atl. 180, 183, 88 Me. 395.

Children of half brothers or sisters.

A bequest to "nephews and nieces" of testator is held to apply to the children of half-brothers and half-sisters, the testator having no nephews or nieces of the full blood in existence. In *re Weiss' Estate* (Pa.) 1 Montg. Co. Law Rep'r, 209, 210.

Grandnephew.

"Nephew," as used by a testator in bequeathing legacies to each of his nephews, excepting one person who in fact was a grandnephew, includes grandnephews. *Brower v. Bowers* (N. Y.) 1 Abb. Dec. 214, 215.

"Nephews and nieces," as used in a will, applies as well to grandnephews and grandnieces as to the children of brothers and sisters of testator, if an intention that the words shall have such intended application is apparent from the instrument. *Shephard v. Shephard*, 17 Atl. 173, 174, 57 Conn. 24; *Benton v. Benton*, 20 Atl. 365, 66 N. H. 169; *Cromer v. Pinckney* (N. Y.) 3 Barb. Ch. 466, 474.

A testatrix bequeathed "to my niece M. M., daughter of my nephew T. M., thirty pounds; to A. L. and M. L., son and daughter of my niece M. L., thirty pounds each." All the residue of her property not thereafter disposed of was to be equally divided amongst all "her nephews and nieces." Held, that the words "my nephews and nieces," in the residuary bequest, meant not only testatrix's nephews and nieces, but their children also. *James v. Smith*, 14 Sim. 214, 217.

"Nephews and nieces," as used in a residuary devise "unto my nephews and nieces hereinbefore named," do not include legatees previously mentioned in a separate clause of the will, and described as the children of testator's deceased niece, and nowhere classed with testator's nephews and nieces, to whom legacies were given. In *re Hunt's Estate*, 6 N. Y. Supp. 186, 188, 53 Hun, 466; *Id.*, 23 N. E. 120, 121, 117 N. Y. 522, 7 L. R. A. 367.

The term "nephews and nieces," in a will devising property to nephews and nieces, does not include the children of such nephews and nieces who are so denominated in the will, nor does it include a niece by marriage. *Lewis v. Fisher* (Pa.) 2 Yeates, 196.

Nephew of husband or wife.

"Nephews," as used by a testatrix in bequeathing a residuary estate to "all my nephews and nieces," includes only her own nephews and nieces, and not those of her husband. *Appeal of Green*, 42 Pa. (6 Wright) 25.

"In strict propriety and in legal usage, it is only the children of brothers and sisters that are called 'nephews' and 'nieces,' and it is only by courtesy that the children of a husband's or wife's brothers and sisters are so called, just as it is in relation to a husband's or wife's father and mother. On a strict interpretation, therefore, a bequest of testatrix to all her 'nephews and nieces' excludes, or rather does not include, the nephews and nieces of her late husband." *Appeal of Green*, 42 Pa. (6 Wright) 25, 30.

A "nephew," according to all the lexicographers, is the son of one's brother or sister. Sometimes the word includes grandnephew. As used in a devise to testator's nephew, naming him, it cannot be construed

to include a nephew of testator's wife of the same name. In *re Root's Estate*, 40 Atl. 818, 819, 187 Pa. 118.

NET.

"Net" is defined as clear of all charges and deductions, as "net profits." *St. John v. Erie R. Co.*, 89 U. S. (22 Wall.) 136, 148, 22 L. Ed. 743; *Turnley v. Michael* (Tex.) 15 S. W. 912; *Evans v. Waln*, 71 Pa. (21 P. F. Smith) 69, 74; *Scott v. Hartley*, 25 N. E. 826, 828, 126 Ind. 239.

"Net" means clear of all tare, tret, and other deductions, as "net weight." *Scott v. Hartley*, 25 N. E. 826, 828, 126 Ind. 239.

"Net" is defined as clear of anything extraneous, with all deductions, such as charges, expenses, discounts, commissions, taxes, etc., made; free from expenses. So that the word "net," as used in a statement to a real estate agent that the company would sell some property if it could realize \$7,000 for it, an offer of \$7,000, from which the owner was to pay commissions, taxes, and assessments, is not an offer of \$7,000 net. *Gibbs v. People's Nat. Bank*, 64 N. E. 1060, 1062, 198 Ill. 307.

The word "net," according to Webster, means clear of all charges and deductions, and implies a gross sum from which allowances and credits are to be taken. The use of the word "net," in a will giving to a certain beneficiary the annual "net" sum of \$1,200, imports that such sum shall be given to the beneficiary free from the collateral inheritance tax. In *re Bispham's Estate* (Pa.) 24 Wkly. Notes Cas. 79, 80.

"Net" is a term used among merchants to designate the quantity, amount, or value of an article or commodity after all tare and charges are deducted. *Andrews v. Boyd*, 5 Me. (5 Greenl.) 199, 201.

In an ordinance providing that the price of gas to consumers shall not exceed \$1.25 per thousand cubic feet, or the net price of \$1.18 $\frac{1}{4}$ for gas paid for within five days after presentation of the bill, the literal meaning of the word "net" forbids all thought or theory of deductions. *State ex rel. City of St. Louis v. Laclede Gaslight Co.*, 14 S. W. 974, 979, 102 Mo. 472, 22 Am. St. Rep. 789.

"Net," as used in a contract to purchase from plaintiff corn in Indiana at a certain price "net, track, Philadelphia, Union Line," should be construed as the opposite of "gross." Webster defines "gross": "Taking in the whole; having no deduction or abatement; whole, total, as the 'gross sum,' 'gross weight.'" Therefore evidence was inadmissible to show a custom of persons engaged in the grain trade that on a sale of grain to be delivered in Philadelphia or oth-

er cities in the Eastern States at a stated price on the "track" or "net," or "net track," such grain was to be delivered on the track at such city without payment of freight by the seller, and that the purchaser should pay the freight and deduct it from the purchase price of the grain, and thus fix the net price. *Scott v. Hartley*, 25 N. E. 826, 828, 126 Ind. 239.

Where the owner of land, in his contract with real estate brokers to sell it for him, states, "I will take \$7,500 net to me," the intention is that the property shall bring him that sum free of all expenses, and not that the brokers shall receive as compensation all the purchase money above that sum. *Turnley v. Michael (Tex.)* 15 S. W. 912.

NET ADDITIONAL YIELD.

The term "net additional yield," in relation to the breach of a contract to use certain material on land to enrich it, means its value after deducting its necessary expenses in harvesting, etc. *Herring v. Armwood*, 41 S. E. 96, 97, 130 N. C. 177, 57 L. R. A. 958.

NET ASSETS.

By the term "net assets," as used in the article of the Code relating to the department of insurance, is meant the funds of an insurance company available for the payments of its obligations in Alabama. *Civ. Code Ala.* 1896, § 2575.

In the chapter relating to insurance, "net assets" means the funds of an insurance company available for the payment of its obligations in the commonwealth, including, in the case of a mutual fire company, its deposit notes or other contingent funds, and, in the case of a mutual marine or mutual fire and marine company, its subscription fund and premium notes absolutely due, and also including uncollected and deferred premiums not more than three months due on policies actually in force, after deducting from such funds all unpaid losses and claims, and claims for losses, and all other debts and liabilities, inclusive of policy liability and exclusive of capital. *Rev. Laws Mass.* 1902, p. 1120, c. 116, § 1.

By the term "net assets," as used in the Tennessee insurance act of 1895, is meant the funds of an insurance company available for the payment of its obligations in Tennessee, including uncollected and deferred premiums not more than three months due on policies actually in force, after deducting from such funds all unpaid losses and claims, and claims for losses, and all other debts and liabilities, inclusive of policy liability and exclusive of capital. *Shannon's Code Tenn.* 1896, § 3274.

By the term "net assets," as used in a chapter relating to home, life, and accident

insurance companies, is meant the funds of the company available for the payment of its obligations in this state, and also including uncollected and deferred premiums not more than three months due on policies actually in force, after deducting from such funds all unpaid losses and claims for losses, and all other debts, exclusive of capital stock. *Rev. St. Tex.* 1895, art. 3096a.

NET BALANCE.

"Net balance," as used in a telegram from a broker to his client reading, "We will give you a net balance tomorrow," means the balance of the proceeds after deducting the expenses incident to the sale. *Evans v. Wain*, 71 Pa. (21 P. F. Smith) 69, 74.

NET CASH RULE.

Where plaintiffs instructed their agents, in selling oil for them, to sell according to the "net cash rule," such phrase meant that the oil should be sold for cash. *Marshall v. Williams*, 16 Fed. Cas. 852.

NET EARNINGS.

"Net earnings" of a business means the excess of receipts over expenditures. *Connolly v. Davidson*, 15 Minn. 519, 530 (Gil. 428, 436), 2 Am. Rep. 154 (citing Story, Partn. 51; *Dob v. Halsey* [N. Y.] 16 Johns. 34, 40, 8 Am. Dec. 293); and is equivalent to "profits," signifying an excess of the value of returns over the value of advances, *People v. San Francisco Sav. Union*, 13 Pac. 498, 499, 72 Cal. 199.

The "net earnings" of a corporation out of which profits are distributable in dividends are properly the gross receipts, less the expense of operating the corporate property to earn such receipts. *St. John v. Erie Ry. Co.*, 21 Fed. Cas. 167, 169 (cited and approved in *Mobile & O. R. Co. v. Tennessee*, 14 Sup. Ct. 968, 972, 153 U. S. 486, 38 L. Ed. 793; *State v. Board of Assessors*, 20 South. 670, 671, 48 La. Ann. 1156; *Jones & Nimick Mfg. Co. v. Commonwealth*, 69 Pa. [19 P. F. Smith] 137, 139).

"Net earnings" means what is left after paying the legitimate cost and expense of making earnings by the use of property. *Vermont & C. R. Co. v. Vermont Cent. R. Co.*, 50 Vt. 500, 587.

A by-law of a railroad company provided that dividends on the preferred stock should first be made semiannually from the net earnings of the road, not exceeding 6 per cent. per annum, after which dividend, if there should remain a surplus, a dividend should be made on the unpreferred stock up to a like per cent. per annum, and, should a surplus then remain of net earnings

after both of said dividends in any one year, the same should be divided pro rata on all the stock. Held, that "net earnings" meant gross receipts, less the expenses of operating the road to earn such receipts. *Hazeltine v. Belfast & M. L. R. Co.*, 10 Atl. 328, 330, 79 Me. 411, 1 Am. St. Rep. 330.

A mortgage given by a railroad company to another railroad company of the net earnings of all business coming to the mortgagor road from or over the mortgagee road covers the earnings of business carried in both directions, and is computed by deducting from the gross earnings of such business its proportional share of the expenses of operating the entire road of the mortgagor. *Schmidt v. Louisville & N. R. Co.*, 25 S. W. 494, 495, 95 Ky. 289.

Deduction of interest on debts.

"Net earnings," as used in a certificate of stock in a railway corporation which provides that such stock shall be entitled to preferred dividends out of the net earnings of the corporation, means the gross receipts, less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what remains; that is, out of the net earnings. Many other liabilities are paid out of the net earnings. *St. John v. Erie Ry. Co.* (U. S.) 21 Fed. Cas. 167, 169.

In a railroad corporation by-law providing that its net earnings should be divided semiannually among its stockholders, etc., "net earnings" means such as are applicable to dividends. "These would be the gross receipts, less the expenses of operating the road, and less, also, interest on such of the company's indebtedness as it is prudent and proper to keep in a permanent form, and less, also, any floating or temporary liabilities which good judgment would require to be presently paid, and less, also, an annual contribution to a sinking fund for the payment of debts, whenever expedient and proper to provide such a fund." *Belfast & M. L. R. Co. v. City of Belfast*, 77 Me. 445, 1 Atl. 362.

Exclusive of expenditure of capital.

"As a general proposition, the 'net earnings' of a railroad company are the excess of the gross earnings over the expenditures defrayed in producing them, aside from and exclusive of the expenditures of capital laid out in constructing and equipping the works themselves." *Barry v. Missouri, K. & T. R. Co.* (U. S.) 27 Fed. 1; *Commonwealth v. Philadelphia & E. R. Co.*, 30 Atl. 145, 146, 164 Pa. 252; *St. John v. Erie R. Co.*, 89 U. S. (22 Wall.) 136, 148, 22 L. Ed. 743; *Union Pacific R. Co. v. United States*, 99 U. S. 402, 420, 25 L. Ed. 274. It may be difficult to draw a precise line between expenditures for construction, and the ordinary expenses incident to operating and maintaining the road

and works of a railroad. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of a company, and all expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof. In *re Lyman* (U. S.) 55 Fed. 29, 40.

As net income.

In St. 1876, c. 236, providing that the annual net earnings of the Eastern Railroad Company shall be paid into a sinking fund, to be held by the trustees for the redemption or purchase of certificates of indebtedness issued under a mortgage, "net earnings" means the revenues to be derived from the property in any manner, or net income or net profits. *Phillips v. Eastern R. Co.*, 138 Mass. 122, 129.

In an act of the Legislature allowing a railroad corporation to issue preferred stock for the purpose of paying a large floating debt, the holders of such preferred stock to receive out of the "net earnings" of the company annually a certain per cent. on such stock, arrearages for any year to be paid out of net earnings of subsequent years before paying anything on the common stock, "net earnings" is not the equivalent of "surplus" or "net profits," though the term may be and often is used as such equivalent, the net earnings being for a limited time, and not for the whole period of time the corporation has existed, which latter might properly be called "surplus" or "profits." *Cotting v. New York & N. E. Ry. Co.*, 5 Atl. 851, 853, 54 Conn. 156.

"Net earnings of the road," as used in Act 1861, § 4, providing that the preferred dividends should be paid to the preferred stockholders of a railroad company out of the net earnings of the road, means the net earnings of all the business of the company for the time being, whether done upon one or many roads, and is not limited to the net earnings of things as they were when the preferred stock was issued. *St. John v. Erie R. Co.*, 89 U. S. (22 Wall.) 136, 148, 22 L. Ed. 743.

Yearly earnings.

The "net earnings" of a railroad are the surplus of the transportation earnings above operating expenses. The phrase has also been defined in a general way as the excess of the gross earnings over the expenditures in producing them, less the expenditure of capital laid out in constructing and equipping the road. Under any definition each year stands by itself, so that the indebtedness of the prior year is not to be deducted from the gross receipts in calculat-

ing the net earnings of any year. *State ex rel. St. Charles St. R. Co. v. Board of Assessors*, 20 South. 670, 671, 48 La. Ann. 1156 (citing *Union Pac. R. Co. v. United States*, 99 U. S. 402, 428, 25 L. Ed. 274; *United States v. Kansas Pac. Ry. Co.*, 99 U. S. 455, 460, 25 L. Ed. 289).

NET ESTATE.

The term "net estate," in *How. Ann. St. § 5847*, subd. 6, providing that the widow shall have one-third of the net estate of the intestate if he leaves children or their issue, means the whole personal estate remaining, after disposition of chattels specifically appropriated by statute, and the payment of debts, costs, and allowances, expenses of administration, etc., for distributing among heirs or distributees. *Phillips v. Phillips*, 51 N. W. 1071, 1072, 91 Mich. 433.

NET GAIN.

The term "net gains," when used in reference to a business, means the excess of receipts over expenditures. "A stipulation for a share of the net gains is a stipulation for a share of profits as such." *Connolly v. Davidson*, 15 Minn. 519, 530 (Gil. 428, 436), 2 Am. Rep. 154 (citing *Story, Partn.* 51; *Dob v. Halsey*, 16 Johns. 34, 40, 8 Am. Dec. 293).

The term "net gain," in a contract for the purchase of logs to be delivered at the mill at which they were to be sawed, the payment of a certain amount per thousand feet to be based on the log scale, the purchaser agreeing to pay a certain sum per thousand feet for all thick shop and better, and a less sum for balance of lumber, mill culls out, and all "net gain" at the prices mentioned on the last payment, means the gain in sawing over the log scale; that is, if the lumber sale overran the log scale, then for the amount of such overrun the seller was to be paid at the rates mentioned. *McIlquham v. Barber*, 53 N. W. 902, 904, 83 Wis. 500.

NET INCOME.

Of business or corporation.

"Net income" or "earnings" are the products of a business, deducting the expenses only. *Jones & Nimick Mfg. Co. v. Commonwealth*, 69 Pa. (19 P. F. Smith) 137, 139.

A contract between parties engaged in transacting a certain business that the net income, after paying the expenses of the concern, is to be equally shared between the contracting parties, means nothing else than sharing the profits of the business as profits. It is evidently the net profits which are to be thus divided, and not the gross profits;

which it has been attempted, in some cases, to make a test to distinguish the cases where a partnership liability attaches, and where it does not. The term "net income" cannot be understood to mean gross profits. *Bromley v. Elliot*, 38 N. H. 287, 304, 75 Am. Dec. 182.

"Net annual income" of corporation stock means "all dividends and bonds distributed among the stockholders which are derived from and represent the surplus earnings of the corporation, but does not extend to any portion of the capital stock of the corporation which has been purchased by it on credit of its bonds and distributed among the stockholders, although such stock, when distributed, is charged to the profit and loss account of the corporation." *Gilkey v. Paine*, 14 Atl. 205, 80 Me. 319.

Of estate.

"Net income," as used when speaking of the net income of an estate, is equivalent to rents, profits, or income. *People v. San Francisco Sav. Union*, 13 Pac. 498, 499, 72 Cal. 199.

"Net income," as used in a will designating the amount to be paid a beneficiary, means the income after the payment of taxes, commissions, and a reasonable allowance for the disbursements of the trustee in the execution of his trust; and, where the investment is in securities purchased at a premium, only such part of the proceeds therefrom can be counted as income as will leave the fund unimpaired at the maturity of the investment. *New York Life Ins. & Trust Co. v. Sands*, 53 N. Y. Supp. 320, 322, 24 Misc. Rep. 102.

"Net income," as used in a will requiring a trustee to pay over all the net income realized from the estate, means the income derived from the whole property, less the necessary expenses in its management, and disbursements incurred on account thereof; that is, less such expenses and disbursements as the society might lawfully incur in its management. *In re Cornell's Estate*, 44 N. Y. Supp. 585, 15 App. Div. 285.

Of real estate.

The "net income" of real estate held in trust is only that portion which remains after payment of taxes, repairs, and commissions, and a large measure of discretion is incident to the payment of at least one of these charges. *In re Hemphill's Estate*, 36 Atl. 409, 410, 180 Pa. 95.

"Net income," as used in a will providing that the beneficiary shall receive one-third of the net income of all real estate after all taxes, assessments, and interest due thereon are paid, should be construed to mean the gross rents of the real estate, less only the taxes, assessments, and interest.

Usually the phrase "net income" of real estate would mean the balance of the rent left after deducting therefrom all necessary charges and expenses of every kind and nature connected with the preservation and management of the land. Under ordinary circumstances, charges for repairs to buildings would certainly be included among the items to be deducted from the gross rents of realty in order to determine the net income thereof, but in the will under consideration the testator has defined "net income" to mean otherwise. *Fickett v. Cohu*, 1 N. Y. Supp. 436, 439, 14 Daly, 550.

In a will giving the testator's wife the net income of one-third part of his homestead, the term "net income" is equivalent to income, or the rents and profits, of an estate, and makes the wife a tenant in common of one-third of the land itself. "Net" is a term used among merchants to designate the quantity, amount, or value of an article or commodity after all tare and charges are deducted. The "income" of an estate means nothing more than the profit it will yield after deducting the charges of management, or the rent which may be obtained for the use of it. *Andrews v. Boyd*, 5 Me. (5 Greenl.) 199, 201.

NET INDEBTEDNESS.

The words "net indebtedness" shall mean the indebtedness of the county, city, town, or district, omitting debts created for supplying the inhabitants with water, and other debts exempted from the operation of the law limiting their indebtedness, and deducting the amount of sinking funds available for the payment of the indebtedness included. *Rev. Laws Mass. 1902, p. 88, c. 8, § 5, subd. 12.*

NET LOSS.

"Net loss," as used in an indemnity bond given to insure a merchant against loss through the insolvency of debtors, and providing that, to simplify adjustment and to avoid disputes, it is agreed that such sum of gross loss shall be the limit to be borne by the indemnified as, less 25 per cent., will equal the agreed amount of annual net loss, implies a resulting remaining loss after credits or collections are deducted. *Strouse v. American Credit Indemnity Co.*, 46 Atl. 328, 331, 91 Md. 244.

NET PREMIUM.

The term "net premium" is used in the business of life insurance to designate that portion of the premium which is intended to meet the cost of the insurance, both current and future. The amount of the net premium is calculated upon the basis of cer-

tain tables of mortality, and upon the assumption that the company will receive a certain rate of interest upon all its assets. The net premium does not include the entire premium paid by the insured, but it does include or is "loaded" with a certain sum for expenses. *Fuller v. Metropolitan Life Ins. Co.*, 41 Atl. 4, 10, 70 Conn. 647.

NET PROCEEDS.

The term "net proceeds," in mercantile language, means the sum actually received after making all deductions. *McMurphy v. Garland*, 47 N. H. 316, 320.

The term "net proceeds," when used in contracts without its signification being qualified or restricted by other words in the same contract, means what remains of the gross proceeds after all expense and loss incurred in realizing them are deducted. *Maloney v. Love*, 52 Pac. 1029, 1030, 11 Colo. App. 288; *Mercur Gold Min. & Mill. Co. v. Spry*, 52 Pac. 382, 384, 16 Utah, 222.

Defendant agreed to pay to plaintiff one-third of the net proceeds of a saddlery and harness manufactory, and in construing the contract the court held that "net proceeds" meant what remained of the receipts after deducting the cost of the raw material, and of the labor and expense of carrying on the business, including, of course, the labor of defendant and his workmen. *Dunlap v. O'Dena* (S. C.) 1 Rich. Eq. 272, 274.

Of cargo.

"Net proceeds," as used in a letter to a captain of a vessel by his employers that "your commissions are six per cent. of the net proceeds of your homeward cargo," means sums actually realized after making all deductions, and includes bad debts as well as other charges. *Caine v. Horsfall*, 1 Exch. 519, 524.

Of income of estate.

The term "residue or net proceeds," in a will which directed testator's executors to carry on his business, and, after paying certain expenses from the income, to pay the residue or net proceeds to certain designated beneficiaries, was construed to show the testator's intention to dispose of such portion of the income as should remain after making proper and legitimate deductions for expenses and losses incurred in the management of the estate and in the conduct of the business intrusted to the executors. *In re Jones*, 9 N. E. 493, 494, 103 N. Y. 621, 57 Am. Rep. 775.

In marine insurance.

The term "net proceeds," in the rule of marine insurance that the measure of damage in case of a partial loss of a cargo of

grain caused by water damage is the difference between the respective gross proceeds of the same article when sound and when damaged, and not the net proceeds, means the gross proceeds deducting freight, duty, and landing charges. The gross proceeds from which such deduction must be made is the market price at which the market, after paying freight, duty, and landing charges, can sell the goods to the consumer or purchaser at the port of arrival. *Lamar Ins. Co. v. McGlashen*, 54 Ill. 513, 518, 5 Am. Rep. 162.

Of sale of land.

The net proceeds of a sale of land is what remains of the gross proceeds after paying the expenses of the sale. *Dallas County v. Club Land & Cattle Co.*, 66 S. W. 294, 298, 95 Tex. 200.

NET PROFITS.

In a contract of service whereby the plaintiff was to receive, in lieu of a salary, "five per cent. of the net profits" of the business, "net profits" means the money received from the sale of goods after deducting their cost and expenses. *Wallace v. Beebe*, 94 Mass. (12 Allen) 354, 357; *Foster v. Goddard* (U. S.) 9 Fed. Cas. 534, 541.

The term "net profits" means the surplus left after deducting for all losses. It was used in such sense in a contract providing for a settlement of yearly business according to the net profits of the business. *Welsh v. Canfield*, 60 Md. 469, 475.

In an agreement between the stockholders of a corporation that all the net profits of the company, after the payment of taxes, insurance, and the necessary amount for the proper maintenance of the property of the company in its then condition and capacity, should be divided equally among the stockholders themselves, "net profits" means what shall remain as the clear gain of any business venture after deducting the capital invested in the business, the expense incurred by its conduct, and the loss sustained in its prosecution. By the words "net profits," as used in the agreement, the parties did not mean the whole sum appearing as net profits on any annual statement, if such sum represented securities taken by the corporation in the ordinary course of its business which were not yet due, and which could not be converted except at a price much less than that which the corporation had given for them, but the term means net gains which had been actually realized, or which could be quickly realized without loss by a sale of assets representing the profits. *Park v. Grant Locomotive Works*, 3 Atl. 162, 167, 40 N. J. Eq. (13 Stew.) 114.

"Net profits," as used in a contract providing that a party should receive a sum

equal to one-third of the net profits, means the gain which accrues on an investment after deducting expenses and losses. They define themselves, and mean what shall remain as the clear gain of any business, after deducting the capital invested in the business, the losses incurred in its conducting, and the losses sustained in its prosecution. In ascertaining the net profits of a business, if we take the capital invested, the expenses of running it, and the losses incurred in its prosecution, which last element necessarily includes such accounts as are to be treated as bad and uncollectible, and deduct from the account of stock and outstanding accounts now freed from bad accounts and treated as outstanding accounts collectible, the difference will be the "net profits." *McClusky v. Klosterman*, 25 Pac. 366, 367, 20 Or. 108, 10 L. R. A. 785.

The "net profits" of an adventure do not mean what is made over the loss, expenses, and interest on the amount invested. The term includes simply the gain that accrues on an investment after deducting the loss and expenses of the business. If but 2 or 3 per cent. is realized on the amount put in, it may be a poorly paying business, but still there would be profits, even if the legal rate of interest were 10 per cent. or greater. *Tutt v. Land*, 50 Ga. 339, 350.

In an agreement by which one party was to furnish the money for the conduct of an enterprise in which the other was actively engaged, the use of the words "net profits" did not, as a matter of law, exclude the inference of his obligation to bear his proportion of the losses, if any should occur. The use of the words may well have been understood as profits after payment of interest, and the idea doubtless was that all expenses should be paid out prior to the division of gains. *Johnson Bros. v. Carter & Co.*, 94 N. W. 850, 851, 120 Iowa, 355.

"Net profits" and "probable value" are convertible terms as applied to a business. *Poposkey v. Munkwitz*, 32 N. W. 35, 41, 68 Wis. 322, 60 Am. Rep. 858.

Of land.

"Net profits," as used in a devise of the net profits of certain land to testator's widow so long as she should remain his widow, means the profits accruing to the widow after the taxes and expenditures for repairs had been paid out of what would be obtained from the estate. *Earl v. Rowe*, 35 Me. 414, 420, 58 Am. Dec. 714.

Of partnership.

The term "net profits," when applied to the profits of a firm, means everything remaining after the payment of all debts due from the firm. It was so held in construing a contract for the dissolution of a partnership and a division of the net profits. *Gorse*

v. Lynch, 72 N. Y. Supp. 1054, 1056, 36 Misc. Rep. 150.

The term "net profits," in an agreement by a person employed by a partnership, stipulating for a certain salary and also one-fourth of the "net profits" of the business, and providing that in estimating the profits on the one hand no deduction should be made for bad debts, and on the other that interest, at a certain rate on the capital furnished by the partners, should be deducted from the net profits, meant that the salary to be paid the employé, as well as the salaries to be paid the partners provided by accompanying articles of partnership, were to be taken as a part of the necessary expenses of the business, and deducted from the gross profits in order to ascertain the net profits in which the employé was to share. *Fuller v. Miller*, 105 Mass. 103, 105.

In an assignment by a partner of all his interest in certain land purchases in which the assignor is entitled to "one-third of the net profits," only the assignor's interest in the profits of the enterprise were transferred, such as belonged to him as a partner; and under the assignment a collateral benefit which he derived as agent of the company, or otherwise than as partner, was not included, so that a sum due him on account of personal expenses in the management of the business did not pass. *Stewart v. Stebbins*, 30 Miss. 66, 83.

NET RECEIPTS.

The "net receipts" of a business are the receipts of the business after deducting the current expenses. *People v. San Francisco Sav. Union*, 13 Pac. 498, 499, 72 Cal. 199; *German Alliance Ins. Co. v. Van Cleave*, 61 N. E. 94, 96, 191 Ill. 410.

NET RECOVERY.

Where a decree had been rendered in the circuit court for a certain sum, and the plaintiff, not satisfied therewith, had taken an appeal to the Supreme Court, where the decree is affirmed, and the parties interested employ an additional attorney to obtain a rehearing, and agreed to pay him a certain fixed sum, and a contingent fee of 5 per cent. "of the net recovery over and above that already decreed," the "net recovery" meant the excess over and above that already decreed in the circuit court, less the amount to which one of the interested parties who had not joined in the contract would be entitled. *Camden v. McCoy*, 37 S. E. 637, 638, 48 W. Va. 377.

NET RENT AND PROFITS.

Net rent is a sum to be paid to the landlord clear of all deductions, and if one agree

to take a lease at a "net rent" he cannot object that the lease contains a covenant for him to pay the land and sewer taxes. *Bennett v. Womack*, 3 O. & P. 96.

A testator in devising certain lands to his wife in trust, and providing that his wife should receive and take all the "net rents" and profits during her own life, to her own use, requires the trustees to receive the gross rents, and, after paying out of them the land tax and other charges on the estate, to hand over the "net rents," or what remains, to his wife. *Barker v. Greenwood*, 4 M. & W. 421, 431.

NET SALES.

Where, in settlement of dispute between a city and the heirs of the grantor of land which had been conveyed conditionally to the city for use as a cemetery, an agreement was entered into providing that the land should be sold, one-half of the net sales to be paid to the city, and one-half to be divided amongst the representatives of the grantor, it was held that, in the absence of all reference in the agreement to any lien or incumbrance, the term "net sales" would be taken to mean the proceeds of the sale after deducting the usual costs, commissions, and expenses incident to a sale. *Williamson v. City of Baltimore*, 19 Md. 413.

NET TONNAGE.

The "net tonnage" of a vessel is the difference between the entire cubic contents of the interior of the vessel numbered in tons and the space occupied by the crew and by propelling machinery. *The Thomas Melville* (U. S.) 62 Fed. 749, 751, 10 O. C. A. 619.

NET VALUE.

"Net value," as used in St. 1820, c. 227, imposing upon every life insurance company an annual excise tax, to be determined by assessment upon a valuation equal to the aggregate "net value" of all policies in force on a certain date then next preceding, means the sum which, with compound interest at the rate of 4 per cent. per annum, and with the addition of future net premiums, will provide for the payment of the policy when it matures. The net value of a policy represents approximately the amounts of the payments which have been made by the holder in excess of the yearly cost of insurance, and thus the aggregate net values which furnish the basis of this tax represent approximately the amount of money of citizens of the commonwealth which the company has in its hands, and which it is investing and managing by virtue of its franchise. *Connecticut Mut. Life Ins. Co. v. Commonwealth*, 133 Mass. 161, 164.

Where the constitution of a corporation provided that on the death of any stockholder his legal representatives might receive the net value of all shares held by such member, it was decided that the "net value" meant the fair market value of the shares as sold in the usual method of selling such property, neither forced at a time of unusual depression in the market, or deferred in expectation of an unusual rise. *Babcock v. Middlesex Sav. Bank & Bldg. Ass'n*, 28 Conn. 302.

NET VALUE OF POLICIES.

The term "net value of policies" intends the liability of an insurance company upon its insurance contracts other than accrued claims, computed by rules of valuation established by other provisions of the act. *Shannon's Code Tenn.* 1896, § 3274; *Code Ala.* 1896, § 2575; *Rev. Laws Mass.* 1902, p. 1120, c. 118, § 1.

NEUTRALITY.

See "Warranty of Neutrality."

Strictly speaking, neutrality consists in the abstinence from any participation in a public, private, or civil war and impartial conduct towards both parties. But the maintenance, unbroken, of peaceable relations between two powers, when the domestic peace of one of them is disturbed, is not "neutrality," in the sense in which the word is used when the disturbance has acquired such head as to demand the recognition of belligerency. *United States v. The Three Friends*, 17 Sup. Ct. 495, 498, 166 U. S. 1, 41 L. Ed. 897.

NEVER INDEBTED.

The term "never indebted," in a replication that plaintiff never was indebted in the manner and form, etc., is not the same as not indebted, and does not authorize the plaintiff to prove payment. *Stockbridge v. Sussams*, 3 Adol. & E. (N. S.) 239, 241.

NEVERTHELESS.

"Nevertheless" is equivalent in meaning to "notwithstanding"; so that in Const. § 68, providing that the Governor and all civil officers shall be liable to impeachment for any misdemeanors in office, and judgments in such cases shall not stand further than removal from office and disqualification, but the party convicted shall "nevertheless" be subject to indictment, trial, and punishment by law, the force of the term "nevertheless" is merely to indicate that impeachment shall not be a bar to prosecution, and it does not require impeachment as a condition precedent to prosecution under indictment. *Commonwealth v. Rowe*, 66 S. W. 29, 32, 112 Ky. 482.

NEW.

The word "new" is a relative term. We have a striking illustration of this fact in the case of the Holy Scriptures. The canonical books which appeared upon the advent of the Christian era, though now nearly 20 centuries old, are known in group as the New Testament, in contradistinction to the former canonical books, which are known together as the Old Testament. A county which has been taken from another, whatever its age, may properly be called a new county with reference to such other. *Mills County v. Brown County*, 29 S. W. 650, 651, 87 Tex. 475.

NEW ACQUISITION.

By "new acquisition" is meant an estate which the intestate has acquired by his own exertions and industry, or by will or deed of a stranger to his blood. *H. C. Frick Coal Co. v. Laughead*, 52 Atl. 172, 174, 203 Pa. 168.

NEW AND USEFUL APPARATUS.

The term "new and useful apparatus," within the meaning of the patent law authorizing the issuing of patents for such apparatus, does not include the mere permanent attachment of advertising material to balloons. *In re Gould*, 8 D. C. (1 McArthur) 410, 413.

NEW AND USEFUL IMPROVEMENT.

A contract, to be wholly performed within a year, by which one party agreed to make application as the other party's assignor for patents for certain "new and useful improvements" in certain machines, must be construed to mean only those then actually embodied in the machine and those then existing in the mind of the party. *Adams v. Turner*, 46 Atl. 247, 249, 73 Conn. 38.

NEW ARTICLE.

Articles of manufacture may be "new" in the commercial sense when they are not new in the sense of the patent law. New articles of commerce are not patentable as new manufactures, unless it appears in the given case that the production of the new article involves the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture or production. *McKay v. Jackman* (U. S.) 12 Fed. 615, 619 (citing *Union Paper Collar Co. v. Van Deusen*, 90 U. S. [23 Wall.] 530, 23 L. Ed. 128).

"A distinction must be observed between a new article of commerce and a new article which as such is patentable. Any change in form from a previous condition may render the article new in commerce; as powdered

sugar is a different article in commerce from loaf sugar, and ground coffee is a different article in commerce from coffee in the berry. But to render the article new, in the sense of the patent law, it must be more or less efficacious, or possess new properties by combinations with other ingredients, not from a mere change of form produced by a mechanical division. It is only where one of these results follow that the product of the compound can be treated as the result of invention or discovery, and be regarded as a new and useful article." Thus, the mere change in the form of glue by reducing it to small particles, so that its solution is accelerated, does not create a new article, within the meaning of the patent law. *Milligan & Higgans Glue Co. v. Upton*, 97 U. S. 3, 6, 24 L. Ed. 985.

NEW ASSETS.

The term "new assets" is commonly used to designate assets coming into the hands of an administrator after the expiration of two years, which time, by the terms of the statute, bars claims against the estate, except as against new assets. *Littlefield v. Eaton*, 74 Me. 516, 521.

The term "new assets" cannot be applied to moneys received by an administrator as royalties or patent rights, which rights the administrator has included in his inventory. *Robinson v. Hodge*, 117 Mass. 222, 224.

The term "new assets," within the meaning of a statute prohibiting the maintenance of suit against an executor after the expiration of two years, unless new assets of deceased came into the executor's hands after the expiration of said two years, means assets for which the executor or administrator has not been previously liable, and does not refer merely to the shape which existing assets, with which he has already been charged, may assume. Thus the proceeds of real estate sold for the payment of debts after the expiration of two years from the date of the administrator's bond is not a receipt of new assets. *Chenery v. Webster*, 90 Mass. (8 Allen) 76, 77. The rents accruing on the real estate up to the time of the sale. *Alden v. Stebbins*, 99 Mass. 616. Or where a note is converted into money. *Sturtevant v. Sturtevant*, 86 Mass. (4 Allen) 122, 124.

The term "new assets," within the meaning of a statute authorizing an action against an administrator after the expiration of two years only by reason of his having received new assets, does not include property received by an administrator de bonis non in settlement of a suit against a surety on the bond of his predecessor for a failure to account for estate which had been inventoried. *Veazie v. Marrett*, 88 Mass. (6 Allen) 372.

The recovery of a judgment by an executor in a suit pending at the time of testator's

death and the receipt of the money collected on such judgment do not constitute "new assets" in the hands of the executor, within the meaning of the statute authorizing the beginning of suits by claimants after the lapse of the period of limitation, if after that time new assets come into the hands of the executor. *Bradford v. Forbes*, 91 Mass. (9 Allen) 365, 369.

NEW ASSIGNMENT.

A new assignment is but a restatement with greater particularity and exactness, in the reply, of the same cause of action already set out in the complaint. *Bishop & Co. v. Travis*, 53 N. W. 461, 51 Minn. 183.

NEW BOND.

"New bond," as used in Gen. St. c. 101, § 6, which authorizes the judge of probate to discharge a surety on a probate bond, "whereupon the principal shall give a new bond," would include a bond executed on the same day that the surety was discharged, though the bond was executed just before the surety was actually discharged. *Brooks v. Whitmore*, 31 N. E. 731, 139 Mass. 356.

NEW BUILDING.

Newness of structure in the main mass of the building—that entire change of external appearance which denotes a different building from that which gave place to it, though some parts of the old may have entered into it—is that which constitutes a "new building" as distinguished from one altered. *Warren v. Freeman*, 41 Atl. 290, 187 Pa. 455, 67 Am. St. Rep. 583 (citing *Miller v. Hershey*, 59 Pa. [9 P. F. Smith] 64).

A "new building" involves the construction, in the main, of a building. That entire change of external appearance which denotes a different building from that which gave place to it, though into the composition of the new structure some of the old parts have entered, is what constitutes a new building. This newness of structure must be in the external or main plan of the building, and not in its internal arrangement. There appears to be a good reason for this, not only in the fact that the external walls of the building constitute the strongest mark of its identity, but also in the notice that the external change furnishes to purchasers and lien creditors, calculated to put them on inquiry as to mechanics' liens. *Miller v. Hershey*, 59 Pa. (9 P. F. Smith) 64, 69.

The term "new dwelling house," in an act in reference to the manner of constructing new dwelling houses, was construed to apply to an alteration of an old building which was of so radical a character as to

practically constitute new buildings. *Bowers v. Bache* (Pa.) 12 Phila. 402, 403.

"New house," as used in a contract by which a person agreed to repay one-half the cost of a party wall whenever she erected a new house, should be construed to include a new front, for, if a new front is not a "new house" within the meaning of the contract, neither is a new rear wall or new roof, or new windows and doors or floors; and so, if the whole house was repaired instead of rebuilt at once, a party contracting would never be liable to pay for the party wall. *Sherley v. Burns*, 58 S. W. 691, 22 Ky. Law Rep. 788.

The words "new buildings" in Act April 21, 1855, declaring that all new buildings in the city shall front upon a street, and have an open space attached thereto, etc., includes a house the back building of which is raised, and two of the walls of which are changed from frame to brick, and a number of alterations made in the interior so as to fit the whole for four cheap tenement houses. *Appeal of Brice*, 89 Pa. 85, 87.

NEW CAUSE OF ACTION.

The expression "new cause of action" may refer to a new state of facts out of which liability arises, or it may refer to parties who are alleged to be entitled under the same state of facts, or it may embrace both features. *Love v. Southern R. Co.*, 65 S. W. 475, 476, 108 Tenn. 104, 55 L. R. A. 471.

NEW COUNTY.

The words "new county" as used in Code, § 34, providing in what manner the jurisdiction of an administration upon an estate may be changed from an old to a new county, were not intended to apply to any county existing at the time that section took effect, but to those counties only which might be thereafter laid out and organized. *Jones v. Rountree*, 23 S. E. 311, 312, 96 Ga. 230.

NEW DOMICILE.

Change of domicile, see "Change."

NEW DRESS.

A "new dress," in the parlance of printers, is a new outfit of type. *Reimer v. Newel*, 49 N. W. 865, 866, 47 Minn. 237.

NEW DWELLING HOUSE.

See "New Building."

NEW ELECTION.

The term "new election," in the statute providing that when a vacancy shall happen in the office of a mayor a new election shall

be held, means another election, and presupposes a prior election. *Gilbert v. Craddock*, 72 Pac. 869, 872, 67 Kan. 346.

NEW GRANT.

As the opposite of the term "new" is "old," the term as used in Act Cong. May 26, 1824, providing that the rights of the proprietor and occupant of certain lots should be postponed to the Spanish grantee who had obtained a "new" grant or order of survey for the same, etc., has no reference to time alone by reference to an epoch after which grants should be considered new, but that "new" grant was put in contradistinction to an "old" grant for the same tract of land. *Pollard's Heirs v. Kibbe* (Ala.) 9 Port. 712, 722.

NEW HISTORY.

Where a person undertakes to furnish a "new history" of a country, the undertaking is not performed by his furnishing a book which commences with the translation of an entire history already existing and extensively known, with new continuations and some additions. *Paton v. Duncan*, 3 C. & P. 386.

NEW HOUSE.

See "New Building."

NEW INDUSTRY.

The term "new industry," as used in the act of Congress imposing a penalty on the importation of contract labor, but exempting therefrom laborers to be employed in a new industry, includes the manufacture of French silk stockings, where it is shown that the articles materially differed from ordinary silk stockings. *United States v. McCallum* (U. S.) 44 Fed. 745, 746.

The term "new industry," within the exception to the prohibition of the contract labor law of 1885, that the statute shall not apply to prevent the engaging of skilled workmen in foreign countries to perform labor in the United States upon any new industry not previously established in the United States, includes the manufacture of fine lace curtains, which has been carried on in this country for only about three years, and is still confined to two or three establishments, which have been brought into existence by the McKinley tariff law, and will probably disappear if the protection is withdrawn. *United States v. Bromiley* (U. S.) 58 Fed. 554, 556.

NEW MACHINERY.

"New machinery," as used in Act Dec. 15, 1863, which provides that "any person,

company, or corporation who shall put into successful operation by the first of March, A. D. 1865, new and efficient machinery" for the manufacture of certain articles, shall be entitled to certain land grants, means machinery in the condition it was in when first manufactured; that is, not worn or defaced by use in any degree. The word was evidently used in opposition to the words "old" or "secondhand." *Maxwell v. Bastrop Mfg. Co.*, 14 S. W. 35, 36, 77 Tex. 233.

NEW MANUFACTURE.

In 1829 A. obtained a patent for the use of hot air blast in furnaces. In 1837 B. took out a patent for an improvement in the manufacture of iron, which consisted in the application of anthracite or stone coal, combined with the hot air blast, in the smelting of iron. The hot air blast was used by B. under a license from A. The use of anthracite was new, and the iron produced in consequence was greater in yield, cheaper in cost, and of better quality than that produced by the ordinary method. Held, that such combination was a new manufacture, within 21 Jac. I, c. 3. *Crane v. Price*, 4 Man. & G. 580.

NEW MATTER.

See "Material New Matter."

In Laws, c. 34, § 11, providing that the state shall not be precluded from producing witnesses, in addition to those of whom a list is required by Rev. St. c. 225, § 3, to be furnished the prisoner before the trial, to rebut or explain any evidence of new matter offered by the defendant, or to discredit his witnesses, the term "new matter" is not to be understood merely as that which proceeds upon the admission of the facts shown by the prosecution, and is in avoidance or explanation of them. Anything set out in the way of defense that is capable of being disproved, whether it admits or avoids or is in direct conflict with the case made, will be regarded as new matter, so as to admit new witnesses to rebut or explain it. *State v. Hartigan*, 19 N. H. 248, 254.

In pleading.

New matter which must be set out to render a plea or defense maintainable is matter not embraced within the issue raised, or which might be raised, by a denial, and therefore not provable under a denial. *Well v. Unique Electric Device Co.*, 80 N. Y. Supp. 484, 485, 39 Misc. Rep. 527 (citing *Millbank v. Jones*, 127 N. Y. 376, 28 N. E. 31, 24 Am. St. Rep. 454).

The term "new matter," in the law of code pleading, has reference to matter which cannot be given in evidence under a denial or denials of allegations of the complaint,

but which must be separately pleaded as a defense. *Pascekwitz v. Richards*, 75 N. Y. Supp. 291, 293, 37 Misc. Rep. 250. A denial only raises an issue on the complaint, whereas a defense consists of new matter which is a defense to the action even though the complaint be true. *Staten Island Midland R. Co. v. Hinchcliffe*, 68 N. Y. Supp. 556, 557, 34 Misc. Rep. 49.

The term "new matter," in the law of code pleading, means matter outside the issues raised by a denial. A defense of new matter, therefore, is a defense based on a concession of plaintiff's claim, and is limited to facts showing a defense, even though facts alleged by plaintiff are true. *Burkert v. Bennett*, 71 N. Y. Supp. 144, 145, 35 Misc. Rep. 318.

The term "new matter" is used in the law of pleading to designate matter other than that embraced in the issue raised by the denial or denials. No matter is new which is provable under the issue raised by denials, but only matter which is outside of that issue, like a general release, a former adjudication, the truth of the matter alleged as slander, that the contract sued on is fraudulent, etc. Matter which is provable under a denial is not new matter at all, and cannot constitute a defense in pleading. *Staten Island Midland R. Co. v. Hinchcliffe*, 70 N. Y. Supp. 601, 604, 34 Misc. Rep. 624.

In the Code, requiring that an answer that sets up no denial must contain new matter constituting a defense or counterclaim, "new matter" has been defined to mean some fact which the plaintiff is not bound to prove in the first instance to establish his cause of action, and which goes in avoidance or discharge of the cause of action alleged in the complaint. *Bell v. Yates* (N. Y.) 33 Barb. 627, 629. If the plaintiff is bound to prove a fact in order to establish his cause of action not alleged in his complaint, the defendant need not allege the contrary in his answer. He may controvert such fact upon the trial, on the introduction of the evidence by the other party, without any allegation in his answer upon the subject. So, where the complaint contains no allegation that the defendant was a corporation, although sued by a name which would indicate that it was a corporation, an allegation in the answer that defendant was not a corporation was not new matter. *Stoddard v. Onondaga Annual Conference* (N. Y.) 12 Barb. 573, 576.

New matter, within Civ. Code S. D. § 99, requiring the answer to contain a statement of any new matter constituting a defense, counterclaim, or set-off, in ordinary, concise language, means, according to the most approved interpretation of the term, any fact extrinsic to the matter alleged as a cause of action, and including all defenses, whether legal or equitable, not included in a de-

nial of the allegations of the petition. *Cady v. South Omaha Nat. Bank*, 65 N. W. 906, 909, 46 Neb. 756 (citing *Bliss*, Code Pl. § 852).

Whatever fact, if proved, would not tend to contradict or deny some allegation of the plaintiff's first pleading, but would tend to establish some circumstance, transaction, or conclusion of fact not inconsistent with the truth of all those allegations, constitutes new matter; and it may be said generally that the defense of new matter necessarily, either expressly or by implication, admits the averments of the complaint, and alleges facts that destroy their effect or defeat them. *Mauldin v. Ball*, 1 Pac. 409, 411, 5 Mont. 96.

New matter in an answer is that which admits that the cause of action stated in the complaint once existed, but at the same time avoids it; that is, shows that it has ceased to exist. Of this character are release and accord and satisfaction. *Landis v. Morrissey*, 10 Pac. 258, 259, 69 Cal. 83.

Matters set up in defense which are not extrinsic to the matters set up in the complaint as the basis of a cause of action are not new matter, within Code Civ. Proc. § 494, authorizing a demurrer to a counterclaim or defense consisting of new matter contained in the answer, on the ground that it is insufficient in law on its face. *Uggla v. Brokaw*, 79 N. Y. Supp. 244, 247, 77 App. Div. 310.

New matter is matter in confession and avoidance. *Gould*, Pl. c. 3, § 195. In an action on a contract, it is not proving new matter for the defendant to show that there are other terms in the contract relied on besides those shown by plaintiff, whether such proof be calculated to defeat the action, or only to reduce the damages. *Ferguson v. Rutherford*, 7 Nev. 385, 390.

Same—Plea of former judgment.

The defense of a bar by a former judgment, being in the nature of a confession and avoidance, is new matter, within the meaning of the Code, and must be specially pleaded. *Bowe v. Minnesota Milk Co.*, 47 N. W. 151, 44 Minn. 460.

Same—Traverse of complaint.

"New matter," in Pub. St. c. 60, par. 75, requiring a reply to new matter in an answer, means matter affirmatively pleaded as a defense, but not that which amounts merely to a traverse of the complaint. *Nash v. City of St. Paul*, 11 Minn. 174, 178 (Gil. 110, 113).

"New matter constituting a defense," in the provision of the Code that an answer may contain a statement of any new matter constituting a defense, is in the nature of a plea of confession and avoidance—an affirma-

tion. An answer which serves merely to put in issue the allegations of the complaint does not constitute such new matter. *Craig v. Cook*, 9 N. W. 712, 713, 28 Minn. 232.

Those matters which the defendant should affirmatively plead as a defense are "new matter," within the meaning of that term as used in the Codes of Procedure, while those that amount merely to a traverse of the allegations of the complaint are not. *Nash v. City of St. Paul*, 11 Minn. 174, 178 (Gil. 110, 113).

In specification for patent.

In Act Cong. July 8, 1870, § 53, relating to patents, and providing that no new matter shall be introduced into the specification, "new matter" means new substantive matter, such as would have the effect of changing the invention, or of introducing what might be the subject of another application for a patent. *Parker & Whipple Co. v. Yale Clock Co.*, 8 Sup. Ct. 38, 46, 123 U. S. 87, 31 L. Ed. 100; *Flower v. Rayner* (U. S.) 5 Fed. 793, 799. The danger to be provided against by the statute was the temptation to amend the patent so as to cover improvements which might have come into use. The Legislature was willing to concede to the patentee the right to amend his specification so as to fully describe the claim of his invention attempted to be secured by his original patent, but which was not fully described thereby, through inadvertence, accident, or mistake, but was not willing to give him the right to patch up his patent by the addition of other inventions, which, though they might be his, had not been applied for by him, or, if they had been applied for, had been abandoned or waived. A patent, therefore, amending a certain process for exploding nitroglycerin, will not support a reissued patent for the composition of nitroglycerin and gunpowder or other substances, even though the original application claimed the invention of the process and the compound, for they are distinct inventions. *Giant Powder Co. v. California Powder Works*, 98 U. S. 126, 138, 25 L. Ed. 77.

NEW NUISANCE.

The continuance of that which was originally a nuisance is regarded as a new nuisance, and, although recovery may be barred on the original cause, an action on the case may be brought at any time before an entry is barred, to recover such damages as have accrued by reason of its continuance within the statutory period. *Langfeldt v. McGrath*, 33 Ill. App. 153, 161 (citing *Chicago, B. & Q. R. Co. v. Schaffer*, 124 Ill. 112, 16 N. E. 239).

NEW PARTIES.

The term "new parties," in the statute enabling a defendant in a bill in chancery

to file a cross-bill without service of process on the defendants to the cross-bill, unless new parties be introduced, means those of the defendants to the original suit who are also made defendants to the cross-bill. The statute does not authorize the making of persons parties to the cross-bill who were not parties to the original. *Ladner v. Ogden*, 31 Miss. 332.

NEW POUND.

In Gen. St. tit. 16, c. 10, § 2, providing that, when the selectmen of a town shall establish a new pound, they shall appoint a poundkeeper for it, to hold office until the next annual meeting, "new pound" means one which is newly established, and not one established to take the place of one already existing. *Bosworth v. Trowbridge*, 45 Conn. 161, 165.

NEW PROJECT.

A city charter forbidding the city council to make any appropriation for any new project or proposition involving any expenditure of money exceeding a certain sum in any one year, without the approval of a majority of the electors, cannot be construed to include the project of building a city hall on the site which had already been purchased therefor. The project of erecting a city hall can hardly be construed as an old one before the building is begun. *Ecroyd v. Coggeshall*, 41 Atl. 260, 262, 21 R. I. 1.

NEW PROMISE.

A renewal of a promise to pay a note barred by the statute of limitations is itself a new promise sufficient to remove the bar of the statute. *McCrillis v. Millard*, 24 Atl. 576, 577, 17 R. I. 724.

Part payment of a debt, whether made by the debtor or by his agent, within the statutory period of limitation from the time when such debt was incurred, ordinarily operates as a new promise, and takes the debt out of the statute of limitations. *Peabody v. Tenney*, 30 Atl. 456, 457, 18 R. I. 498.

To constitute a new promise, within Code 1873, § 2539, providing that an action on a promissory note which is barred may be revived by a new promise to pay the same, made in writing, must be one made by the debtor. The statute does not contemplate a promise of any other person. Therefore it cannot be made by the assignee. *Hellman v. Klene*, 35 N. W. 516, 517, 73 Iowa, 448, 5 Am. St. Rep. 693.

NEW PROOF.

New proof, to be available on bill of review, must be such as could not have been

discovered before the hearing by the exercise of reasonable diligence. *Ketchum v. Breed*, 26 N. W. 271, 277, 66 Wis. 85.

NEW ROAD.

"New," as used in 1 Rev. St. p. 502, § 2, authorizing commissioners of highways to lay out new roads and discontinue old ones, does not necessarily mean an ancient or long-existing road. The phrase "new road" means a road newly laid out where one was not, and the words "old road" are opposite thereto, and mean one laid out and used, whether long ago or of more recent date. *People v. Griswold*, 67 N. Y. 59, 61.

The construction of a railway yard, and tracks therein, to be used in connection with, and as a part of, a railroad line, is not a construction of a new road, or any part thereof, within Laws 1887, c. 13, abrogating, as to railway companies constructing a new road, the common-law rule as to the liability of a master for injuries to a servant caused by the negligence of a fellow servant. *Moran v. Eastern Ry. Co. of Minnesota*, 50 N. W. 930, 931, 48 Minn. 46.

"New road," as used in Laws 1887, c. 13, § 1, relating to the liability of railroad companies for injury to their employes, and providing that nothing in the act shall be construed so as to render any railroad company liable for damages sustained by any employe, etc., while engaged in the construction of a new road, or any part thereof, not open to the public travel or use, does not include a road which is open to public travel; nor would a company be liable for injuries sustained by its employes while working on yards to be used in connection with a road which is open to public travel. *Schneider v. Chicago, B. & N. R. Co.*, 43 N. W. 783, 784, 42 Minn. 68.

NEW TERM.

It is well understood that an adjourned term of court is not a new term of such court, but a continuance of the term at which the adjournment was taken. *Commonwealth v. Norfolk County*, 5 Mass. 435, 436.

NEW TRIAL.

See "Bill for New Trial"; "Motion for New Trial."

A new trial is a re-examination of the issue in the same court. Gen. St. Kan. 1901, § 5711.

A new trial is a re-examination in the same court of an issue of fact after a verdict by the jury or a decision by the court. Ann. St. Ind. T. 1899, § 3356; Mansf. Dig. § 5151; B. & C. Comp. St. Or. § 173; Skinner

v. Walker, 98 Ky. 729, 735, 34 S. W. 233, 234; Harris v. Bruton, 53 S. W. 322, 324, 2 Ind. T. 524.

A new trial is a re-examination in the same court of an issue of fact after a verdict by a jury, report of a referee, or decision by the court. Rev. St. Okl. 1903, § 4493; Gen. St. Kan. 1901, § 4754; Gibson v. Gibson, 24 Neb. 394, 407, 39 N. W. 450, 456; McDermott v. Halleck, 69 Pac. 335, 337, 65 Kan. 403; Blevins v. Morledge, 47 Pac. 1068, 5 Okl. 141; United States v. Trabing, 6 Pac. 721, 723, 3 Wyo. 144.

A new trial is a re-examination in the same court of an issue of fact, or some part or portion thereof, after verdict by a jury, report of a referee, or a decision by the court. Code Iowa 1897, § 3755; Hooker v. Chittenden, 76 N. W. 706, 707, 106 Iowa, 321; Crossland v. Admire, 24 S. W. 154, 118 Mo. 87.

A new trial is a re-examination in the same court of an issue of fact after a verdict by a jury, a report of a referee or master, or a decision by the court. Rev. St. Wyo. 1899, § 3746; Bates' Ann. St. Ohio 1904, § 5305; First Nat. Bank v. Swan, 23 Pac. 743, 749, 3 Wyo. 856.

A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, judicial officer, or referees. Rev. St. Utah 1898, § 3291.

A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee. Comp. Laws Nev. 1900, § 3289; Ballinger's Ann. Codes & St. Wash. 1897, § 5070; Castellaw v. Blanchard, 31 S. E. 801, 803, 106 Ga. 97; Froman v. Patterson, 24 Pac. 692, 693, 10 Mont. 107.

A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees. Code Civ. Proc. S. D. 1903, § 300; Code Civ. Proc. Cal. 1903, § 656; Leach v. Pierce, 29 Pac. 235, 237, 93 Cal. 614; San Diego Land & Town Co. v. Neale, 20 Pac. 372, 373, 78 Cal. 63, 3 L. R. A. 83; Mobile Light & R. Co. v. Hansen, 33 South. 664, 135 Ala. 284 (citing Truss v. Birmingham, L. G. & M. R. Co., 96 Ala. 316, 11 South. 454).

A new trial is a re-examination of the issue in the same court, before another jury, after a verdict has been given. Cr. Code N. Y. 1903, § 462; Rev. St. Okl. 1903, § 5556; Pen. Code Cal. 1903, § 1179; Rev. Codes N. D. 1899, § 8270; Code Cr. Proc. S. D. 1903, § 429; Pen. Code Idaho 1901, § 5520; Rev. St. Utah 1898, § 4950.

A new trial is the rehearing of a criminal action, after verdict, before the judge or

another jury, as the case may be. Code Cr. Proc. Tex. 1895, art. 815.

The term "new trial" has been a familiar one to the profession since our early colonial history, and had acquired a settled meaning in England before our ancestors came to this country. It has always been used in the sense of a complete retrial of a cause, except in certain peculiar instances. These new trials are always retrials of the facts of the case, and are usually defined as a re-examination of an issue of fact. Zaleski v. Clark, 45 Conn. 397, 401.

The phrase "new trial," as employed in the statute relative to appeals, means, as at common law, a retrial of issues of fact. Dodge v. Bell, 34 N. W. 739, 37 Minn. 382; Hine v. Myrick, 62 N. W. 1125, 1126, 60 Minn. 518.

A new trial is the proceedings for the re-examination of the issues of a cause after determination of a former trial thereof. The new trial is "a modern invention to mitigate the severity of proceedings by attaint." A venire de novo was the ancient proceeding at common law for the obtaining of a new trial, but it differs from a new trial, in that the former must be granted upon "matter appearing on the record," but a new trial may be granted upon things out of it, as if a verdict be contrary to evidence, or the judge has given wrong instructions. Bosseker v. Cramer, 18 Ind. 44, 46.

A new trial is said in an ancient case to be only a new invention to be introduced on account of the severity of a judgment of attaint, to avoid which it was thought best to proceed in a milder way. So new trials were introduced. An application for a new trial was not a matter of right, but was granted of grace, to prevent a failure of justice. Kearney v. Snodgrass, 7 Pac. 309, 310, 12 Or. 311.

A new trial is a hearing of the cause before a new jury, but with as little prejudice to the parties as if it had never been heard before. It is not granted where the scales of evidence hang nearly equal. That which leans against the former verdict ought always very strongly to preponderate. Gunn v. Union R. Co., 49 Atl. 999, 1004, 23 R. I. 289.

A new trial is a re-examination of the issue in the same court before another jury. Code Cr. Proc. § 462; Whart. Cr. Pl. 84. When a new trial is ordered, it shall proceed in all respects as if no trial had been had. As was said by Judge Gray in People v. Palmer, 17 N. E. 215, 109 N. Y. 413, 4 Am. St. Rep. 477: "It would be a grievous miscarriage of justice, and the intent of the law would be thwarted, if it should be held that a reversal upon a prisoner's appeal for er-

rors of law upon his trial had the effect of putting it out of the power of the people to further try him under the indictment, when his guilt might be competently established. The effect of defendant's appeal is merely to continue the trial under the indictment in the appellate court; and, if reversal of the judgment of conviction follows, that judgment, as well as the record of the former trial, has been annulled and expunged by the judgment of the appellate court, and they are as though they never had been, while the indictment is left to stand as to the crime of which the prisoner had been charged and convicted, as though there had been no trial." *People v. Molineux*, 73 N. Y. Supp. 806, 807, 36 Misc. Rep. 435.

Same charge, or of lower degree.

Since Hill's Ann. Laws Or. § 234, does not provide that the granting of a new trial places the parties in the same position as if no trial had been had, and since the rule is that a conviction of a lower degree necessarily included within an indictment charging the commission of a greater crime operates as an acquittal of all degrees above it, a new trial, in the absence of a statute declaring the effect of a reversal of the judgment, must be confined to a retrial of the charge upon which the accused was convicted, or of a lower degree. *State v. Steeves*, 43 Pac. 947, 954, 29 Or. 85.

Default judgment.

The term "new trial" is not strictly applicable except in cases where issues have been joined, and it would be a remarkable construction to limit the regulations as to the granting of new trials by a circuit court on appeal from a magistrate's court to judgments by default, to which the term does not apply in strictness, and exclude such regulations in reference to trial actually had, to which the term properly applies. *Wideman v. Patton*, 42 S. E. 190, 191, 64 S. C. 408.

Upon a default judgment, there has manifestly been no trial, verdict, or decision, within the meaning of Civ. Code Ky. § 340, providing that a new trial is a re-examination in the same court of an issue of fact after a verdict by a jury or a decision by the court. And therefore the statute requiring a motion for new trial to be made within three days after the verdict or decision has no application to a case where the judgment was entered on default. *Riglesberger v. Bailey*, 44 S. W. 118, 102 Ky. 608.

Setting aside a default, and giving a defendant leave to file an answer and defend, is not the granting of a new trial, within the meaning of the statute. *Freeman v. Ambrose*, 40 Pac. 381, 12 Wash. 1.

Where plaintiff refused to proceed with the trial of a case at the time set, and for

that reason a verdict was directed for defendant, and judgment entered that plaintiff take nothing, and defendant recovered his costs, the setting aside of the judgment was not a granting of a new trial. *J. F. Hart Lumber Co. v. Rucker*, 50 Pac. 484, 485, 17 Wash. 600.

Judgment on demurrer.

A new trial is the re-examination of an issue of fact in the same court after verdict, report, or decision. A demurrer presents an issue of law, and a judgment thereon is not reviewable upon a motion for a new trial. It is only where the action of the court in the course of trial on the issues of fact is sought to be reviewed that a valid motion for new trial, and judgment thereon by the trial court, is a necessary precedent fact. *Barber Asphalt Pav. Co. v. City of Topeka*, 50 Pac. 904, 905, 6 Kan. App. 133.

An order denying a motion to vacate an order sustaining a demurrer, and for a new trial on the demurrer, is not an order refusing a new trial, so as to be appealable, under Gen. St. 1878, c. 86, § 6. *Dodge v. Bell*, 34 N. W. 739, 37 Minn. 382.

Trial after disagreement of jury.

The re-examination of the issues after a disagreement of the jury is not a new trial, in the sense used in the statute giving the right of appeal from an order granting a new trial. *Dossett v. St. Paul & T. Lumber Co.*, 69 Pac. 9, 11, 28 Wash. 618.

NEW WORK.

By a "new work" is understood every sort of edifice or other work which is newly commenced on any ground whatever. When the ancient form of work is changed, either by an addition being made to it, or by some part of the ancient work being taken away, it is styled also a new work. Civ. Code La. 1900, art. 856.

NEWLY DISCOVERED EVIDENCE.

In 8 Grah. & W. New Trials, 1016, the learned authors give the following definition of "newly discovered evidence": "By 'newly discovered evidence' is meant proof of some new and material fact in the case, which has come to light since the verdict." And further, at page 1020 of the same volume, in giving a further elucidation of the rule, they state the same as follows: "If a case has gone against a party simply because a portion of his evidence, without any fault of his, has remained latent, so that the truth has been obscured, what is more evident than that the truth ought to be vindicated by a second trial? It would be as wrong to permit, under such circumstances, the successful party to enjoy his advantage, obtained not upon his own strength, but upon the weakness of

his opponent, as to permit the latter to suffer without redress." In *re McManus*, 72 N. Y. Supp. 409, 413, 35 Misc. Rep. 678.

In order that a new trial may be granted upon the ground of newly discovered evidence, it must appear (1) that the evidence has been discovered since the trial; (2) that it could not have been discovered before the trial by the plaintiff or defendant, as the case may be, by the exercise of reasonable diligence; (3) that it is material in its object, and such as ought on another trial to produce an opposite result on the merits; and (4) that it is not to be merely cumulative, corroborative, or collateral. *Wynne v. Newman's Adm'r*, 75 Va. 811, 816.

Newly discovered evidence, as ground for a new trial, in order to be sufficient, must fulfill all of the following requirements: (1) Must be such as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as could not have been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be cumulative to the former issue; and (6) it must not be merely impeaching or contradicting the former evidence. *People v. Priori*, 58 N. E. 668, 672, 164 N. Y. 459.

Matter of record.

In *Vardeman v. Edwards*, 21 Tex. 743, the court said: "A party cannot be heard to say that evidence is newly discovered which he was bound to know was a record in a public office, at all times accessible. From the very nature of the evidence being documentary—a matter of record in a public office—it could not be newly discovered." And in *Shiels v. Lamar*, 58 Ga. 594, overruling a motion based on newly discovered evidence, the court said: "The new matter relied on consists principally of record evidence drawn from the archives of government, which might as easily have been found at the time of the controversy as now." Subsection 7 of section 340 of the Civil Code provides that "a new trial may be granted for newly discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial." Recollection of a recorded deed which could have been discovered with reasonable diligence is not newly discovered evidence, since recollection is not discovery. *Howton v. Roberts* (Ky.) 49 S. W. 340, 342.

Transactions occurring after trial.

Evidence relied on, on a motion for new trial, consisting solely of transactions which have taken place since the trial of the case, tending to show a compromise and settlement of the matter in litigation, is not newly discovered evidence, constituting a ground for new trial. *Putnam v. MacLeod*, 50 Atl. 646, 647, 23 R. I. 373.

5 Wds. & P.—55

NEWLY INVENTED MACHINE.

Acts 1839, § 7, providing that every person or corporation who has or shall have purchased or constructed any "newly invented machine, manufacture, or composition of matter," prior to the application of the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the machine, etc., so made or purchased, means the invention patented. *Andrews v. Hovey*, 8 Sup. Ct. 676, 677, 124 U. S. 694, 31 L. Ed. 557 (citing *McClurg v. Kingsland*, 42 U. S. [1 How.] 202, 11 L. Ed. 102).

NEW YORK FUNDS.

"New York funds," as used in a promissory note payable at New York in New York funds, or their equivalent, may embrace stocks, bank notes, specie, and every description of currency which is used in commercial transactions. Whether it means funds of the state generally, or of the city of New York, is not clear. The presumption is in favor of the latter, but this is by no means certain. In this respect, as well as what constitutes New York funds, the face of the note is indefinite. It is susceptible of different interpretations, and for this reason it cannot be considered a negotiable instrument. It is not a note payable in money. *Hasbrook v. Palmer* (U. S.) 11 Fed. Cas. 766, 767.

NEW YORK HARBOR.

In a proposal for an open policy of insurance upon a certain vessel, "New York Harbor" was written under "from," as indicating the place of starting, and also under "to," indicating the place of delivery. The evidence in an action on the policy showed that the cargo was to be carried from Brooklyn city to Tarrytown. Held, that New York Harbor included Tarrytown as between the parties. *Petrie v. Phoenix Ins. Co.*, 11 N. Y. Supp. 188, 57 Hun, 591.

NEWS.

See "Criminal News."

"News" means information, intelligence, knowledge, and is not the subject of property rights until published and copyrighted. *State ex rel. Star Pub. Co. v. Associated Press*, 60 S. W. 91, 105, 159 Mo. 410.

NEWSPAPER.

See "Official Newspaper"; "Public Newspaper"; "State Paper"; "Weekly Newspaper."

Newspapers, in ordinary acceptance, are publications issued periodically, containing the general or current news, or news of the

day, designed to be read by the public generally. *Crowell v. Parker*, 46 Atl. 35, 22 R. I. 51, 84 Am. St. Rep. 815; *Rosewater v. Pinzenscham*, 57 N. W. 563, 566, 38 Neb. 835.

A newspaper is defined by Webster as a sheet of paper, printed and distributed at stated intervals, for conveying intelligence of passing events, advocating opinions, etc.; a public print that circulates news, advertisements, proceedings of legislative bodies, public announcements, etc. *Burrill, Law Dict.*, defines it as a "paper or publication issued in numbers at stated intervals, conveying intelligence of passing events. The term 'newspaper' is properly applied only to such publications as are issued in a single sheet and at short intervals, as daily or weekly." It is difficult to determine with clearness and exactness where the lines of demarcation should be drawn between a newspaper, in the legal and common acceptance of the term, and the numerous publications devoted to some special purpose, and which circulate only among a certain class of the people, and which are not within the purview of the statutes requiring publication of legal notices in some newspaper. Many publications, such as literary, scientific, religious, medical, and legal journals, that are obviously but for one class of people, and that class always but a small part of the entire public, are not newspapers, within the legal and ordinary meaning of the word. The daily and weekly newspapers, common to all parts of the country, of general circulation among the people, without regard to class, vocation, or calling, devoted to the gathering and dissemination of news of current events of interest to all, and usually espousing and advocating principles of some political party with persistency, if not at all times with consistency, are, without doubt, newspapers, within the meaning of the statute. *Hanscom v. Meyer*, 82 N. W. 114, 115, 60 Neb. 68, 48 L. R. A. 409, 83 Am. St. Rep. 507; *Lynch v. Durfee*, 59 N. W. 409, 410, 101 Mich. 171, 24 L. R. A. 793, 45 Am. St. Rep. 404; *Hull v. King*, 37 N. W. 792, 793, 38 Minn. 349.

In ordinary understanding a newspaper is a publication containing a narrative of certain events and occurrences, published regularly, at short intervals, from time to time, and the publishing at short intervals has always been deemed essential to constitute a newspaper. *Attorney General v. Bradbury*, 7 Exch. 97, 103.

Where a newspaper is within a statutory definition, the fact that it has no subscribers who pay directly is immaterial. *Norton v. City of Duluth*, 54 Minn. 281, 283, 56 N. W. 80, 81.

Any daily or weekly periodical devoted exclusively to legal news, which has been published in the commonwealth for six consecutive months, shall be deemed a newspaper, for the insertion of legal notices requir-

ed by law, if the publication of such notice in such periodical is ordered by the court. *Rev. Laws Mass. 1902*, p. 88, c. 8, § 5, subd. 13.

It is difficult, if not impossible, to determine with clearness and exactness where the lines of demarcation should be drawn between a newspaper, in the legal and common acceptance of the term, and the numerous publications devoted to some special purpose, and which circulate only among a certain class of people, and which are not within the purview of statutes requiring publication of legal notices in some newspaper. The daily and weekly newspapers, common to all parts of the country, of general circulation among the people, without regard to class, vocation, or calling, devoted to the gathering and dissemination of news of current events of interest, and usually espousing and advocating the principles of some political party with persistency, if not at all times with consistency, are, without doubt, newspapers, within the meaning of Code Civ. Proc. § 497, requiring notice of execution sales of lands to be given by advertisement in some newspaper, etc. On the contrary, many publications, such as literary, scientific, religious, medical, and legal journals, that are obviously for but one class of people, and that class always but a small part of the entire public, are not newspapers, within the legal and ordinary meaning of the word; and it would be manifestly unjust, as well as against the letter and spirit of the law, to recognize such publications as proper for the advertisement of legal notices, the object in all cases being to give wide and general publicity regarding the subject of which notice is required to be published. *Hanscom v. Meyer*, 60 Neb. 68, 71, 82 N. W. 114, 115, 48 L. R. A. 409, 83 Am. St. Rep. 507.

Different editions.

Under a law requiring notices to be published in a newspaper, a publication for part of the time in a daily edition of a paper, and part of the time in its weekly edition, which was sent to different subscribers in different localities, and was in fact a separate and different paper, was not sufficient. *Hull v. Chicago, B. & Q. R. Co.*, 32 N. W. 162, 169, 21 Neb. 371.

A "newspaper," in its popular acceptance, is a publication issued at regular, stated intervals, containing, among other things, the current news, or the news of the day; but where a company issues several editions, containing largely different matter, and sold to different subscribers, it is a question of fact whether such papers constitute one newspaper, or not. *Rosewater v. Pinzenscham*, 57 N. W. 563, 566, 38 Neb. 835.

As paper in English.

When legal notices are to be published in a newspaper, an English newspaper is al-

ways intended, unless expressed to be otherwise. *Graham v. King*, 50 Mo. 22, 23, 11 Am. Rep. 401.

As public newspaper.

The word "newspaper," as used in an officer's return, should be construed as synonymous and equivalent to the words "public newspaper," as used in a statute requiring a notice to be given in such newspaper, since the word "newspaper" necessarily implies that it is public. *Bailey v. Myrick*, 50 Me. 171, 181.

Paper issued by collection agency.

A paper issued by a collection agency, showing on its first page that its purpose was to collect debts, and a large part of which paper contained notices warning the public against persons alleged to have failed to pay their debts, or asking for information as to such persons, is in no sense a newspaper, as that term is generally understood. A manifest difference exists between a paper which prints an article as the news of the day, and a paper whose announced purpose is to trace up and make known a record of the individuals as to whom warning is given in its columns. *United States v. Burnell* (U. S.) 75 Fed. 824, 830.

Corporation reporter.

"Newspaper," as used in Rev. St. c. 100, § 1, requiring the publication of notices in a newspaper, should be construed to include the National Corporation Reporter, a weekly publication of 20 pages, including a colored cover of 4 pages, 3 of which are occupied with advertisements, and the front one by the title, and the intermediate ones with reading matter mainly, but not exclusively, relating to law and finance, of interest to corporations. *Maass v. Hess*, 41 Ill. App. 282, 283.

Daily mercantile paper.

A newspaper is a paper or publication conveying news or intelligence—a printed publication issued in numbers at stated intervals, conveying intelligence of passing events. The term "newspaper" is popularly applied only to such publications as are issued in a single sheet, and at short intervals, as daily or weekly, so that a daily mercantile journal, which publishes general news relating to mercantile matters, proceedings of courts, stock, markets, and financial affairs, is a newspaper, within Code Civ. Proc. § 1678, authorizing notices of foreclosure sales to be published in newspapers. *Williams v. Colwell*, 43 N. Y. Supp. 720, 722, 18 Misc. Rep. 390.

A daily 8-page paper, 12 by 18 inches, with a bona fide morning circulation of 375 copies, and an evening circulation of 578

copies, 368 of which were paid by commission men, being a law and business reporter, with reports of the daily markets, containing also items of general interest and news to the public, general advertisements, and plate matter in varying quantities, sometimes more than a column, containing general matter, was a newspaper within the meaning of Charter of Milwaukee, c. 3, § 9, requiring the city council to let the publication of city ordinances, etc., to the newspaper offering to make the publication at the lowest price for a year. *Hall v. City of Milwaukee*, 91 N. W. 998, 999, 115 Wis. 479.

Legal paper.

A paper devoted to the gathering and dissemination of legal news among its readers is, or at least may be, a "newspaper." Newspapers are devoted to the dissemination of intelligence on a great variety of subjects, such as politics, commerce, temperance, religion, and so on; and the law and legal topics and occurrences are not excluded from the range of newspaper enterprise. It is not the particular kind of intelligence published that constitutes one publication a newspaper, rather than another. *Kellogg v. Carrico*, 47 Mo. 157, 158.

A newspaper devoted principally to legal intelligence is a newspaper in which notices required by statute or the order of courts may be published, and comes within the statutory definition of a newspaper for the publication of legal notices. *Kerr v. Hitt*, 75 Ill. 51, 54; *Lynch v. Durfee*, 59 N. W. 409, 410, 101 Mich. 171, 24 L. R. A. 793, 45 Am. St. Rep. 404; *Turney v. Blomstrom*, 87 N. W. 339, 340, 62 Neb. 616 (citing *Hanscom v. Meyer*, 60 Neb. 68, 82 N. W. 114, 48 L. R. A. 409, 83 Am. St. Rep. 507).

Rev. St. 1894, §§ 320, 1299 (Rev. St. 1881, §§ 318, 1279), providing for the service of process by publication in a newspaper of general circulation, includes a periodical ephemeral in form, issued daily, except Sunday, and devoted to the general dissemination of legal news, and containing other matter of general interest to the public. *Lynn v. Allen*, 44 N. E. 646, 647, 145 Ind. 584, 33 L. R. A. 779, 57 Am. St. Rep. 223.

The term "newspapers of general circulation," in Act April 29, 1874, providing that notice of intention to apply for a charter of incorporation shall be inserted in two newspapers of general circulation printed in the proper county, etc., does not include the Legal Intelligencer, however large its subscription list, as its circulation is mainly, if not entirely, confined to the legal profession. In re Application for Charter (Pa.) 11 Phila. 200.

Within the meaning of Rev. St. c. 100, § 5, requiring all publications of legal notices

to be made in a secular newspaper of general circulation, proof that the Chicago Daily Law Bulletin was a paper published each day, and in general circulation, and that its contents, while devoted largely to legal matter, also embraced notes and information of a general character, is sufficient to show that such paper is a newspaper in which notice of attachment could be properly published. *Railton v. Lauder*, 18 N. E. 555, 556, 126 Ill. 219. See, also, *Pentzel v. Squire*, 43 N. E. 1064, 1065, 161 Ill. 346, 52 Am. St. Rep. 373.

In the ordinary understanding of the word, a newspaper is a publication which usually contains, among other things, the current general news of the day, and is intended for general circulation and adapted to the general reader. The *Northwestern Reporter*, a weekly publication purporting to be, and in fact, "devoted specially to the interests of the legal profession," the usual contents of which were the general laws of the state of Minnesota, published shortly after their passage, the decisions of the Supreme Court of the state and of the Supreme Court of Wisconsin, and occasional decisions of other courts, a court directory, cards of attorneys and counselors at law, a list of transfers of real estate in Ramsey county, Minn., advertisements and notices of lawbooks, and about a page of miscellaneous business advertisements and legal anecdotes, was not a newspaper, within the meaning of Gen. St. 1878, c. 65, § 15, providing that the publication of a summons issued by a justice of the peace could be "made in a newspaper published in the county," etc. *Beecher v. Stephens*, 25 Minn. 146, 147.

Real estate paper.

Newspapers, in the ordinary acceptance of the term, do not include a publication primarily devoted to limited interests, such as a real estate register and rental guide never employed as a medium for advertising legal notices, and not likely to be consulted by those interested in mortgage sales, within the meaning of the term "newspaper," as used in the power of sale in a mortgage, requiring publication of the notice of the sale in a newspaper. *Crowell v. Parker*, 46 Atl. 35, 22 R. I. 51, 84 Am. St. Rep. 815.

Religious paper.

"Newspaper," as used in Gen. St. 1878, c. 51, § 5, requiring notices of sale on mortgage to be published in a newspaper, should be construed to include a paper issued weekly, containing principally religious news and special reading of interest to persons of a particular religious denomination, but containing a column each week devoted to the general news of the day, embracing every sort of news of interest to the general reader. *Hull v. King*, 37 N. W. 792, 793, 38 Minn. 349; *Hernandez v. Drake*, 81 Ill. 34, 35.

Sporting paper.

A newspaper is defined in *Hull v. King*, 38 Minn. 349, 350, 37 N. W. 792, as "a publication, usually in sheet form, intended for general circulation, and published regularly at short intervals, containing intelligence of current events and news of general interest." A publication may be devoted to the dissemination of knowledge or intelligence of a particular kind, or to the advocacy of particular views; but if it also contains information of current events, and news of importance and interest to the general reading public, it is a newspaper, within the meaning of the term. So it is that a publication devoted mainly to the promulgation of religious news and doctrines of a religious sect, or essentially to the dissemination of legal learning and literature, when devoting a portion of its columns to news matters of current and public interest, has been held to come within the designation. Citing *Kellogg v. Carrico*, 47 Mo. 157; *Kerr v. Hitt*, 75 Ill. 51; *Railton v. Lauder*, 126 Ill. 219, 18 N. E. 555; *Pentzel v. Squire*, 161 Ill. 346, 43 N. E. 1064, 52 Am. St. Rep. 373; *Lynch v. Judge of Probate*, 101 Mich. 171, 59 N. W. 409; *Lynn v. Allen*, 145 Ind. 584, 44 N. E. 646, 33 L. R. A. 779, 57 Am. St. Rep. 223. Thus a newspaper sensational in tone, containing the sporting news and some current news of general interest, many advertisements of a business nature, and that has been made the medium for legal publications for more than two years, and which is published on Saturday, falls within the legal acceptance of a newspaper. *United States Mortg. Co. v. Marquam*, 69 Pac. 41, 42, 41 Or. 391.

NEWSPAPER REPORTS.

"Newspaper reports," as used in Rev. St. § 1897, providing that if a juror's opinion is founded only on rumor and newspaper reports, and is not such as to prejudice or bias his mind, he may be sworn, means a rumor or current story printed in a newspaper. "Report" is one of the synonyms of "rumor"; another, "hearsay"; another, "story"; and Webster defines a rumor to be "flying or popular report; a current story passing from one person to another without any known authority for the truth of it." *State v. Culler*, 82 Mo. 623, 626.

NEWSPAPER SUBSCRIBER.

See "Subscriber."

NEXT.

See "Then Next."

The word "next" imports something which has preceded it. *Green v. McLaren*, 7 Ga. 107, 109.

As immediately following.

"Next," as used in a fire insurance policy providing that no action shall be sustained unless commenced within six months next after the fire shall occur, means simply that the action shall be commenced within the six months immediately following the fire, and next after it, and has no ambiguous or qualifying meaning. *Daly v. Concordia Fire Ins. Co.*, 65 Pac. 416, 16 Colo. App. 349.

Act 1799, requiring a defendant to a suit in equity to answer at the next court after the filing of the bill, will be construed to mean "the next court after that to which the bill is returned." *Green v. McLaren*, 7 Ga. 107, 108.

A reference to the next or following section or other division of a statute means the section or other division immediately following. *Laws N. Y. 1892, c. 677, § 10.*

As nearest.

The word "next" means nearest. *State v. Asbell*, 46 Pac. 770, 772, 57 Kan. 398. See, also, *Cheeseborough v. Clark* (Conn.) 1 Root, 141.

Under a statute providing that appraisers appointed by a justice should consist, among others, of the next justice, the word "next" did not mean nearest, but merely some one in the town where the land lay. *Cheeseborough v. Clark* (Conn.) 1 Root, 141.

As next practical.

"Next," as used in the statute authorizing an appeal to the next quarterly sessions, means the next practical session for the appeal. *Reg. v. Trafford*, 15 Q. B. 200, 203; *Rex v. Essex*, 1 Barn. & Ald. 210, 211; *Rex v. Justices of Yorkshire*, 1 Doug. 193.

If, by reason of the distance between the parish to which a pauper has been removed and the place where the sessions are held, there is not time to lodge an appeal at the sessions held immediately subsequent to the removal, the sessions next ensuing are to be construed as "next sessions," within the meaning of the act. *Rex v. Justices of Yorkshire*, 1 Doug. 193.

Where the order removing a pauper was served on Saturday, and the sessions were holden on the following Tuesday, and the appellant parish was 37 miles distant from the place where the sessions were to be held, the statute did not require that the appeal be to such next sessions. *Rex v. Essex*, 1 Barn. & Ald. 210, 211.

As referring to day, not month.

"Next," as used in a declaration averring that an arbitration award was to be made on or before the 18th day of January next ensuing the date of the bond, which

was dated the 10th of January, may be considered as referring to the day of the month, and not the month itself. *Tompkins v. Corwin* (N. Y.) 9 Cow. 255, 258.

In Act Jan. 7, 1828, providing that the rule of construction thereby prescribed should not extend to any deed or will executed before "the 15th of January next," "next" means next after, and refers to the next 15th day of January, and not to the next January. *Weeks v. Weeks*, 40 N. C. 111, 115, 47 Am. Dec. 358.

Where a notice to defendant was dated on the 3d day of October, 1842, and stated that an execution was returnable on the third Tuesday of "October next," the word "next" referred to the third Tuesday of the month, and not the month, and was sufficient. *Nettleton v. Billings*, 13 N. H. 446, 447.

As referring to same month.

The word "next," as used in a capias attested July 7, 1834, returnable on "July 8th next," means the 8th day of July next after the 7th day of July, the teste of the writ, *Scott v. Adams* (N. Y.) 12 Wend. 218; *Condon v. Barr*, 47 N. J. Law (18 Vroom) 113, 116, 54 Am. Rep. 121; and not the same month the following year, *Findley v. Ritchie* (Ala.) 8 Port. 452, 455.

Where a notice issued by the commissioners of a jail on an application by a prisoner to be permitted to take the oath prescribed for poor debtors was dated on the 6th day of May, and appointed "the 22d day of May next" as the day of hearing, it was held that the term "next" must be understood to refer to the 22d day of the same month. *Osgood v. Hutchins*, 6 N. H. 374, 384.

In a writ of capias dated and executed on the 2d day of September, 1822, and returnable to the "next circuit court to be held for said county on the first Monday after the fourth Monday in September next," a plea in abatement that the writ was returnable on the first Monday after the fourth Monday in September next, to wit, September, 1823, which was not the first term of said court after the writ was issued, but two terms after, was properly stricken out. At most, the term used, "September next," is one of double import. *Gibson v. Laughlin* (Ala.) Minor, 182.

"Next," as used in Act May 3, 1852, declaring that it should take effect from and after the "15th day of May next," takes effect from and after the 15th day of May, 1852, the month in which it was passed, although strictly "the 15th day of May next" would mean the 15th day of May, 1853. *Fosdwick v. Village of Perrysburg*, 14 Ohio St. 472, 480.

A writ issued on the 12th day of May, and returnable "on the 17th day of May next," was held returnable on the 17th day of May in the following year. *Bunn v. Thomas* (N. Y.) 2 Johns. 190.

The word "next" in Act Feb. 14, 1889, providing that every borough, township, or ward shall on "the third Tuesday of February next" vote for and elect a properly qualified person for constable in each of said districts, who shall serve for three years, applies to the election of 1890, and not to the election occurring in February, 1889. "We think that the obvious and natural meaning of the words 'the third Tuesday of February next' is the same as that conveyed by the expression 'third Tuesday of next February.'" In *re Tallon's Bond*, 7 Pa. Co. Ct. R. 636.

In a note made on the 4th day of December, containing the promise to pay "on or before the 25th day of December next," the note was not due until the 25th day of December of the following year. The word "next" referred to the next month of December. *Wallace v. Hill* (Ala.) Minor, 70.

A notice dated March 6, 1824, that "plaintiff would move for judgment in the circuit court to be held on the second Monday after the fourth Monday in March next," did not authorize the entry of judgment at the April term, 1824. An interpretation that the word "next" refers to the month in which the notice was dated would be contrary to the common understanding of mankind, and to the meaning which the words used have universally obtained. *Bank of Mobile v. State* (Ala.) Minor, 290. 291.

NEXT AFTER JUDGMENT.

The phrases "next after judgment," "next after the rendering of judgment," "from the rendition of judgment," "from the time of rendering judgment," "after entering up final judgment," and "after judgment entered of record," occurring in various statutes providing that certain proceedings may be had within fixed times after the event designated by such phrases, all refer to the same time; and this, according to an intendment at law and the practice of the New Hampshire courts, is the last day of the term in which the record shows the judgment to have been rendered, unless the true time of entering the judgment appears upon the record. *New Hampshire Strafford Bank v. Cornell*, 2 N. H. 324. 331.

Rev. St. c. 26, § 28, providing that writs of review may be commenced within three years next after the rendition of the judgment, should be construed so as to mean that the day on which the original judgment was rendered is to be excluded in the computation of the three years; and hence, where

a judgment was rendered on the 9th day of May, 1840, a writ of review brought on the 9th day of May, 1843, was commenced within three years next after the rendition of the judgment, within the meaning of the statute. *French v. Wilkins*, 17 Vt. 341, 346.

NEXT ANNUAL ASSESSMENT.

The term "next annual assessment," in Pub. Laws 1884, c. 447, permitting the abolition of school districts in favor of the town, and requiring the school property taken to be appraised, and at the next annual assessment a tax to be levied on the whole town therefor, is equivalent to saying "when the assessors began to make their next annual assessment." In *re Town Council of Cranston*, 28 Atl. 608, 610, 18 R. I. 417.

NEXT BEFORE.

Under St. 2 & 3 Wm. IV, c. 71, §§ 1, 4, 7, an enjoyment as of right for 30 years "next before" the commencement of an action may be proved by showing that the party has enjoyed for several periods, amounting together to 30 years, and that during the whole time between such periods, and between the last of them and the action, if such period intervene, the estate was in the hands of a tenant for life. Held, that a plea by defendant generally that he had enjoyed as of right for 30 years next before the commencement of the action might be sustained by proof of enjoyment during two periods amounting together to 30 years; one period before and one after a life estate was outstanding in another. *Clayton v. Corby*, 2 Adol. & El. (N. S.) 813, 824.

NEXT COURT.

"Next court," as used in St. 1794, § 19, requiring the return of a levy on execution to be made to the next court of the county, is complied with by a levy made and returned on the same day to the county court, which commences its session on that day. *Lanier v. Stone*, 8 N. C. 329, 332.

"Next court" implies a precedent court, and, if so, the next court is the second court; and, as used in an act providing that in proceedings in equity the party against whom a bill shall be filed shall appear and answer to the same at the next court, the answering term is the second term. *Green v. McLaren*, 7 Ga. 107, 109.

NEXT DAY.

"Next day," in a legal sense, means the next business day. *German Security Bank v. McGarry*, 17 South. 704, 705, 106 Ala. 633.

The next day on which notice of default in payment should be made after present-

ment and protest means the next business day. Hence, where the protest was made on Saturday, the notice was properly mailed on the next Monday, leaving the intermediate Sunday out of the computation. *Howard v. Ives* (N. Y.) 1 Hill, 263, 265.

NEXT DEVISEE.

By the term "first devisee" is understood the person to whom the estate is first given by the will, while the term "next devisee" refers to the person to whom the remainder is given in tail. *Young v. Robinson*, 5 N. J. Law (2 Southard) 689, 709, 710.

NEXT ELECTION.

Laws 1890, c. 351, § 4, as amended by Laws 1901, c. 323, providing for the submission of a proposed new charter of a municipality to the voters thereof for ratification at a general or special election, is not in conflict with the constitutional provision requiring such submission at the next election after the charter shall have been framed; the words "general or special election," in the statute, being necessarily a legislative construction of the words of the Constitution, "at the next election." *State v. Kiewell*, 90 N. W. 160, 86 Minn. 136.

The term "next election by the people," in Const. art. 5, § 8, authorizing the Governor, when a vacancy occurs in an office, for the filling of which no provision is made by the Constitution, to fill such vacancy by granting a commission which shall expire at the end of the next legislature, or at the next election by the people, does not mean the next general election, or the next election held by the people, but it must mean that the appointee shall hold until some one has been elected to fill that office. *People v. Budd*, 45 Pac. 1060, 114 Cal. 168, 34 L. R. A. 46.

NEXT FRIEND.

A *prochein ami* is simply a person appointed to look after the interests and to manage the suit of one who, by reason of some disability, is unable to look after his own interests and manage his own suit. *Bliven v. Wheeler*, 50 Atl. 644, 23 R. I. 379.

Prochein ami or next friend is said to be any person who will undertake the infant's cause. 1 Bl. Comm. 464. It is not limited to any particular relative. It appears that originally the practice was for the person intended to act as *prochein ami* to go with the infant before a judge at chambers, or for a petition to be presented in behalf of the infant, stating the nature of the action, and praying that, in respect of his infancy, the person intended may be assigned as his *prochein ami*. This was accompanied with an affidavit on which the judge granted his

flat, and on this a rule was drawn up by the clerk of the rules admitting the person designated to sue as the *prochein ami* of the infant. *Guild v. Cranston*, 62 Mass. (8 Cush.) 506, 507.

A *prochein ami* is one admitted by the court to prosecute for an infant, because otherwise the infant might be prejudiced by the refusal or neglect of his guardian. *Tucker v. Dabbs*, 59 Tenn. (12 Heisk.) 18, 19; *Crotty v. Eagle's Adm'r*, 35 W. Va. 143, 151, 13 S. E. 59, 62.

A *prochein ami* or guardian ad litem for an infant party to an action is a species of attorney, whose duty it is to prosecute the infant's rights, and to bring those rights directly under the notice of the court; but he can do nothing to the injury of the infant, and therefore cannot compromise or settle his suit, and a payment to him is not a legal satisfaction unless ratified by the infant on obtaining his majority. *Leopold v. Meyer* (N. Y.) 10 Abb. Prac. 40; *Tucker v. Dabbs*, 59 Tenn. (12 Heisk.) 18, 19; *Crotty v. Eagle's Adm'r*, 35 W. Va. 143, 151, 13 S. E. 59, 62.

A *prochein ami* is a person appointed by the court to look after the interests of an infant party to a suit, and to manage the suit for him. *O'Donnell v. Broad* (Pa.) 6 Kulp, 435.

A next friend is the person who institutes a suit on behalf of an infant. In *re Cahill's Estate*, 15 Pac. 364, 366, 74 Cal. 52 (citing *Story*, Eq. Pl. § 57).

"Next friend" is the legal designation of the person by whom an infant brought and prosecuted an action either at law or in equity. Such a person is now designated a guardian ad litem. *McKinney v. Jones*, 11 N. W. 606, 610, 55 Wis. 39.

The court may control a next friend, as well as a guardian ad litem, and should permit or direct what is most for the interest of the infant. In reason, there can be no difference between the power of a next friend and of a guardian ad litem. The one is permitted by the court to prosecute on behalf and in the name of an infant, and the other is appointed by the court to defend the suit of an infant. A *prochein ami* has no power to submit an infant's case to arbitration. *Tucker v. Dabbs*, 59 Tenn. (12 Heisk.) 18, 19.

As a party.

A *prochein ami* is not regarded for any purpose as a party to the suit, and his duty ends when it is prosecuted to final judgment. *Leopold v. Meyer* (N. Y.) 10 Abb. Prac. 40. See, also, *Bliven v. Wheeler*, 50 Atl. 644, 23 R. I. 379.

A *prochein ami*, in contemplation of law, is considered an officer of the court, especial-

ly appointed by it to look after the interests of the party in whose behalf he acts. He is not a party to the suit within the meaning and clause of the evidence act which declares that where an original party to a contract or cause of action is dead, or where an executor or administrator is a party to the suit, neither party shall be admitted to testify in his own behalf, or on the call of his co-complainant or codefendant, otherwise than now by law allowed, etc. *Trahern v. Colburn*, 63 Md. 99, 103, 104.

The *prochein ami* or next friend is not a technical party to the cause, but he is a party within the meaning and contemplation of the Constitution and the acts of the Assembly relating to the removal of causes, and therefore capable of making the affidavit and suggestion for removal. *Thomas v. Safe Deposit & Trust Co.*, 23 Atl. 3, 4, 73 Md. 451.

NEXT GENERAL ELECTION.

Const. art. 5, § 37, provides that vacancies in the elective offices shall be filled by appointment until the "next general election." Held, that the phrase "next general election" meant the next election at which it is provided by law that the officer may be elected whose office has become vacant. *State v. Gardner*, 54 N. W. 606, 607, 3 S. D. 553; *People v. Col*, 64 Pac. 477, 478, 132 Cal. 334.

NEXT LIVING RELATIVE.

"Next living relative," as used in the constitution of a mutual benefit insurance society providing that on the death of a member his certificate should be paid to his beneficiary, which should be his wife, children, adopted children, parents, brothers, sisters, etc., and that if the relative named should be deceased at the time of the member's death, and no change of beneficiary had been made, the benefit should be paid to the next living relative in the order named, means the relative next in relationship to the deceased member and not to the dead beneficiary. *Mattison v. Sovereign Camp Woodmen of the World*, 60 S. W. 897, 898, 25 Tex. Civ. App. 214.

NEXT OF KIN.

Where the words "next of kin" are used simpliciter in a gift over, and without any explanatory context showing a different intention on the part of the testator, they must be taken to mean next of kin according to the statute of distributions. *Pinkham v. Blair*, 57 N. H. 226, 234; *Snow v. Durgin*, 47 Atl. 89, 90, 70 N. H. 121; *In re Kane's Estate*, 40 Atl. 90, 92, 185 Pa. 544; *May v. Lewis*, 43 S. E. 550, 551, 182 N. C. 115; *Green*

v. Hudson River R. Co. (N. Y.) 32 Barb. 25, 28.

As used in the civil damage act providing that in every action for the death of a person the amount recovered shall be for the exclusive benefit of the widow or next of kin of such deceased person, "next of kin" means those persons who are entitled to inherit personalty under the statutes of descent and distribution. "Bouvier says the 'next of kin' is used to signify the relations of a party who has died intestate." The term "next of kin" embraces only that class of persons to whom, at common law, the administration of the estate of the deceased would be committed in case of intestacy. *Warren v. Englehart*, 13 N. W. 401, 13 Neb. 283 (citing 1 Williams, Ex'rs, 281); *Snedeker v. Snedeker*, 63 N. Y. Supp. 580, 47 App. Div. 471; *Atchison, T. & S. F. Ry. Co. v. Ryan*, 64 Pac. 603, 62 Kan. 682.

The term "next of kin," when used with reference to real estate, never meant those only of the blood of the first purchaser. The term does not now mean anything different when applied to real property than when applied to personal property, and so does not mean only next of kin inheritable at common law. *Hillhouse v. Chester* (Conn.) 3 Day, 166, 212, 3 Am. Dec. 265.

The words "next of kin," used simpliciter in a deed or will, means next of kin according to the statute of distributions, including those claiming per stirpes or by representation. "They have a technical statutory meaning, and this meaning is not the nearest of kin, but those of the kindred or relations by blood, who, in cases of intestacy, by the statute of distributions succeed to the share in the intestate's personal property. The words 'next of kin' and the word 'distributees,' under the statute, are not synonymous, but the words 'next of kin' mean such of the distributees as are of the kindred or relations by blood." *Slosson v. Lynch* (N. Y.) 28 How. Prac. 417, 419.

In a California statute providing that any other of the next of kin who would be entitled to share in the distribution of the estate shall be entitled to administer, etc., "next of kin" should be construed to mean the next of kin capable of inheriting, or who would be entitled to distribution if there be no nearer kindred. *Anderson v. Potter*, 5 Cal. 63, 64.

"Next of kin" is frequently used by judges as their synonym for the word "heirs" in the disposition of personal property, but what they mean by the phrase is not merely the nearest kinsmen, but the distributees under the statute, including both the widow and those who, by the statute, may represent deceased kinsmen. This appears from the language of the learned chancellors, in the

earliest and latest decisions, that "the next of kin are entitled to claim under such description [heirs] as the persons appointed by law to succeed to the personal property," thus basing their title, not on kinship, but on the statute. Such a judicial use of the phrase has long been practiced. *Leavitt v. Dunn*, 28 Atl. 590, 56 N. J. Law, 309.

Damages recoverable for death or wrongful act being limited by Rev. St. c. 70, § 2, to injuries resulting to the wife and next of kin, the term "next of kin" means those standing in that relation in a technical sense. If the next of kin are collateral, it is a material question whether they were in the habit of claiming and receiving pecuniary aid from the deceased. If they were not, they can only recover nominal damages. If they were lineal, the law presumes pecuniary loss from the fact of the death. *Chicago, P. & St. L. R. Co. v. Woolridge*, 51 N. E. 701, 702, 174 Ill. 330.

Civil or common law as determining.

The meaning of the words "next of kin" in a statute is to be determined by the common law of England, where the common law in that regard was enforced in the state at the time of the enactment of the statute. *Hutchinson Inv. Co. v. Caldwell*, 14 Sup. Ct. 504, 506, 152 U. S. 65, 38 L. Ed. 356.

Who are the "next of kin" of equal degree, within the statute of distributions which, after providing for the succession of estates in certain cases, directs in all other cases the surplus to be distributed among the next of kin, are to be determined by the rule of the ecclesiastical law, which in such matters is a part of the common law. In regard to the mode of reckoning degrees of kindred the rule of the civil law has always prevailed, so far as relates to the succession to the personal estate of the intestate. By the civil law, from the intestate to his father in lineal ascent is one degree, and thence to the grandfather is another, or the second, degree. From the intestate to his mother is lineally one degree, thence to her father or mother is the second degree, and thence downward to the aunt is the third degree. The paternal grandfather being in the second, and the maternal aunt in the third, degree, by this mode of computation he is therefore the nearest of kin. *Swezey v. Willis* (N. Y.) 1 Bradf. Sur. 495, 497.

"Next of kin," as used in Acts 1883, No. 169, § 1, subd. 5, providing that if an intestate shall have no issue nor widow, and no father, mother, brother, nor sister, his estate shall descend to his next of kin in equal degree, means those who stand in the nearest relationship to him according to the civil law for computing degrees of kinship. *Van Cleve v. Van Fossen*, 41 N. W. 258, 259, 73 Mich. 342.

Degree of consanguinity as affecting.

Under the statute (2 Purple's St. 245) authorizing the bringing of a suit for the negligent death of a person for the use of the widow and next of kin of the deceased, it is not necessary that the next of kin be within certain degrees of consanguinity in order that the suit may be brought for their use, as the phrase "next of kin" is a technical legal phrase, and must be supposed to have been used by the Legislature in its technical sense. *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338, 345, 346.

As kin living at time.

In a will devising all of testatrix's property, or as much as should be necessary for the purpose, in trust for the support, use, and benefit of her father, and providing that on his death, after payment of certain specific legacies, the residue of the estate should go to her next of kin and the next of kin of testatrix's deceased husband, "next of kin" means the nearest blood relation living at the time of the death of testatrix's father. *Fargo v. Miller*, 22 N. E. 1003, 1004, 150 Mass. 225, 5 L. R. A. 690.

"Next of kin," within Act Cong. March 3, 1891 (26 Stat. 908), making appropriations to pay the French spoliation claims, applies to the next of kin of the original claimant, living at the time of the passage of the act, and the next of kin then dead never acquired any interest in the fund. In *re Clement's Estate*, 28 Atl. 932, 160 Pa. 391.

"Next of kin," as used in Act Cong. March 3, 1891 (26 Stat. 908), relating to awards of the French spoliation claims, providing that in all cases where the original sufferers were adjudged bankrupt the awards should be made on behalf of the next of kin instead of to the assignees in bankruptcy, means the next of kin to be ascertained as of the date of the death of the original sufferer, and not as of the date of the act of Congress providing for the award. *Balch v. Blagge*, 31 N. E. 764, 157 Mass. 144.

In construing a will by which testator left his property to his son for life, and in fee if he married and had children, but if he died unmarried and without children, then the remainder to testator's next of kin, the court held that the term "next of kin" could not mean such son, but meant the next of kin existing at the time the son died, that being the time of the creation of the fund, which was then for the first time in condition to pass to the next of kin. *Delaney v. McCormick* (N. Y.) 25 Hun, 574, 576.

"Next of kin" are words having a distinct and legal meaning, which do not point to persons who are different at different periods, but to persons who must be ascertained at a future period, namely, at the death

of the person to whom they are to be next of kin; and therefore if you say "next of kin" of a person, at a period when he did not die, the words have in reality no sensible meaning or expression. *Gundry v. Pinniger*, 7 Eng. Law. & Eq. 148, 151.

When a bequest is made to one or more for life, and remainder to the testator's heirs or "next of kin," the bequest is to those who are such next of kin at the time of his decease, unless there are words indicating a clear intention that it shall go to those who will be his relations or next of kin at the time of the happening of a contingency upon which the estate is to be distributed. *Childs v. Russell*, 52 Mass. (11 Metc.) 16, 23.

The "next of kin" of a decedent who are entitled to bring an action for his death includes all those entitled, under the provisions of the law relating to the distribution of personal property, to share in the unbequeathed assets of a decedent after payment of debts and expenses, other than a surviving husband or wife. The question as to who are next of kin is to be determined by these who were next of kin at the time of decedent's death. *Mundt v. Glockner*, 50 N. Y. Supp. 190, 26 App. Div. 123.

As used in an order by the probate court directing that a fund recovered by the administrator of a deceased person be distributed and paid over to the "next of kin and representatives of said intestate according to the provisions of the statute in that behalf in force at the time of his decease" (referring to the decease of the intestate), "next of kin" means such persons as may be entitled to receive the funds to be distributed. *Armstrong v. Grandin*, 39 Ohio St. 368, 374.

As nearest blood relations.

The proper primary signification of the words "next of kin" comprises those related by blood who take the personal estate of one who dies intestate, and bears the same relation to the personal estate as the word "heirs" does to real estate. *Tillman v. Davis*, 95 N. Y. 17, 24, 47 Am. Rep. 1.

Primarily the words "next of kin" "indicate the nearest degree of consanguinity, and they are perhaps more frequently used in this sense than in any other." *Swasey v. Jaques*, 10 N. E. 758, 761, 144 Mass. 135, 59 Am. Rep. 65.

The first and most prominent definition of the words "next of kin" given in *Burrill's Law Dictionary* is "nearest of blood," and even Judge Story, in his *Equity Jurisprudence* (volume 2, § 1065b), says "next of kin" is sometimes construed to mean 'next of blood' or 'nearest of blood.'" *Slosson v. Lynch* (N. Y.) 43 Barb. 147, 162.

"Next of kin" means the nearest degree of consanguinity. *Swasey v. Jaques*, 10 N. E. 758, 762, 144 Mass. 135, 59 Am. Rep. 65.

In a will providing that income of a trust fund on the death of the beneficiary shall be paid over and transferred to "my next of kin," the nearest blood relations of testator, and not those who would take under the statute of distributions, are meant. *Fargo v. Miller*, 22 N. E. 1003, 1004, 150 Mass. 225, 5 L. R. A. 690. See, also, *Pinkston v. Semple*, 9 South. 329, 330, 92 Ala. 564.

As nearest in relationship.

"Next of kin" means nearest in relationship, and it is held that an allegation, in an action by a mother to recover damages for the death of her son, that she is next of kin to the deceased, raises after verdict the presumption of proof, at the trial, of the death of the father. *David v. Waters*, 5 Pac. 748, 749, 11 Or. 448.

As nearest of kin.

"Next of kin" means nearest of kin, and does not include those who are entitled by representation. *Henry v. Henry*, 31 N. C. 278, 279.

The term "next of kin," in common parlance, means nearest of kin, and this is its meaning when used in wills, unless it is evident from the will that something else was meant. *Redmond v. Burroughs*, 63 N. C. 242, 246.

Under a bequest to the "next of kin according to the laws of the state of New Jersey," the words, if they mean anything, mean that the next of kin are to take as the laws of New Jersey prescribe, but by these laws, in cases of intestacy, where there are brothers and sisters and children of a deceased brother, the children take the brother's share by right of representation, and the living brothers and sisters do not take the whole. If to the words "next of kin" in the will under consideration the literal construction of "nearest" should be given, the result would be that the nearest of kin would take, not the whole, but only their shares, and the testator would die intestate as to the rest. Therefore the term will be construed to mean the statutory next of kin; that is, next of kin who are in fact the nearest, and those who by statute stand in the place of such nearest. *Duffy v. Hargan*, 50 Atl. 678, 679, 62 N. J. Eq. 588.

In Act Cong. March 3, 1891, c. 540, 26 Stat. 897, 908, making appropriations to pay certain French spoliation claims, providing that "in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy," the

phrase "next of kin" means nearest of kin, without regard to the statutes of distribution. In *Swasey v. Jaques*, 144 Mass. 135, 145, 10 N. E. 758, 59 Am. Rep. 65, Field, J., speaking for the court, said: "It is certainly difficult to distinguish between the expressions 'next of kin,' 'nearest of kin,' 'nearest of kindred,' and 'nearest blood relations'; and primarily the words indicate the nearest degree of consanguinity." *Blagge v. Balch*, 16 Sup. Ct. 853, 859, 162 U. S. 439, 40 L. Ed. 1039 (citing *Redmond v. Burroughs*, 63 N. C. 242; *Davenport v. Hassel*, 45 N. C. 29; *Wright v. Methodist Church* [N. Y.] Hoff. Ch. 202, 213). See, also, *Slosson v. Lynch* (N. Y.) 28 How. Prac. 417, 419; *Leavitt v. Dunn*, 28 Atl. 590, 56 N. J. Law (27 Vroom) 309, 44 Am. St. Rep. 402.

As relative within sixth degree.

The term "next of kin," as used in the act relating to the dissection of dead bodies, in defining the rights of next of kin, shall be taken and construed to mean surviving husband or wife, father or mother, son or daughter, brother or sister, or any relative within the sixth degree of consanguinity. *Horner's Rev. St. Ind.* 1901, § 4266.

Adopted child.

"Next of kin," in Code, § 2429, providing that the personal estate of all persons dying intestate and without widow or children, or descendants of children, without father or mother, and without brother or sister, or child of either, is distributable to every one of the next of kin of the intestate who are in equal degree, means strictly next or nearest in blood, and an adopted son is not next of kin of the adopted parent's descendants. In ascertaining who the next of kin is, the law follows the line of consanguinity. *Helms v. Elliott*, 14 S. W. 930, 931, 89 Tenn. 446, 10 L. R. A. 535.

Father.

In Code, § 2502, providing that when a married man over 21 years of age is, by reason of intemperance, unfit to manage his estate, or is wasting or squandering it, his brothers or sisters or next of kin may file their bill in chancery to preserve the estate of such person from further waste, "next of kin" means literally, and at the civil law, nearest in blood relationship, the degrees of kinship being reckoned both upwards to the ancestor and downwards to the issue, each generation counting for a degree, and may therefore include the father. *Pinkston v. Semple*, 9 South. 329, 330, 92 Ala. 564.

Half blood.

Under the statute providing that if the intestate shall have no lineal descendant, father, mother, brother or sister of the whole blood or their children, or brother or sister

of the half blood, or lineal ancestry, then the widow shall take two-thirds of the estate and the remainder shall descend to the next of kin, where the intestate left a widow and first cousin of the whole blood, and three first cousins of the half blood, the court held that the cousins of the half blood were included within the term "next of kin" in the same degree as the cousin of the whole blood. *Edwards v. Barksdale* (S. C.) 2 Hill, Eq. 416, 417.

By the laws of Vermont, brothers and sisters of half brothers inherit real estate and personal property as "next of kin" to each other. *Brown v. Brown* (Vt.) 1 D. Chip. 360.

Heirs at law.

The words "next of kin" in a majority of cases means the same as the words "heirs at law," and hence, when used in a will devising land to a certain person, to be held, used, occupied, and enjoyed by her during the term of her natural life, and at her death pass by descent to her heirs or next of kin in the same manner as though she had been seised thereof in her lifetime in fee simple, sole and unmarried, and had died intestate, did not show an intention to leave a life estate merely, instead of a fee simple. *Serfass v. Serfass*, 42 Atl. 888, 190 Pa. 484.

P. executed a deed of land in trust to permit M. to receive the rents during her life, subject to the limitations hereinafter mentioned; to sell, lease, or mortgage, as M. by writing might direct; to invest the proceeds of any sale, and pay M. the interest, or reinvest in other realty as M. might direct; and on the death of M. to convey the land, or such part as might remain, or the proceeds thereof, to such persons as M. by will may have appointed; and in default of such appointment unto her "heirs at law or next of kin." Held, that the words "next of kin" were synonymous with "heirs at law," and the rule in *Shelley's Case* did not apply. *Martling v. Martling*, 39 Atl. 203, 208, 55 N. J. Eq. 771.

While the word "heir," which has a popular as well as a technical meaning, is, under special circumstances, held to include "next of kin," the latter phrase, which has not acquired a popular meaning, but has a technical meaning only; is never held, when standing alone, to include heirs at law. "Heir" may have either of two meanings, but "next of kin," when used simpliciter, has only one. *New York Life Ins. & Trust Co. v. Hoyt*, 55 N. E. 293, 301, 161 N. Y. 1.

No doubt cases can be found in this state and country, and more particularly in England, where, for the purposes of effectuating the intention of the testator, or grantor in a deed or instrument in writing, the word "heir," when employed, has been held

to mean next of kin, and "next of kin" has been held to mean heir; but we find no case in this state which has gone to the extent of holding that where there is no ambiguity in the language employed, and where the person employing the language intends to create a fund in personal property, and then provides further that in the disposition of that property it shall go to the next of kin according to the statute of distributions of the state of New York—showing that there was an intention to remove the doubt so as to exclude heirs, and those who under the law of descent would have succeeded to the property—the words "next of kin," as thus employed, meant heirs. *New York Life Ins. & Trust Co. v. Hoyt*, 52 N. Y. Supp. 819, 823, 31 App. Div. 84.

Husband.

The term "next of kin," in a statute requiring actions for wrongful death to be brought in the name of the personal representative of the deceased for the exclusive benefit of the widow and next of kin, does not include the husband of a deceased wife. *Drake v. Gilmore*, 52 N. Y. 389, 393; *Dickens v. New York Cent. R. Co.*, 23 N. Y. 158, 159. See, also, *Watson v. St. Paul City Ry. Co.*, 73 N. W. 400, 401, 70 Minn. 514; *Western Union Tel. Co. v. McGill* (U. S.) 57 Fed. 699, 705, 6 C. C. A. 521, 21 L. R. A. 818. But where, under the statute of distribution, the husband was his wife's sole heir at law, he took rank as next of kin to her to the exclusion of her brothers and sisters. *Steel v. Kurtz*, 28 Ohio St. 191, 197.

The phrase "next of kin," whether used in a statute, will, or contract, has, by a perfectly uniform force of decision, been held to include only relations by blood, and not connections by marriage, not even a husband or a wife. *Supreme Council of Chosen Friends v. Bennett*, 19 Atl. 785, 787, 47 N. J. Eq. 39; *Peterson v. Webb*, 30 N. C. 56, 58; *Wetter v. Walker*, 62 Ga. 142, 144.

Where, under statutes of descent and distribution, a husband does not inherit his wife's personal estate, he is not the "next of kin." *Warren v. Englehart*, 13 N. W. 401, 13 Neb. 283.

Code, § 399, prohibiting a party from being examined as a witness as to any transaction with the decedent against parties who are his "next of kin," applies to a husband in relation to his deceased wife, he having the right to administer her estate and collect the debts due her, and her personal estate belonging to him, subject only to the debts of the wife. *Dewey v. Goodenough* (N. Y.) 56 Barb. 54, 57.

The phrase "next of kin," as applied to the right of the next of kin to dispose of the body of deceased, includes the surviving

husband. *O'Donnell v. Slack*, 55 Pac. 906, 907, 123 Cal. 285, 289, 43 L. R. A. 388.

The term "next of kin" includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed residue of the assets of a decedent, after payment of debts and expenses, other than a surviving husband or wife. Code Civ. Proc. N. Y. 1899, §§ 1870, 2514, subd. 12.

Illegitimate children.

The term "next of kin," as used in the civil law, means all persons, legitimate or otherwise, of the same blood. In the Illinois statute of wills (1 Gross, St. p. 807, § 66) providing that in case of the death of an illegitimate person leaving no heirs, etc., the property shall pass to and vest in the next of kin to the mother of such person, "next of kin" includes the illegitimate children of the mother, where the mother is heir. *Rogers v. Weller* (U. S.) 20 Fed. Cas. 1130, 1131.

Nephew.

The term "next of kin" in Code Civ. Proc. § 2660, subd. 8, authorizing letters of administration to be granted to next of kin entitled to share in the distribution of an estate, which term is defined in section 2514, subd. 12, as including all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed residuary estate of a decedent after the payment of debts and expenses, other than the surviving husband and wife, does not include a nephew whose father died subsequent to deceased, as the father, and not the son, would take in the estate of the decedent. In re *Haug's Estate*, 60 N. Y. Supp. 332, 333, 29 Misc. Rep. 36.

"Next of kin" has been defined by Coke to be next of blood who are not attainted for treason, etc. Where a will making a bequest to testator's sister provided that it should be considered as the only share she should have out of the estate, and providing, on the death of testator's son leaving no children, the estate given to him should go to testator's next of kin, the sister, though surviving testator and his son, is not embraced in the term "next of kin," but nephews and nieces are. In re *Everitt's Estate*, 46 Atl. 1, 2, 195 Pa. 450.

Nonresident alien.

"Next of kin," as used in a statute giving the next of kin of a decedent an action for his death, includes every widow, and all next of kin, whether citizens, resident aliens, or nonresident aliens. *Vetaloro v. Perkins* (U. S.) 101 Fed. 393, 397.

Son-in-law.

The husband of a daughter of testator is not her "next of kin" in the technical sense

of the term. Appeal of Irvin, 106 Pa. 176, 182, 51 Am. Rep. 516.

Wife.

"Next of kin" does not include the wife or widow of a person. *Oldfield v. New York & H. R. Co.*, 14 N. Y. (4 Kern.) 310, 316; *Lathrop v. Smith*, 24 N. Y. 417, 420; *Storer v. Wheatley's Ex'rs*, 1 Pa. (1 Barr) 506.

A widow is not the "next of kin" to her deceased husband, within the meaning of the statute of 1715 giving the right of administration to the next of kin. *Wilson v. Frazier*, 21 Tenn. (2 Humph.) 30, 31.

The words "next of kin," used in a will containing a residuary clause, making a bequest of the testator's residuary estate amongst his next of kin as if he had died intestate, does not include the widow of the testator. *Garrick v. Camden*, 14 Ves. 372, 380; *Luce v. Dunham*, 69 N. Y. 36, 42. The words "next of kin" mean relatives in blood, *Murdock v. Ward*, 67 N. Y. 387, 389; unless accompanied by other words clearly manifesting a purpose to extend their significance, and the mere addition of a reference to the statute of distributions is not sufficient. *Haraden v. Larrabee*, 113 Mass. 430, 431; *Slosson v. Lynch* (N. Y.) 43 Barb. 147, 149; *Keteltas v. Keteltas*, 72 N. Y. 312, 315, 28 Am. Rep. 155.

The words "next of kin," used simpler, without anything in the context to indicate a different meaning, means those of the kindred or blood, excluding the widow. *Snyder v. Snyder* (N. Y.) 60 How. Prac. 368, 370.

The term "next of kin," in a will directing that the share of any deceased legatee should be paid over to his next of kin according to the statute of distributions, was construed not to include a widow. "I think that it is settled by authority in this state that a direction that the property shall be distributed among the next of kin, the same as in the case of intestacy, is not sufficient to extend the meaning of the term 'next of kin' to include either of the relatives named, though he or she would share in the property of the deceased if it were a case of actual intestacy." *In re Devoile*, 63 N. E. 1102, 1103, 171 N. Y. 281, 57 L. R. A. 536.

A provision in a deed that on the death of the grantor the trustee should account for what should remain to the "heirs at law and next of kin" of the grantor includes in the term "next of kin" the widow of the grantor. *Knickerbacker v. Seymour* (N. Y.) 46 Barb. 198, 207.

While a widow is not strictly one of the "next of kin," so as to entitle her to take under that designation as a distributee of the estate, yet she is included in that term as used in sections 9, 10, 2 Rev. St. p. 114, authorizing an action to be brought "by any

legatee, or by any of the next of kin entitled to share in the distribution of the estate," against the executor or administrator thereof to recover his legacy or distributive share. The distinction is covered by the remark of Foster, J., in *Dewey v. Good-nough*, 56 Barb. 58, that, "where the statute is intended to enforce a clear moral obligation or process, it is enough if a case be within the spirit of the statute." *Betsinger v. Chapman*, 24 Hun, 15, 18, 88 N. Y. 487; *Merchants' Ins. Co. v. Hinman* (N. Y.) 34 Barb. 410, 418.

The term "next of kin" in 2 Rev. St. p. 89, absolving an administrator from liability for any assets distributed to next of kin before suit commenced on a creditor's claim, and permitting such creditor to recover the same of the next of kin of the deceased to whom any of the assets of the estate should have been paid or distributed, was not used in its strict sense of blood relatives, but in a more enlarged meaning, and applied to all relatives of a testator to whom any assets should have been paid, and consequently included the widow, the same as other relatives who had received a portion of the estate. *Merchants' Ins. Co. v. Hinman* (N. Y.) 15 How. Prac. 182, 184.

Primarily the term "next of kin" includes only relation or relationship by blood or consanguinity, and therefore does not include a widow; but it is sometimes used in a broader sense to include relations by marriage. Therefore the words "next of kin," as used in Code, § 3639, protecting the executor, administrator, heir at law, and next of kin of a deceased person from the testimony of an adverse party as to any personal transaction with the deceased, include relatives by marriage, and consequently include the widow of the deceased. *French v. French*, 51 N. W. 145, 146, 84 Iowa, 655, 15 L. R. A. 300.

"Next of kin," within the meaning of a statute prohibiting a person having transactions with a deceased from testifying against the next of kin of such deceased, are the distributees of the deceased intestate, and not simply the nearest blood relations of the decedent, and would include the decedent's widow. An interested witness by this statute is not permitted to testify against the next of kin of a decedent as to personal transactions with the deceased, not because of their blood relation to the deceased, but simply because they were distributees of such intestate. The ordinary meaning of the phrase "next of kin" is nearest blood relation, but this primitive meaning is not always given to the phrase. *Seabright v. Seabright*, 28 W. Va. 412, 465. See, also, *Leavitt v. Dunn*, 28 Atl. 590, 56 N. J. Law (2d Vroom) 309, 44 Am. St. Rep. 402.

The phrase "next of kin," as applied to the right of the next of kin to dispose of the

body of deceased, includes a surviving wife. *O'Donnell v. Slack*, 55 Pac. 906, 907, 123 Cal. 285, 289, 43 L. R. A. 388.

The term "next of kin" includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed assets of the decedent, after payment of debts and expenses, other than a surviving husband or wife. Code Civ. Proc. N. Y. 1899, §§ 1870, 2514, subd. 12.

NEXT OF KINDRED.

A provision, in the constitution of a corporation for benevolent purposes, that a stated amount shall be paid to the "next of kindred" toward the burial expenses of a member's wife, requires payment of such amount to the husband, inasmuch as the term "next of kindred" is not technical, and is not the same as "next of kin." *Talbot v. Tipperary Men National, Social & Benevolent Ass'n*, 52 N. Y. Supp. 633, 635, 23 Misc. Rep. 486.

Under a statute providing that where there is no wife or children there shall be made a just and equal distribution to the next of kindred to the intestate, in an equal degree or legally representing their stocks, and according to his or her respective rights, it is held that the terms "next of kindred" and "stock" are common-law words, and not civil. *Davis v. Vanderveer's Adm'r*, 23 N. J. Eq. (8 C. E. Green) 558, 566, 567.

NEXT PORT REACHED.

The phrase "next port reached," as used in a steamship contract providing that if the passenger could not be landed at the port of destination he might be landed at the next port reached, means the port beyond the place of destination by the vessel, reasonably near on the line of voyage. It was not intended that the passenger might be landed at some intermediate port, and that such landing would be in compliance with the contract. For example, if the vessel on her outward voyage had stopped at Victoria the first day out, and there learned that the ice accumulated during the winter season had not yet freed Port Clarence, the point of destination so that the vessel could enter there, and if the Port of Victoria was 15 days' distant from Port Clarence, but the nearest landing place thereto, no one would argue that the passenger under this contract could be landed at Victoria. *Bullock v. White Star S. S. Co.*, 70 Pac. 1106, 1108, 30 Wash. 448.

NEXT REGULAR MEETING.

Laws 1890, c. 37, art. 3, § 5, declares that the mayor of any city shall have power to remove any officer appointed by him when-

ever he shall be of the opinion that the interests of the city demand such removal, but he shall report the reasons for such removal to the city council "at its next regular meeting." Held, that the term "at its next regular meeting" presupposed that the act of removal had been accomplished, and that the "next regular meeting" should be construed to be the next meeting occurring after such removal. This construction is also strengthened by the fact that the city council is charged with no duty in reference to the removal. It is not vested with any power to approve or disapprove of the action of the mayor, and no action on its part is required in reference to the report, and none is contemplated by the section. *State v. Williams*, 60 N. W. 410, 412, 6 S. D. 119.

NEXT REGULAR SESSION.

"Next regular session," as used in the Constitution providing that each general assembly shall provide for all the appropriations necessary for the ordinary and contingent expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, presupposes a prior session. In the use of the words "next regular session," the session immediately succeeding the first under the Constitution about to be made must have been contemplated. The second session must be the next regular session. *People v. Lippincott*, 64 Ill. 256, 258.

NEXT REGULAR TERM.

Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], provides that offenses against the laws of the United States may be admitted to bail agreeably to the mode of process against offenses in the state wherein the proceedings are had. Rev. St. Wis. § 4808, provides that a person giving bail shall enter into recognizance "for his appearance at the next term of the circuit court of the county." Section 4810 provides that he may at his option give bail for his appearance either at the then pending or next regular term thereof, or for his appearance at such term, and from term to term thereafter. Held, that a bond for the offender's appearance at a special term of the United States District Court not then called, which is afterwards called at a different time from that named in the bond, and after two regular terms have elapsed, at which he might have been tried, is void. *United States v. Kelver* (U. S.) 56 Fed. 422, 424.

NEXT SESSION.

"Next session," as used in Gen. St. 1882, § 91, providing for the appointment of supervisors of registration by and with the consent of the Senate if in session, and if not in session subject to the approval of

the senate at its next session, and making them ineligible to any other office during the term for which they are appointed, should not be construed to mean next regular annual meeting or next regular session of the Senate, but should be construed in their ordinary and usual signification. An extra session is such "next session," and hence one whose appointment as supervisor of registration was not approved at such extra session was not an incumbent of that office after the close of such session, so as to make him ineligible to another office because the term for which supervisors of registration are appointed had not expired. *State v. Williams*, 20 S. C. 12, 14.

NEXT SPRING TERM.

"Next spring term," as used in a summons issued on the 1st of March, requiring the defendants to answer on the first day of the next spring term, was equivalent to the "next March term." The terms of court being fixed by law, and the summons, unless the next term begins within 10 days from its next day, being required to be made returnable to the first day of the next term, the defendant must have known to what term the issue was made returnable and when the same was held, and could not have been misled by its designation as the "next spring," instead of the more correct term, the "next March term." *Anderson v. Pearce*, 36 Ark. 293, 295, 38 Am. Rep. 39.

NEXT SUCCEEDING GRAND JURY.

As used in Code Proc. § 196, providing that, if a demurrer is allowed, the judgment is final on the indictment demurred to, and is no bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, directs the same to be re-submitted to the same or to the "next succeeding grand jury," refers back to the time when the judgment on the demurrer is made and entered, and the meaning is that, if the order of resubmission is made, it must be to the first grand jury that meets after the demurrer is allowed. *People v. Hill*, 3 Pac. 75, 82, 3 Utah, 334.

NEXT SUCCEEDING YEAR.

The words "for the next succeeding year," as used in Code, § 3940, authorizing the grand jury impaneled at the fall term of the superior court to fix the compensation of jurors for the next succeeding year, will be construed as applicable to the year touching which that particular grand jury has power to act, to wit, the year succeeding the beginning of the fall term for which they were impaneled and during which they

actually served, the reports or presentments expressly referring to the section of the Code conferring the power which the grand jury meant to exercise. *Tanner v. Rosser*, 15 S. E. 750, 89 Ga. 811.

NEXT SUPREME COURT.

By the term "next Supreme Court" of Errors, in a statute providing for summons in error, and declaring that the record in a cause may be transmitted to the next Supreme Court of Errors, etc., is meant the next court after the filing of the motion, and not after the close of the term. *Russell v. Monson*, 33 Conn. 506, 507.

NEXT TERM.

Before next term, see "Before."

A defendant upon whom an original notice is served, requiring him to appear and answer on or before the second day of the "next term" of the district court, has a right to assume that the term next after the service is the "next term" named in the notice. *Butcher v. Brand*, 6 Iowa (6 Clarke) 235, 236.

The words "next term," in St. 1840, c. 87, providing that a cause removed to the Supreme Judicial Term shall be entered at the next term after removal, does not include a term commencing on the same day on which an order of removal is made by the common pleas. *French v. Barnard*, 63 Mass. (9 Cush.) 403, 404.

The words "next term," in a statute providing that, on appeal from an order of road commissioners, the clerk of the road commissioners should lodge a copy of the proceedings with the clerk of the county court, and such court should appoint a committee of revision at the next term after such copy should be lodged with their clerk, exclude a present or existing session of the court appealed to, and carry the appeal to the next succeeding term. *Town of Shelburn v. Eldridge*, 10 Vt. 123, 125.

The words "next term," in a statute authorizing an appeal from a judgment of the circuit court to the next term of the Supreme Court, means the next term holden after the termination of the term of the circuit court at which the judgment is rendered. *Moodie's Lessee v. Vandyke* (Pa.) 4 Yeates, 512.

The words "at the next term thereafter," in Burns' Rev. St. 1894, § 8587, providing that if an executor fail to pay taxes due on his estate the county treasurer shall present to the court at the next term thereafter a brief statement of the delinquency, are merely directory, and the object of the statute was to furnish a summary remedy

against the delinquent taxpayer, and proceedings commenced by the county treasurer at the term running when the executor failed to pay the taxes are not invalid where the executor was given a reasonable time to prepare his defense. *Gallup v. Schmidt*, 56 N. E. 443, 445, 154 Ind. 196.

The "next term of the court," within Code, c. 124, § 2, requiring process in garnishment to be made returnable to the next term of court though more than 90 days from the date of the order, means the next term of the court absolutely, and where a garnishment skips a term and is returnable to the second term after its issuance it is void. *Coda v. Thompson*, 19 S. E. 548, 549, 39 W. Va. 67.

The word "next," as used in the statute providing that an appeal shall be entered at the term of the circuit court which shall be held within and for the district next after the expiration of 10 days from the time of claiming the same, means the term succeeding that at which the order is entered next after the expiration of 10 days. *In re McEwen* (U. S.) 4 Fed. 13. 15.

Hill's Ann. Laws, § 2781, provides that, where a county board of equalization is unable to complete the equalization during the week in which it is required to meet, the county court shall, at its next term thereafter, complete the equalization. Section 899 provides that, in addition to its regular terms, a county court may hold terms at such times as the court may appoint. Held, that the words "next term" mean next session of the court, and, where a county court adjourned its regular September term to October 9th, it might at such adjourned term complete the work of an equalization board which sat during the first week in October. *Godfrey v. Douglas County*, 43 Pac. 171, 28 Or. 446.

As general or special.

"Next term of court," as used in an instruction to commissioners appointed by a county court to view and lay out a road and report in writing at the next term of court, means the next regular term fixed by law, and not a special term appointed meantime, and subsequently to the appointment and instruction of the jurors. *Tompkins v. Clackamas County*, 4 Pac. 1210, 1211, 11 Or. 364.

Within the meaning of the statute providing that if a process is not served on the defendant, and he does not voluntarily appear before the end of the term at which a writ of attachment was made returnable, the clerk shall make an advertisement that, unless the defendant appears and pleads before the next term of the court, judgment will be entered, where such a notice was made to appear at the "next term," without

mentioning the time at which the term was commenced, the notice referred to the next general term, and it was error to enter judgment at a special term which had not been duly called and noticed at the time of such advertisement. *Wilkie v. Jones* (Iowa) *Morris*, 97, 98.

In criminal case.

In a prosecution for murder, in which the defendant was held to appear at a preliminary examination on the 14th of February, and was tried during a term of court then in session, it was said, in construing Cr. Code, § 57, which provides that, when the prisoner is committed by the magistrate, he shall also bind by recognizance such witnesses against the prisoner as he shall deem material to appear and testify at the next term of court, that the statute did not operate to preclude a trial at that term, and that "the words 'next term' ordinarily mean the next subsequent term, and, if there was no other provision on the subject, there would be much force in defendant's contention. We are not to determine the question, however, upon inferences drawn from provisions with reference to other subjects, because the Legislature has specifically declared when a criminal case is triable: All indictments shall be tried at the next term at which the defendant appears, unless the same be continued for cause. Cr. Code. § 157. The two sections seem to be somewhat inconsistent, but the express provisions of section 157 must prevail over a mere inference drawn from section 57. The word 'next' means nearest, and the words 'next term,' as used in section 57, when construed in connection with section 157, may be taken to mean the next term at which the case is triable." *State v. Asbell*, 46 Pac. 770, 772, 57 Kan. 398.

Rev. St. 1878, § 4680, providing that change of venue for prejudice of the judge in criminal actions shall not be awarded after "the next term succeeding that at which the accused shall have been arraigned," etc., means that the change of venue shall not be awarded after the next term succeeding the arraignment at which the petition might properly be presented. *State v. Sasse*, 38 N. W. 343, 344, 72 Wis. 3.

In a recognizance condition for the appearance of the accused at the "next term" of the court, where the statute provides that certain terms shall be held for criminal business and others for civil business, "next term" would be construed to mean the next term devoted to criminal business. *People v. O'Brien*, 41 Ill. 303, 305.

In eminent domain proceedings.

In the statute providing that either party may appeal from an assessment of damages for the laying out of the street to

the "next term of the superior court by giving the adverse party or parties ten days' notice in writing," by "next term" is meant the next term which is held beginning after the expiration of the 10 days allowed for giving notice, and not a term which may be held within such 10 days. *Sondley v. City of Asheville*, 14 S. E. 514, 516, 110 N. C. 84.

NICELY LOCATED.

A statement in negotiations for the sale of a lot that it is "nicely located" is not a representation which can be made the subject of criminal prosecution as a false pretense. It does not convey any definite idea at all, as there is no standard for trying the accuracy of such a statement. What is a nice location to one may be far otherwise to another, and even to the mind of one using it the expression is vague and indeterminate. *People v. Jacobs*, 35 Mich. 38, 38.

NICKLE.

"Nickle," when used in connection with the business of a general merchant, who does not buy or sell nickel, and whose wares are not as a rule sold for a nickel, but who denominates his place of business as the "Nickle Store," is not a term descriptive of the business, and hence an exclusive right to use such word in connection with his business may be acquired. *Duke v. Cleaver*, 46 S. W. 1128, 1130, 19 Tex. Civ. App. 218.

NICKNAME.

A nickname is a short name, one nicked or cut off for the sake of brevity, without conveying any idea of opprobrium, and frequently evincing the strongest affection or the most familiarity; and where such a name is used in a devise parol evidence is admissible to show the person intended. *North Carolina Institute for the Education of the Deaf and Dumb v. Norwood*, 45 N. C. 65, 74.

NIECE.

The term "nieces," in its primary and ordinary sense, means the immediate descendants of the brothers and sisters of the testator. *Cromer v. Pinckney* (N. Y.) 3 Barb. Ch. 466, 474.

The term "nephew" or "niece" in a will containing a provision for the children of testator's brothers and sisters, and providing that in case any one of the children of testator's brothers and sisters mentioned in the clause should die, or have died before testator, leaving lawful issue surviving at the time of his death, then the issue of his deceased nephew or niece should receive the

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share which his or her ancestor should have received, etc., includes nieces and nephews of testator who died before the will was made. *Hayward v. Barker*, 21 N. E. 142, 143, 113 N. Y. 366.

Grandnieces.

The word "nieces" does not include grandnieces or more remote descendants, unless there be something in the will indicating an intention on the part of the testator that the word should be taken in such more extended sense. *Cromer v. Pinckney* (N. Y.) 3 Barb. Ch. 466, 474.

"Nieces," as used in a bequest of property to testator's "nieces," will be construed to include grandnieces, where such is the apparent intention of the testator. *Benton v. Benton*, 20 Atl. 365, 66 N. H. 169; *In re Hunt's Estate*, 6 N. Y. Supp. 186, 188, 53 Hun, 466; *Id.*, 23 N. E. 120, 121, 117 N. Y. 522, 7 L. R. A. 367; *Shepard v. Shepard*, 17 Atl. 173, 174, 57 Conn. 24.

The term "nephews and nieces" in a will devising property to nephews and nieces does not include the children of such nephews and nieces who are so denominated in the will. *Lewis v. Fisher* (Pa.) 2 Yeates, 196, 199.

Husband's nieces.

"In strict propriety and in legal usage it is only the children of brothers and sisters that are called nephews and nieces, and it is only by courtesy that the children of a husband's or wife's brothers and sisters are so called, just as it is in relation to a husband's or wife's father and mother. On a strict interpretation, therefore, a bequest of testatrix to all her nephews and nieces excludes, or rather does not include, the nephews and nieces of her late husband." *Appeal of Green*, 42 Pa. (6 Wright) 25, 30.

Niece of half blood.

The term "niece," includes nieces of the half blood. *State v. Gulton*, 24 South. 784, 785, 51 La. Ann. 155.

A bequest to nephews and nieces of testator is held to apply to the children of half-brothers and half-sisters, the testator having no nephews or nieces of the full blood in existence. *In re Weiss' Estate*, 1 Montg. Co. Law Rep'r, 209, 210.

Wives of nephews.

"Nieces," as used in a devise to "my nephews and nieces living at my decease," notwithstanding she left no nieces by blood, but where she did leave two brothers, since it was possible that one of them might have a daughter or daughters born to him, should not be construed to include the wives and widows of the nephews of the testator. According to modern usage, the word "niece"

means the daughter of a brother or sister. It does not, by its accepted meaning, include the wives or widows of nephews. *Goddard v. Amory*, 16 N. E. 725, 727, 147 Mass. 71.

The term "nieces" in a will devising property to nephews and nieces does not include a niece by marriage. *Lewis v. Fisher* (Pa.) 2 Yeates, 196, 199.

NIGHT—NIGHTTIME.

"Literally, 'night' is that part of the natural day between sunset and sunrise." As used in a fire policy on a business house requiring a record of all business transacted to be locked in a fireproof safe at night, it does not mean the time from sunset to sunrise, but includes all time until the business of the day is ended and the house closed for the night. *Jones v. Southern Ins. Co. (U. S.)* 38 Fed. 19, 21.

"Nights," as used in a fire insurance policy on a factory, in which the insured represented that a watchman was kept nights, means through the hours of every night in the week from 8 p. m. to the usual hour of commencing work in the morning, 8 o'clock p. m. being the time when the work for the day ceased. *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 38, 54 Am. Dec. 308.

As after sundown.

"Night," as used in an indictment for burglary, alleging that the offense was committed about the hour of 12 o'clock in the night of a certain day, means in the night, after sundown of that day. *Shelton v. Commonwealth*, 16 S. E. 355, 89 Va. 450.

The word "nighttime" in an information charging the commission of an offense as committed in the nighttime of the day on which the information is filed does not show an act which is future in time to the act of making the complaint, as the information could properly be dated on that day if filed at any time before midnight, and the term "nighttime" would embrace the period of one hour after sunset to 59 minutes past 11. *Commonwealth v. Flynn*, 57 Mass. (3 Cush.) 525, 527.

As between darkness and dawn.

"Nighttime," as used in relation to the crime of burglary, means the time between darkness after sundown and dawn of daylight in the morning. *State v. Mecum*, 64 N. W. 286, 287, 95 Iowa, 433.

Some authorities declare that by "nighttime" is meant that period between the termination of daylight and the earliest dawn in the morning. *State v. McKnight*, 16 S. E. 319, 320, 111 N. C. 690.

The "nighttime" consists of the period from the termination of daylight in the evening to the earliest dawn of the next morning. There is no intervening time between the night and the day, and when the light of the latter is entirely gone, and the great characteristic which distinguishes it from the night no longer exists, the day terminates with it. The next day commences with the earliest dawn, and the night, of course, ends at that time. *State v. Bancroft*, 10 N. H. 105, 106.

As between sunset and sunrise.

Nighttime is the period between sunset and sunrise. *Pol. Code Mont.* 1895, § 3145; *Laws N. Y.* 1892, c. 677, § 27; *Pen. Code N. Y.* 1903, § 492; *Ann. Codes & St. Or.* 1901, § 2174; *Rev. St. Utah* 1898, §§ 4329, 4338; *Rev. Codes N. D.* 1899, §§ 7385, 7413; *Pen. Code S. D.* 1903, §§ 545, 573; *Pen. Code Cal.* 1903, §§ 450, 463; *Pol. Code Cal.* 1903, § 3260; *Gen. St. Minn.* 1894, §§ 6673, 6681; *Rev. St. Okl.* 1903, §§ 2413, 2433; *State v. Miller*, 67 Pac. 790, 24 Utah, 312; *State v. Gray*, 46 Pac. 801, 23 Nev. 301; *Taylor v. Territory (Ariz.)* 64 Pac. 423.

St. 1847, c. 13, defines the time of night from any criminal prosecutions to be the time between one hour after sunset on one day and one hour before sunrise on the next day. *Commonwealth v. Williams*, 56 Mass. (2 Cush.) 582, 589; *Commonwealth v. Lamb*, 67 Mass. (1 Gray) 493, 495.

The term "nighttime," when used in any statute, ordinance, indictment, or information, shall be construed to mean the time between one hour after the setting of the sun on one day and one hour before the rising of the same on the following day; and the time of sunset and sunrise shall be ascertained according to the mean solar time of the nineteenth meridian west from Greenwich, commonly known as "central time," as given in any published almanac. *Rev. St. Wis.* 1898, § 4637a.

"Nighttime" is defined in the statute to include all the 24 hours from 30 minutes after sunset until 30 minutes before sunrise. Such a definition of the term in an instruction in a prosecution for burglary is not erroneous. *Jackson v. State (Tex.)* 38 S. W. 990.

Where *Pen. Code*, art. 710, relating to burglary, defines "daytime" to include any portion of the 24 hours from 30 minutes before sunrise until 30 minutes after sunset, a theft at "night," within the meaning of the above act, is a theft committed at any time between 30 minutes after sunset and 30 minutes before sunrise. *Laws v. State*, 10 S. W. 220, 221, 26 Tex. App. 643.

Discernment of features as test.

A burglary is committed in the "night" when there is not daylight enough to enable

one to discern the features of another. *State v. Morris*, 47 Conn. 179, 180.

"Night," as defined by 4 Bl. p. 224, is that period of a day when, excluding moonlight, there is not daylight or crepusculum enough begun or left to discern a man's face. Thus, it was error for the court to charge, without reference to the condition of the light, that nighttime ended and daytime began one hour before sunrise. *Klieforth v. State*, 59 N. W. 507, 508, 88 Wis. 163, 43 Am. St. Rep. 875.

"Nighttime," in the law relating to burglary, cannot be construed to mean only such time when a man's face could not be discerned by natural light, since the light of the moon may sometimes be sufficiently brilliant at nighttime for such purpose. *Thomas v. State*, 6 Miss. (5 How.) 20, 31.

"Nighttime," within the California law relating to burglary, means that portion of the 24 hours when there is insufficient daylight to discern a man's features. *People v. Griffin*, 19 Cal. 578.

By "nighttime," under the statute authorizing the execution of a search warrant, is meant that space of time during which the sun is below the horizon of the earth, except that space which precedes its rising and follows its setting, during which by its light the countenance of a man may be discerned. *Petit v. Colmary* (Del.) 55 Atl. 344, 345

As time within twilights.

The expression "by night," as used in Crimes Act, § 33 (Nix. Dig.), providing a penalty for the breaking of any dwelling house or burglariously entering it by night, had a technical meaning, and meant burglarious night, or that portion of the natural night within twilights. *State v. Robinson*, 35 N. J. Law (6 Vroom) 71, 73 (citing 1 Russell, 826, 2 East, P. C. 513).

NIGHT-WALKER.

"Night-walker" is a name applied to one who roams at night for evil purposes. *State v. Clemons*, 42 N. W. 562, 563, 78 Iowa, 123.

A night-walker is a woman who strolls the streets at night for the unlawful purpose of picking up men for lewd purposes, and is indictable at common law. *Thomas v. State*, 55 Ala. 260, 261 (citing 2 Whart. Cr. Law, § 1445); *Lawrence v. Hedger*, 3 Taunt. 14, 15; *Stokes v. State*, 9 South. 400, 401, 92 Ala. 73, 25 Am. St. Rep. 22.

A "night-walker" simply as such seems, by the old English law, to have been held to be a suspected person rather than a criminal. *Thomas v. State*, 55 Ala. 260, 261 (citing 1 Burns, Justice, 942, tit. "Eavesdrop-

pers"; 3 Hawk. P. C. 64, § 20; *Lawrence v. Hedger*, 3 Taunt. 14).

A "common night-walker" is one whose habit is to be abroad at night for the purpose of committing some crime, of disturbing the peace, or doing some wrongful or wicked act. *Watson v. Carr*, 1 Lewin, C. C. 6. In 1 Burns, Justice, 765, it is said persons who eavesdrop men's houses "to hearken after discourse, and thereupon to frame slanderous and mischievous tales," "to cast men's gates, carts, and the like," are night-walkers, who at common law are common nuisances. *Thomas v. State*, 55 Ala. 260; *Stokes v. State*, 9 South. 400, 401, 92 Ala. 73, 25 Am. St. Rep. 22. Or who commit other outrages or misdemeanors in the night, or shall be suspected to be pilfering or otherwise like to disturb the peace, or that be persons of ill behavior or of evil fame or report generally, or that shall keep company with any such or with other suspicious persons in the night. In other places night-walkers are said to be those who are abroad during the night and sleep by day, and of suspicious appearance and demeanor; and so the offense of being a common night-walker is one which may be charged in an indictment in general terms. It is an offense at common law as well as by statute. *State v. Dowers*, 45 N. H. 543, 544 (citing Bouv. Law Dict.).

NIGHTS.

The answer, "there is a watchman nights," given by an applicant for a fire insurance policy in answer to the question whether there was a watchman in the building to be insured during the night, means that there was a watchman in the mill every night. *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 159, 86 Am. Dec. 362.

NIHIL DICIT.

A judgment nihil dicit is regarded as a species of judgment by confession, and carries with it more strongly the admission of the justice of the plaintiff's cause of action than a judgment by default. It amounts to a confession of the cause of action stated or attempted to be stated in the petition, if the amount claimed can be ascertained by the proceedings had on a judgment by default; that is, a writ of inquiry on an unliquidated demand, or by the clerk upon a liquidated demand evidenced by a written instrument filed as part of the petition, or sufficiently described to enable the clerk to make the computation of the amount due. *Gilder v. McIntyre*, 29 Tex. 89, 91. And where a note sued on is incorporated as a part of the petition, and defendant's answer is withdrawn, the withdrawal amounts to a judgment nihil dicit, and no proof of the note

is necessary. *Graves v. Cameron*, 14 S. W. 59, 77 Tex. 273.

A judgment by default is a judgment rendered in consequence of the nonappearance of a defendant. A judgment *nihil dicat* is one rendered against a defendant for want of pleading. *Bouv. Law Dict.* The Code, however, makes no distinction between the two, and where parties have appeared, but do not plead, a judgment by default may properly be rendered against them. *Wilbur v. Maynard*, 6 Colo. 483, 485.

Nihil dicat is entered after a defendant has appeared, where he says nothing in defense. *Buena Vista Freestone Co. v. Parrish*, 34 W. Va. 652, 654, 12 S. E. 817.

The term "*nihil dicat*" may be properly used to characterize a judgment taken against a party for a failure to plead within the time required, though the term "default" is usually extended to cover such case. *Falken v. Housatonic R. Co.*, 27 Atl. 1117, 1119, 63 Conn. 258.

NIHIL HABET.

In a proceeding by *scire facias sur mortgage*, the sheriff returned to the first writ issued "Non est," and to an alias writ "*Nihil habet*." Held, that the fact that the first return was not "*Nihil habet*," rendered a judgment entered by default for plaintiff voidable merely. In this connection the court says: "We quite agree that '*Nihil habet*' is the more comprehensive return to a writ of *scire facias*, but '*Non est*' is a proper return to a writ of summons, and we cannot treat it as a nullity upon this writ of *scire facias*, except at the instance of the defendant." *Brundred v. Egbert*, 30 Atl. 503, 504, 164 Pa. 615.

NISI.

See "Judgment *Nisi*."

NITRATE.

The use of "nitrate of sodium" for "nitrite of sodium" in the specifications of a patent relating to the manufacture of a coloring compound from coal-tar products is not such a misuse of terms as will invalidate the patent; it appears that no one skilled in the art would be misled thereby, and that the use of "nitrate" for "nitrite" was common in the earlier patents relating to the particular art. *Matheson v. Campbell* (U. S.) 69 Fed. 597, 601.

NITRATE OF LEAD.

"Nitrate of lead" is a chemical combination of lead and nitric acid. Lead previously melted and cooled is placed in a vessel

filled with dilute heated nitric acid, and subjected to a slight additional heat. The nitrate of lead is formed in crystals upon the side of the vessel. Its form as a commodity in the market is ordinarily that of a white, opaque crystal. *Meyer v. Arthur*, 91 U. S. 570, 571, 23 L. Ed. 455.

NITROGLYCERIN.

The prohibition in Rev. St. § 5353, against transporting nitroglycerin upon vehicles engaged in interstate passenger traffic, extends also to dynamite, which is made by mixing nitroglycerin with some solid and inert absorbent substance, and contains no other explosive ingredient. *United States v. Saul* (U. S.) 58 Fed. 763, 764.

The term "nitroglycerin" is used to designate an explosive acid derived from nitric acid and glycerin. As used in a fire policy prohibiting the insured from keeping any nitroglycerin on the premises, it includes the various compounds as dynamite, etc., "in which nitroglycerin is the active and effective force." *Sperry v. Springfield F. & M. Ins. Co.* (U. S.) 26 Fed. 234, 237.

NIXE.

A nixe is a letter addressed to a fictitious person, or to a place where there is no post office; a decoy letter used by the post-office inspectors for the purpose of discovering any meddling or interference with the mails. *United States v. Denicke* (U. S.) 35 Fed. 407, 408.

NO.

A fire policy covered a building described as being a patent cordage manufactory, situated on the "No. West corner" of certain streets, and also *lignum vitæ* contained in the cellar of said building. The insured owned two buildings, one on the northwest and the other on the southwest corner of the streets; the former having no cellar, and the latter a cellar containing *lignum vitæ*. The court, in holding that parol evidence was admissible to show that the building on the southwest corner was intended, said that the "alphabetical letters 'No.' do not signify north. They are evidently an abbreviation designed to signify something not fully expressed. They are not an abbreviation of the word 'north,' for no instance has been referred to in which they have been so used. If the letter 'N.' was there alone, it might have the signification claimed, because in conveyances, maps, charts, and other instruments the letter 'N.' is commonly used as an abbreviation for the word 'north.' But when this letter is found in connection with and preceding the letter 'o' it signifies the word

'number,' and nothing else. Buildings in cities are designated by their numbers, and are so related to in instruments of conveyance and policies of insurance; and these circumstances sufficiently account for the presence of these letters in the policy, without attributing to them a new and unusual signification." *Burr v. Broadway Ins. Co.*, 16 N. Y. 267, 271.

NO.

Not any; not one; none; not at all; not in any respect or degree—a word expressing negation denial or refusal. *Webst. Dict.*

NO ACTION SHALL BE BROUGHT.

"No action shall be brought upon any agreement," as used in the statute of frauds, § 4, providing that "no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such an action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized," is not equivalent to the words "no contract shall be allowed to be good," and does not make the contract void, but only means that no action shall be brought upon such an agreement in any court in which the British legislature has power to direct what shall and what shall not be done. It applies to something which is to take the place where the law of England prevails. It is a parcel of the procedure, and not of the formality of the contract. "This may be a very good agreement, though, for want of compliance with the requisites of the statute, not enforceable in any English court of justice. The statute contemplated that the agreement may be good, though not capable of being enforced if not evidenced by writing." *Leroux v. Brown*, 12 C. B. (Eng.) 801, 824.

"No action shall be brought," as used in the statutes providing that no action shall be brought on an agreement not to be performed within a year, unless some memorandum thereof is in writing, refers to the remedy, and is a rule of evidence merely, prohibiting proof of such agreement so that a parol contract made in a jurisdiction where no such rule obtains cannot be enforced in a jurisdiction where such statute exists. *Wolf v. Burke*, 32 Pac. 427, 428, 18 Colo. 264, 19 L. R. A. 792.

NO ATTORNEY AT LAW.

The words "no attorney at law," in the statutes providing that no attorney at law, shall be allowed to practice in any court, etc., unless he shall take a certain oath, is

the same signification as "not an attorney at law." The effect of the statute is to require every attorney at law, regardless of his former rights and privileges, to take the prescribed oath. *Ex parte Hunter*, 2 W. Va. 122-175.

NO CASE.

In *Rev. St. § 4283* [U. S. Comp. St. 1901, p. 2943], declaring that the liability of the owner of any vessel for any embezzlement, loss, or destruction suffered by several freighters or owners of goods shall in no case exceed the value of his interest in the vessel and her freight then pending, the term "no case" means that for each case of embezzlement, loss, or destruction happening during the voyage the owner of the vessel's liability may extend to his whole interest in the vessel. *Place v. Norwich & N. Y. Transp. Co.*, 6 Sup. Ct. 1150, 1155, 118 U. S. 468, 30 L. Ed. 134.

NO ELECTION.

Code 1886, pt. 3, tit. 2, c. 14, § 3177, providing that in quo warranto the validity of no election may be contested in such proceedings, means that the validity of any election cannot be tried. *Parks v. State*, 13 South. 756, 757, 100 Ala. 634.

NO EQUITY IN THE BILL.

A demurrer on the ground that there is no equity in the bill is a mere general demurrer, which, in the old chancery practice, was only sufficient to draw in question the equity of the bill. As a general demurrer does not exist in the practice, a demurrer in such language is insufficient, but the ground of demurrer must be specially stated. *McGuire v. Van Pelt*, 55 Ala. 344, 349.

NO EVIDENCE.

In *Pollock v. Pollock*, 71 N. Y. 137, Judge Folger said that insufficient evidence, in the eye of the law, is "no evidence," and then added the language of *Maule, J.*, in *Jewell v. Parr*, 13 C. B. 918: "When we say that there is no evidence to go to a jury, we do not mean literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established." *Cassidy v. Uhlmann*, 63 N. H. 554, 562, 170 N. Y. 505.

NO GO.

In an action for malicious prosecution to a complaint alleging that defendant maliciously caused and procured to be sued out "a certain writ of no go, directed to the sheriff, whereby he was commanded to arrest the plaintiff, and whom he should safe-

ly keep, so that he might have his body before said court at the next ensuing term thereof, to answer in a civil action," it was objected that there is no such writ known to the law as that described in the complaint by the appellation of "no go," and that, if a writ *ne exeat* was thereby meant, the appellation used is not known to the law, and will not be recognized by the courts. The court said: "'No go' may be a substantial translation of the technical words '*ne exeat*,' the name of a writ known to the law, but we are not inclined to sanction such eccentric innovations in pleading. It is not, however, essential that the writ should be described by its technical name. The substance of it is stated in the complaint, and is thus shown to be such a writ as the law directs in certain cases, which we think is sufficient." *Ammerman v. Crosby*, 26 Ind. 451-453.

NO GRACE.

"No grace," as used in the body or margin of a note, means that the note is due or shall be due on the day of its maturity, according to its face, without the allowance of any days of grace. *Perkins v. Franklin Bank*, 38 Mass. (21 Pick.) 483, 485.

NO INTENTION.

The words "evince no intention," as used in Gen. St. 1878, c. 45, § 46, providing that when any conditions annexed to a grant, conveyance, or lease are merely nominal, and evince no intention of actual or substantial benefit to the party to whom or in whose favor they are to be performed, they may be disregarded, are to be construed as synonymous with the phrase "evince an absence of intention." *Sloux City & St. P. R. Co. v. Singer*, 51 N. W. 905, 906, 49 Minn. 301, 15 L. R. A. 751, 32 Am. St. Rep. 554.

NO KNOWLEDGE OR INFORMATION.

"No knowledge or information," as used in a statement that a party had no knowledge or information as to certain matters, is equivalent to a denial of sufficient knowledge or information to form a belief concerning them. *Dickinson v. Gray* (Ky.) 9 S. W. 281, 282.

NO LIQUORS EXCEPT.

"No liquors except," as used in St. 1875, c. 99, authorizing the granting of licenses to sell intoxicating liquors, and providing that certain classes of licenses shall be subject to the condition that "no liquors except" those the sale of which is allowed by the license shall be kept on the premises, signifies that only liquors of that kind the sale of which is allowed by the license shall be kept on the premises. *Commonwealth v. Fredricks*, 119 Mass. 199, 205.

NO MECHANIC.

A statement in regard to a mason that he is no mechanic, that he cannot make a good wall or do a good job of plastering, that he is no workman, and that he is a botch, are slanderous *per se*, as imputing want of skill or knowledge. *Fitzgerald v. Redfield* (N. Y.) 51 Barb. 484, 491.

NO MORE.

Code, art. 47, § 27, provides that if, in the descending or collateral line, a father or mother be dead, the children of such father or mother "shall receive the same share of the estate as the father or mother, if living, would have been entitled to, and no more." Held, that the words "no more" were probably inserted in the statute out of abundant caution, in order to publish it distinctly and with emphasis that they were to take *per stirpes*, and not *per capita*. *Kendall v. Mondell*, 10 Atl. 240, 67 Md. 444.

In an agreement by defendant to practice medicine no more in a certain place after a certain time, the term "no more" covers all time thereafter. It is an agreement that he will never again practice medicine in that place. *Martin v. Murphy*, 28 N. E. 1118, 1119, 129 Ind. 464.

As a limitation.

"No more," in a railroad charter providing that it should pay to the state a certain sum as taxes, and no more, will be construed to act as a limitation as to state taxes only, and will not relieve against county taxes. *Kentucky Cent. R. Co. v. Pendleton County* (Ky.) 2 S. W. 176.

Act 1878 provides that there shall be paid into the treasury of the commonwealth a tax on each \$100 worth of stock in a certain railroad company, equivalent to the rate of taxes on each \$100 worth of property for state revenue, and no more. The term "no more," used in the statute, applies to the taxes provided to be paid into the state treasury, and is a limitation only on the amount of taxes that may be assessed for that purpose. *Kentucky Cent. R. Co. v. Bourbon County*, 82 Ky. 497, 528.

"No more," as used in a bequest of "one dollar, and no more," is consistent with an intention to give that sum only by will, and to allow the legatee to take whatever other portion of the estate the law would give him. To prevent the legatee from having more than \$1, it is necessary for the testator to make disposition of his entire estate. *Wells v. Anderson*, 44 Atl. 103, 69 N. H. 561.

A testator left specific legacies to his children, and to some of the children added to the description of the property given the words "and no more." But these words were

not added to the description of the property given to certain other children. There was no residuary clause, and as to certain property he died intestate. In an action involving the question whether such property should go to the latter children, or be divided amongst all the children, the court said: "The testator gave to some of his children so much, adding, 'and no more,' and is not this the effect of every bequest? The legatees claim the thing bequeathed, but no more. It is impossible to exclude some of the children, because of the words 'no more,' if the testator really did die intestate in regard to the fund now for distribution." And it was held that the property should be divided equally among all the children. *Stewart v. Pattison* (Md.) 8 Gill, 46-57.

NO MORE AND NO LESS.

An instruction in a suit by an administrator to recover fees due his intestate that the finding of the jury as to the value of the intestate's services should be a fair and reasonable sum, according to the evidence upon the subject, "no more and no less," should not be construed to confine the jury to the opinions of witnesses sworn on the subject, but the words mean that they must determine the question according to their own knowledge and common sense, as applied to the evidence, including expert testimony. *Leitensdorfer v. King*, 4 Pac. 37, 39, 7 Colo. 436.

NO OTHER.

1 Rev. St. p. 278, § 10, distinguishes between public and private contempts, and provides relative to public contempts "that every court of record shall have power to punish, as for a criminal contempt, persons guilty of either of the following acts, and no others." The phrase "and no others" implies that there were other and nonenumerated offenses answering the description or characteristics of public contempts, which, but for the statute, might be so deemed and punished, and all these it was affirmatively intended to shut out, so that for the criminal contempt the statute only can be looked to; and hence an act of contempt not enumerated in the statute cannot be punished as a criminal contempt. *People v. Court of Oyer and Terminer*, 4 N. E. 259, 261, 101 N. Y. 245, 54 Am. Rep. 691.

Act Cong. Oct. 1, 1890, § 50, relating to tariff, provides that, "on and after the day when this act shall go into effect, all goods, wares, and merchandise previously imported," etc., for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty upon the entry or withdrawal thereof than if the same were imported, respectively, after that day. Held, that the phrase "no other duty," as here used, means the same duty. In re Gar-

diner (U. S.) 53 Fed. 1013, 1014, 4 C. C. A 155.

"No other manner," in Rev. St. § 3377 providing that any person whose land is overflowed or otherwise injured by any mill-dam may obtain compensation therefor in a civil action in the circuit court of the county where the land lies, "but in no other manner," limits the recovery of compensation to the form of remedy described as a civil action, but does not affect the jurisdiction of the county court prescribed by Rev. St. § 2465, authorizing such court to exercise judicial powers in all civil actions or proceedings in law or equity concurrent with the circuit court. *Geise v. Greene*, 5 N. W. 869, 870, 49 Wis. 334.

NO REASON TO DOUBT.

The phrase "no reason to doubt," in an instruction that if, from the evidence, the jury have no reason to doubt the defendant's guilt, then they might convict, exacted too high a degree of proof. There may be a reason to doubt which does not justify a reasonable doubt, or the inference of probable guilt. *Peagler v. State*, 20 South. 363, 110 Ala. 11.

NO SCHOLAR.

A charge that a physician is "no scholar" is actionable, as a learned education is considered as an essential qualification in a member of the medical profession. *Fitzgerald v. Redfield* (N. Y.) 51 Barb. 484, 491.

NO TRACT OF LAND.

As used in Act March 27, 1889, art. 3, § 3, providing that no tract of land shall be crossed by more than one ditch for irrigation purposes, the term "no tract of land," being employed without qualifications, must be held to include the property of corporations as well as natural persons, since such would have been the construction, had the statute read, "The land of no person shall be crossed." *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.*, 64 N. W. 343, 347, 45 Neb. 884, 29 L. R. A. 853, 50 Am. St. Rep. 585 (citing *Wales v. City of Muscatine*, 4 Iowa [4 Clarke] 304; *Ricker v. American Loan & Trust Co.*, 140 Mass. 346, 5 N. E. 284; *Norris v. State*, 25 Ohio St. 217, 18 Am. Rep. 291).

NO WORKMAN.

A statement in regard to a mason that he is no mechanic, that he cannot make a good wall or do a good job of plastering, that he is "no workman," and that he is a botch, are slanderous *per se*, as imputing

want of skill or knowledge. *Fitzgerald v. Redfield* (N. Y.) 51 Barb. 484, 491.

NOIL.

"Noil" means the short hair of a camel or sheep, obtained by combing. *Lobsitz v. United States* (U. S.) 75 Fed. 834.

NOISE.

See "Unnecessary Noise."

A municipal ordinance imposing a penalty for making any noise will be construed to mean such unreasonable noise as is of a nature disturbing to the community. *State v. Cantieny*, 24 N. W. 458, 462, 34 Minn. 1.

Noise alone may be of such character as to be productive of actual physical discomfort and annoyance to a person of ordinary sensibility, and, when it is of such a nature, may become a nuisance actionable at law, or subject to injunction by equity. *Dittman v. Repp*, 50 Md. 516, 523, 33 Am. Rep. 325.

NOLLE PROSEQUI.

A nolle prosequi is a voluntary withdrawal by the prosecuting attorney of present proceedings on a particular bill. At common law it might at any time be retracted, and was not a bar to a subsequent prosecution on another indictment, but might be so far canceled as to permit a revival of the proceedings on the original bill. *State ex rel. Graves v. Primm*, 61 Mo. 166, 171 (citing 1 Whart. Cr. Law [7th Ed.] § 513); *Moulton v. Beecher* (N. Y.) 1 Abb. N. C. 193, 203 (citing Whart. Am. Cr. Law, § 513).

A nol. pros. or a nolle prosequi is a proceeding by which the plaintiff or the attorney for the state voluntarily declares that he will not further prosecute a suit or indictment, or a particular count in either. A judgment of non pros. or non prosequitur, as used in a statute providing that, on failure of taking a certain proceeding, judgment of non pros. may be entered against the plaintiff, with costs for the defendant, is a judgment of the court on motion of the defendant in a civil action in case the plaintiff does not file his declaration or replication in due time, and is not to be confounded with a nol. pros. *Commonwealth v. Casey*, 94 Mass. (12 Allen) 214, 218.

A non pros. is in effect like a nonsuit, and is the same as in modern practice is the dismissal of an action for want of prosecution. By the common-law nonsuit, the plaintiff goes out of court as to all the defendants, the same as he does by a non pros.; and therefore when he desires to go out of court only as to some of the defendants, or as to

a part of the declaration, a nol. pros. is probably the most apt way of doing it, though we are little accustomed to that in civil cases. The nature of a nol. pros. in civil cases was not accurately ascertained and defined until modern times, some of the older authorities considering it a retraxit operating to release or discharge the action, and an absolute bar to another action for the same cause; but in later cases, which have been adhered to ever since, a nol. pros. is considered not to be in the nature of a retraxit, but only an agreement not to proceed further as to some of the defendants or as to some of the suit, but he is well at liberty to go on as to the rest. *Davenport v. Newton*, 42 Atl. 1087, 1091, 71 Vt. 11.

"The effect of a nolle prosequi is to put the defendant without day on the indictment." *Bowden v. State*, 1 Tex. App. 137, 145.

A nolle prosequi has no greater effect than to annul or make void an indictment, and it does not mean that the indictment was either quashed or reversed. *State ex rel. Graves v. Primm*, 61 Mo. 166, 171.

NOLO CONTENDERE.

There is no difference in legal effect between the plea of nolo contendere and the plea of guilty, at least with regard to all the proceedings in the indictment. *United States v. Hartwell* (U. S.) 26 Fed. Cas. 196, 199.

The plea of nolo contendere is a mild form of pleading guilty. It is seldom used in Pennsylvania, though in general practice in some of the New England states. It has the same effect as a plea of guilty so far as concerns the proceedings upon the indictment, and a defendant who is sentenced upon such plea to pay a fine is convicted of the offense for which he was indicted. The advantage which may attend this plea is that, when accompanied by a protestation of the defendant's innocence, it will not conclude him in a civil action from contesting the facts charged in the indictment. *Buck v. Commonwealth*, 107 Pa. 486, 489.

In a prosecution for the illegal sale of liquor, a former prosecution in which a plea of nolo contendere was entered was sought to be introduced in evidence, and it was held that this was erroneous, in that the plea of nolo contendere is not a confession of the truth of the charge. The court remarked that, if the plea of nolo contendere has the same effect as admitting the charge, it differs in no respect from a plea of guilty. The existence of the two pleas is evidence that there is, or was supposed to be, some distinction between them. This distinction is stated as follows: When the defendant pleads guilty, the clerk writes "Confesses" on the indictment, and he is set aside until

the time of passing sentence. An implied confession is where, in a case not capital, a defendant does not directly own himself to be guilty, but tacitly admits it by throwing himself on the King's mercy, and desiring to submit to a small fine, which the court may either accept or decline as they think proper. If they grant the request, an entry is made to this effect: that the defendant "non vult contendere cum domina regina, et posuit se in gratiam curiæ," without compelling him to a more direct confession. The difference, in effect, between implied and expressed confession, is that after the latter "Not guilty" cannot be pleaded to an action of trespass for the same injury, whereas it may be done at any time after the former. 1 Chit. Cr. Law, 431. Under the plea of nolo the defendant does not confess or acknowledge the charge against him, as upon the plea of guilty, but, waiving his right to contest the truth of the charge against him, submits to punishment. The modern use of the terms attach the same meaning, and hence the plea cannot be used against the defendant as an admission in any civil suit for the same act. *State v. La Rose*, 52 Atl. 943, 945, 71 N. H. 435.

As conviction.

A plea of nolo contendere is an implied confession of guilt, and has the same effect as a plea of guilty, so far as the proceedings on an indictment are concerned, and hence a defendant who has been sentenced on such a plea is to be deemed convicted of the offense for which he was indicted. *Commonwealth v. Horton*, 9 Pick. 206; *Commonwealth v. Ingersoll*, 145 Mass. 381, 14 N. E. 449. In the latter case it is said: "A plea of nolo contendere, when accepted by the court, is, in effect upon the case, equivalent to a plea of guilty. It is an implied confession of guilt, only, and cannot be used against the defendant as an admission in any civil suit for the same act. The judgment of conviction follows upon such a plea as well as upon a plea of guilty, and such a plea, if accepted, cannot be withdrawn, and a plea of not guilty entered, except by leave of the court. If such plea is tendered, the court may accept or decline it, in its discretion. If the plea is accepted, it is not necessary or proper that the court should adjudge the party guilty, for that follows as a legal inference from the implied confession, but the court proceeds thereon to pass the sentence of the law." *Barker v. Almy*, 39 Atl. 185, 186, 20 R. I. 367 (citing *State v. Conway*, 38 Atl. 656, 20 R. I. 270).

A plea of nolo contendere may be followed by a sentence, but it does not establish the fact of guilt for any other purpose than that of the case to which it applies. Doubtless it is often used as a substitute for a plea of guilty, but it simply says that the defendant will not contend. This is not a

confession of guilt, because an accused person might find himself without witnesses to establish his innocence, from their death, absence, or other cause, and hence waive a fruitless contest. *Doughty v. DeAmoreel*, 46 Atl. 838, 22 R. I. 158.

NOMINAL

Mr. Anderson, in his Dictionary of the Law, defines "nominal" thus: "Existing in name only; apparent; formal; not real or substantial." *Mulliner v. Shumake* (Tex.) 55 S. W. 983, 984.

NOMINAL CONDITIONS.

2 Comp. Laws, § 4113, providing that when any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual or substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, means conditions which evince no intention of actual or substantial benefit to the grantor. Where the observations of the conditions are an existing, substantial benefit, or its breach works an actual, substantial injury to the grantor, it cannot be considered as nominal, merely. *Barrie v. Smith*, 10 N. W. 168, 170, 47 Mich. 130.

A condition in a warranty deed of certain land that the saw timber on said land is to be the property of the grantor if he shall remove the same on or before a date specified, if performed, would have been a substantial benefit to the plaintiff, and its non-performance was equally beneficial to his grantee. Hence Comp. Laws 1871, § 4113, providing that the breach of conditions which are merely nominal shall not work a forfeiture, does not apply to the condition in such deed. *Monroe v. Bowen*, 26 Mich. 523, 524, 532.

NOMINAL CONSIDERATION.

"Nominal consideration," when used in reference to the value of property as a consideration for an exchange of property, means the inflated or trade value of the property. *Boyd v. Watson*, 70 N. W. 120, 123, 101 Iowa, 214.

NOMINAL DAMAGES.

Nominal damages are a trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proven to be sustained, or where, from the nature of the case, some injury has been done, the amount of which the proofs fail entirely to show. *Maher v. Wilson*, 73 Pac. 418, 421, 139 Cal. 514.

Nominal damages are a trifling sum awarded where no serious loss is proven. *Armstrong v. Rhoades* (Del.) 53 Atl. 435.

"Nominal damages" means those damages that exist only in name, and not in amount. *Brennan v. Berlin Iron Bridge Co.*, 44 Atl. 727, 728, 72 Conn. 386. "Nominal damages" means no damages at all. In the quaint language of an old writer, they are a mere peg to hang costs on. They are such as are to be awarded in a case where there has been a breach of a contract, and no actual damages whatever have been or can be shown. *Stanton v. New York & E. R. Co.*, 22 Atl. 300, 303, 59 Conn. 272, 21 Am. St. Rep. 110.

The term "nominal damages" means damages for some trifling sum, as a penny, one cent, six cents, etc., *Davidson v. Devine*, 11 Pac. 664, 665, 70 Cal. 519; awarded where a mere breach of duty or infraction of right is shown, with no serious loss sustained, *Springer v. J. H. Somers Fuel Co.*, 46 Atl. 370, 371, 196 Pa. 156.

Nominal damages are those recoverable where a legal right is to be vindicated from an invasion that has produced no actual, present loss of any kind. *Duggan v. Baltimore & O. R. Co.*, 28 Atl. 182, 184, 159 Pa. 248, 39 Am. St. Rep. 672.

Nominal damages are those which are given when the legal right of a party is infringed, but no appreciable loss or injury is suffered. The person whose legal right is affected is entitled in such instances to recover some trifling sum, at least, as the law implies some damages from the infringement of the legal right. *Atchison, T. & S. F. R. Co. v. Watson*, 15 Pac. 877, 880, 37 Kan. 773.

Nominal damages arise by implication of law from the violation of the rights of another, from which injury arises, which is either incapable of ascertainment, or the value of which the proof wholly fails to show. *Western Union Tel. Co. v. Lawson*, 72 Pac. 283, 284, 66 Kan. 660.

Nominal damages never purport to be real damages. They are awarded when, from the nature of the case, some injury has been done, the amount of which the proofs fail entirely to show. *Bellingham Bay & B. C. R. Co. v. Strand*, 30 Pac. 144, 145, 4 Wash. 311.

In an action for conversion of a threshing machine, in which defendant had sold the machine to plaintiff under a contract by which it was agreed that, on plaintiff's default in payment, defendant might take the property, and, on plaintiff's default, defendant had so taken the property pursuant to such contract, the court held that, under such circumstances, plaintiff's damages, at best, were but nominal, and said that "nominal damages cannot be classed as actual damages." *Mulliner v. Shumake (Tex.)* 55 S. W. 983, 984.

The term "nominal damages," like "exemplary damages," is purely relative, and carries with it no suggestion of certainty as to amount. A finding by the jury, expressed in the words "that the jury find for the plaintiff nominal damages," without naming any amount, is not a lawful verdict. *Sellers v. Mann*, 39 S. E. 11, 113 Ga. 643.

NOMINAL HORSE POWER.

The words "nominal horse power" have no technical meaning in the boiler manufacturing trade, and mean the rated or professed capacity of boilers as distinguished from the capacity above or below the nominal horse power which they might actually develop when in use. *Heine Safety Boiler Co. v. Francis Bros. & Jellett (U. S.)* 117 Fed. 235, 236, 54 C. C. A. 267.

A contract for a boiler, stipulating that it shall have a "nominal capacity of 140 horse power," means a boiler of such size and dimension and having such heating surface and other elements as are ordinarily and usually found associated with boilers described as boilers of 140 horse power. *Francis Bros. & Jellett v. Heine Safety Boiler Co. (U. S.)* 112 Fed. 899, 900.

NOMINAL PAR.

The par of exchange is the value of money of one country in that of another, and may be either real or nominal. "Nominal par" is that which has been fixed by law or custom, and, for the sake of uniformity, is not altered; the rate of exchange alone fluctuating. *Blue Star S. S. Co. v. Keyser (U. S.)* 81 Fed. 507, 510 (citing *Bouv. Law Dict.* "Exchange").

NOMINAL PARTNER.

The term "nominal partner" is a term unknown to the law of partnership. In *re Swift (U. S.)* 118 Fed. 348, 350.

NOMINAL PARTY.

When a promissory note belongs to, and is sued for the benefit of, an intestate estate, in the name of the administrator, the administrator, as plaintiff, cannot be deemed a nominal party, within Rev. St. c. 82, § 387, cl. 3, declaring that, if the representative party is nominal only, both parties may be witnesses; and this is true, though the proceeds finally go to pay the debts of the estate, or to the administrator as heir at law of the intestate. *Wing v. Andrews*, 59 Me. 505, 508.

NOMINAL VALUE.

"Nominal value," as used in *Taylor's St.* 843, § 1, requiring the assignee for the ben-

est of creditors to give a bond in a sum not less than the whole amount of the nominal value of the assets of the assignor, which value should be ascertained by the oath of one or more witnesses and of the assignor, means the value named by the witnesses; and a bond given in the full value or real value as ascertained by such witnesses is in all cases sufficient. *Hutchinson v. Brown*, 33 Wis. 465, 468.

NOMINATE.

The word "nominate" means to recommend for confirmation. *Paschal's Ann. Const.* p. 175, note 179; *Territory v. Rodgers*, 1 Mont. 252, 259.

"Nominating," as used in Acts 1900, c. 16, creating a board of police examiners, and authorizing the nominating by them of the police commissioners from created lists of qualified persons for appointment or promotion on the police force, does not mean the act or ceremony of bringing forward and submitting the name of the candidate, especially for the elective office, according to certain prescribed form, but it means, primarily, naming—mentioning by name. 5 Cent. Dict. p. 4010. It cannot be given the meaning of the term "nominate," as political usage has defined it to indicate the selection of the candidate to be voted for at the public election. Nomination for office involves selections of particular candidates to be voted for. Nominations by the examiners consist simply in naming a number of eligibles from among whom the commissioners must make selections. *Keyser v. Upshur*, 48 Atl. 399, 401, 92 Md. 726.

The words, "I nominate A. my legatee" of a sum specified, or "of the residue of my estate," carry to him the sum specified or the residue as effectually as though the more formal and usual words, "I bequeath," had been used. *Wyman v. Woodbury*, 33 N. Y. Supp. 217, 220, 86 Hun. 277.

A buyer and a seller agreed to each nominate a referee on or before a certain day, who were to fix the price of the goods sold. It was held that a selection of a referee by one of the parties previous to the day fixed, but which was not communicated to the other party until after such day, was not a nomination, within the meaning of the agreement. *Tew v. Harris*, 11 Adol. & El. (N. S.) 7, 11.

NOMINATION.

"Nomination" is defined by Cowell to be "a power to appoint a clerk to a patron of a benefice." *Godwin v. Lunan* (Va.) Jeff. 96, 106.

"Nominations" is equivalent to the word "appointments," when used by a mayor in an instrument executed for the purpose of

appointing certain persons to office. *People v. Fitzsimmons*, 68 N. Y. 514, 519.

NOMINEE.

The term "nominees" is used to designate persons selected as candidates for office. *State v. Hirsch*, 24 N. E. 1062, 1063, 125 Ind. 207, 9 L. R. A. 170.

NON.

Not. The common particle of negation. *Black, Law Dict.*

NON ASSUMPSIT.

The plea "non assumpsit" enables the party to show anything which at law would defeat and destroy his cause of action; but when the matter of defense is a pure equity, calling for the interposition and requiring the aid of a court of chancery, the defendant desirous of availing himself of it must give notice either by plea or notice. Nothing but a common-law defense can be received on the general issue. *Taylor v. Coryell* (Pa.) 12 Serg. & R. 243, 250.

NON CEPIT.

See "Plea of Non Cepit."

NON COMPOS MENTIS.

"Non compos mentis" is a generic term, and includes all the species of madness, whether it arises on idiocy, sickness, lunacy, or drunkenness. *Somers v. Pumphrey*, 24 Ind. 231, 244 (quoting Bouv. Law Dict.).

According to Lord Coke and Blackstone, the phrase "non compos mentis" embraces four classes of persons: First, idiots from birth; second, those who by sickness, grief, or other accident wholly lose their reasoning and understanding; third, lunatics; fourth, drunkards, and those who voluntarily temporarily deprive themselves of understanding. *Stanton v. Wetherwax* (N. Y.) 16 Barb. 259, 262; *In re Barker* (N. Y.) 2 Johns. Ch. 232, 233; *In re Beaumont*, 1 Whart. 52, 53, 29 Am. Dec. 33; *Johnson v. Phifer*, 6 Neb. 401, 404; *Commonwealth v. Haskell* (Pa.) 2 Brewst. 491, 496.

The term "non compos mentis" includes all persons of unsound mind. *Shannon's Code Tenn.* 1896, § 62; *Olv. Code Ala.* 1896, § 1; *Pen. Code Ga.* 1895, § 2; *Cason v. Owens*, 28 S. E. 75, 76, 100 Ga. 142.

A lunatic, indeed, is properly one that hath lucid intervals, sometimes enjoying his senses and sometimes not, and that frequently depending on the change of the moon. But under the general name of "non compos

mentis," which Sir Edward Coke says is the most legal name, are comprised not only lunatics, but persons under frenzies, or who lose their intellects by disease; those that grow deaf, dumb, and blind, not being born so; or such, in short, as are judged by the court of chancery incapable of conducting their own affairs. Mr. Fonblanque, in his treatise on Equity, vol. 1, p. 63, note "p," has transcribed the above passage, and observes that he was induced to do so in order to obviate the error in which the learned commentator seems to have fallen in the concluding sentence. He then proceeds by saying that, the rules of judging upon the point of insanity being the same at law as in equity, the courts of chancery cannot assume any kind of discretion upon the subject. Littleton (section 405) speaks of a man of nonsane memory as one who is non compos metis, upon which Lord Coke in his Commentary (Co. Litt. 246b, 247a) says: "Here Littleton explaineth a man of no sound memory to be non compos mentis. Many times, as here it appeareth, the Latin word explaineth the true sense, and calleth him not amens, demens, furiosus, lunaticus, fatuus, stultus, or the like, for a non compos mentis is the most sure and legal. Now, it is obvious that Lord Coke considered 'non compos mentis' not only the legal, but the sure term, and not amens, demens," etc. In re Beaumont (Pa.) 1 Whart. 52, 53, 29 Am. Dec. 33.

A person is non compos mentis who has not the regular use of the understanding sufficient to deal with discretion in the common affairs of life. Foster v. Means (S. C.) Speers, Eq. 569, 574, 575, 42 Am. Dec. 332.

As entire loss of understanding.

The degree of imbecility which will render a person legally non compos mentis is sometimes defined as an entire loss of understanding. Burnham v. Mitchell, 34 Wis. 117, 136.

Non compos mentis means a total deprivation of sense. Dennett v. Dennett, 44 N. H. 531, 537, 84 Am. Dec. 97; Jackson v. King (N. Y.) 4 Cow. 207, 218, 15 Am. Dec. 354.

Lord Coke defines one non compos mentis, aside from natural idiots, lunatics, and drunken men, as one that by sickness, grief, or other accident, wholly loseth his memory and understanding. Potts v. House, 6 Ga. 324, 350, 354, 50 Am. Dec. 329; Jackson v. King (N. Y.) 4 Cow. 207, 217, 15 Am. Dec. 354. This is a sweeping definition, and more so than this court will sanction in certain cases that may be submitted to its jurisdiction. Sprague v. Duel (N. Y.) Clarke, Ch. 90, 93. Lord Hardwicke, in Ex parte Barnsley, 3 Atk. 168, says: "Being non compos, of unsound mind, are certain terms in law, and import a total deprivation of sense. A weakness does not carry this idea along with it;

but courts of law understand what is meant by 'non compos' or 'insane,' as they are words of a determinate signification." In re Bush's Will, 5 N. Y. Supp. 23, 24, 1 Con. Sur. 330. "These terms mean, in respect to the condition of the mind of a person, a total want of understanding. Deeds of all such persons are void, but mere imbecility or weakness of mind, however great, will not avoid a deed or contract, unless there be evidence to show a total want of reason or understanding." There is no grade of understanding between the highest and lowest which incapacitates a man from making a contract where there is no fraud, imposition, or undue influence practiced upon him. A person who is 'childish,' which term means simplicity or weakness of mind, is capable of making a deed, in the absence of fraud, for she is not non compos mentis." Mulloy v. Ingalls, 4 Neb. 115, 117. Shelford says, with reference to whether a person should be regarded non compos or not, that "weak minds differ from strong ones only in the extent or power of their faculties; but, unless they betray a total loss of understanding, or idiocy, or delusion, they cannot properly be considered unsound." Potts v. House, 6 Ga. 324, 350, 354, 50 Am. Dec. 329.

The term "non compos mentis" imports a total deprivation of senses. Therefore, in order to set aside a grantor's deed on the ground that he was non compos mentis, it must be shown that he came within the legal acceptance of the term; that it was not a partial, but an entire, loss of the understanding, for the law does not draw any discriminating line by which to determine how great must be the imbecility of the mind to render a contract void, or how much must remain to uphold it. Weakness of understanding is not of itself any objection in law to the validity of a contract, but a man legally non compos mentis is not the disposer of his own property. Jackson v. King (N. Y.) 4 Cow. 207, 217, 15 Am. Dec. 354.

As legally incompetent to transact business.

"Non compos mentis" is a general term, embracing all who are deemed legally incompetent to transact business. It includes three separate classes, viz., idiots, persons of unsound mind, and persons of unsound memory. Each of these classes is entirely distinct from both the others. The first embraces not only congenital idiots, or idiots from birth, but also such as have subsequently become mentally imbecile from sickness or other cause. The second class comprises all who suffer from alienation of mind, whether they are lunatics, monomaniacs, or generally deranged. The third is confined to a peculiar class, composed mostly of persons whose memories are impaired by age. To mingle these separate classes, each of which has its

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The phrase "non compos mentis" is used as synonymous with that of nonsane mind and memory, the unsound mind of modern phraseology and our own statute books. *Stewart's Ex'r v. Lisperard* (N. Y.) 26 Wend. 255; *Hovey v. Chase*, 52 Me. 304, 315, 317, 83 Am. Dec. 514; *Foster v. Means* (S. C.) Speers, Eq. 569, 42 Am. Dec. 332.

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Non est factum was the general issue at common law in actions on bonds, and its office was to put in issue the execution of the deed sued on. In Indiana the term "non est factum" is and has been applied to all pleas, answers, and replies that deny the execution of the written instrument constituting the foundation of the previous pleading answered by such denial, but in this state such pleading, under our statute, had not been regarded as having the effect of putting in issue the execution of any instrument, but only its existence, unless the pleading was verified by oath. *Evans v. Southern Turnpike Co.*, 18 Ind. 101, 102 (citing Ind. Dig. 651; *Moorman v. Barton*, 16 Ind. 206).

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can be given only upon a motion made by the plaintiff. *German Ins. Co. v. Frederick*, 58 Fed. 144, 148, 7 C. C. A. 122.

Where a verdict was for the defendant, where the plea confessed a cause of action, the courts would render judgment for the plaintiff without regard to the verdict, which was called a judgment "non obstante veredicto." *Wentworth v. Wentworth*, 2 Minn. 277, 282 (Gil. 238, 243), 72 Am. Dec. 97.

At common law a judgment non obstante veredicto was entered for the plaintiff, and that when the plea confessed the cause of action and set up insufficient matters to constitute either a defense or a bar, or, as expressed by Smith, Act. 161, it is a judgment rendered in favor of the plaintiff notwithstanding the verdict for the defendant, and is given upon motion by the plaintiff, when, on an examination of the whole proceedings, it appears to the court that defendant has admitted himself to be in the wrong, and that, though decided in his favor by the jury, it is on a point which does not at all better his case. The complaint being confessed, the plea must have been bad in substance, not merely in form, it seems, to have entitled the plaintiff to a judgment notwithstanding the verdict. *Hill v. Ragland (Ky.)* 70 S. W. 634, 637.

NON PROSEQUITUR.

"Non prosequitur," in our practice, is commonly called a "nonsuit," and covers judgment by non prosequitur, nolle prosequi, and technical nonsuits, and also judgments of nonsuit entered under statute at rules. According to the common-law practice, a non prosequitur was entered where plaintiff failed to take any necessary step after defendant had appeared and pleaded. *Buena Vista Freestone Co. v. Parrish*, 34 W. Va. 652, 654, 12 S. E. 817.

Where a statute provides that on the failure of taking a certain proceeding, judgment of "non pros." may be entered against the plaintiff, with costs for the defendant, judgment of non pros., or non prosequitur, is meant, which is a judgment of the court on motion of the defendant in a civil action in case the plaintiff does not file his declaration or replication in due time, and is not to be confounded with nol. pros., or nolle prosequi, by which the plaintiff or the attorney for the state voluntarily declared that he will not further prosecute the suit or indictment, or a particular count in either. *Commonwealth v. Casey*, 94 Mass. (12 Allen) 214, 218.

A "non pros." is in effect like a nonsuit, and is the same as in modern practice is a dismissal of an action for want of prosecution. By the common-law "nonsuit" the plaintiff goes out of court as to all the defendants, the same as he does by a non

pros., and therefore, when he desires to go out of court only as to some of the defendants, or as to a part of the declaration, a "nol. pros." is probably the most apt way of doing it, though we are little accustomed to that in civil cases. The nature of a nol. pros. in civil cases was not accurately ascertained and defined until modern times; some of the older authorities considering it a retraxit, operating to release or discharge the action, and an absolute bar to another action for the same cause, but in later cases, which have been adhered to ever since, a nol. pros. is considered not to be in the nature of a retraxit, but only an agreement not to proceed further as to some of the defendants or as to some of the suit, but he is well at liberty to go on as to the rest. *Davenport v. Newton*, 42 Atl. 1087, 1092, 71 Vt. 11.

NONANCESTRAL PROPERTY.

Ancestral property is realty which comes to one by descent or devise from a now dead ancestor, or by deed of actual gift from a living one, there being no other consideration than that of blood, as distinguished from "nonancestral property," which is realty which comes to one in any other way. *Brown v. Whaley*, 49 N. E. 479, 480, 58 Ohio St. 654, 69 Am. St. Rep. 793.

NONAPPARENT SERVITUDE.

"Nonapparent servitudes" are such as have no exterior sign of their existence; such, for instance, as the prohibition of building on an estate, or of building above a particular height. *Civ. Code La. 1900*, art. 728.

NONARRIVAL.

The charterers of a ship for a voyage from C. to B. and thence to G. to take in a homeward cargo caused another ship to be chartered on their account and go and bring home a cargo from G., with a proviso that, in the event of the nonarrival of the first-mentioned ship at G., then the second charter should be void. Held, that "nonarrival," as used in such charter party, meant nonarrival within such time as might answer the purposes of the charter of the second ship, and that, the first ship not having arrived in time to answer those purposes, and the delay not being attributed to the charterers, the charter of the second ship was void, and the charterers were not bound to provide a homeward cargo for her. *Soames v. Lonergan*, 2 Barn. & C. 564.

NONASSESSABLE.

As used in a stock certificate, "nonassessable" means that there shall be no liability or further assessment or taxation after the entire subscription of 100 per cent. shall

have been paid. *Upton v. Tribilcock*, 91 U. S. 45, 48, 23 L. Ed. 203.

The word "nonassessable," in reference to shares of stock in a corporation, is susceptible of the construction which includes liability over and above the subscription price, and such was its meaning in an agreement in guaranty of the purchasers of any of the capital stock of a corporation that such stock was nonassessable until the then owners of such capital stock should have expended a certain sum in the enterprise. A contention that the word "nonassessable" meant that the stock would not be assessed to make up the deficiencies in the amount originally subscribed was held to be without foundation. A proceeding under Rev. St. Ohio, § 3200, providing that there shall be found and determined by each person liable as stockholders the amount payable on all the indebtedness of the corporation, constituted an assessment within the common definition, and stock subject to such contribution is not nonassessable. *Omo v. Bernart*, 65 N. W. 622, 623, 108 Mich. 43.

The word "nonassessable," when stamped upon a certificate of stock, does not operate as a waiver of the obligation created by the acceptance and holding of a certificate to pay the amount due on the stock. A promise to take shares of stock in a corporation is a promise to pay for them. At most, the legal effect of the word in question is a stipulation against the further taxation or further assessment after the holder shall have carried out his contract to pay the 100 per cent. in the manner and at the time indicated. *Upton v. Tribilcock*, 91 U. S. 45, 48, 23 L. Ed. 203.

"Nonassessable interest," as used in reference to a lease on a mining claim, is an interest against which no expense is chargeable. The holder incurs no liability by reason of any work done upon the claim. *Maloney v. Love*, 52 Pac. 1029, 1030, 11 Colo. App. 288.

NONATTENDANCE.

"Attend" is defined as to be present, or to be near at hand, or within call, so that, as used in Gen. St. 1899, § 1931, providing that all writs, orders, and processes from the probate court shall be issued and directed to the sheriff to be served, except in his absence or "nonattendance," the sheriff is not required to be present in court, and it is sufficient if he is in his office ready to receive the process. *Skinner v. Cowley County Com'rs*, 66 Pac. 635, 637, 63 Kan. 557.

NONCLAIM.

The statute of "nonclaim" (*Gantt's Dig. c. 4, § 99*), which provides that all demands

against any estate not presented within two years from the granting of letters of administration shall be barred, has all the attributes and characteristics of a statute of limitations, and did not run during the war. *Williamson v. McCrary*, 33 Ark. 470, 474.

NONCOMMISSIONED OFFICER.

"Noncommissioned officers," as the term is used in the United States army, does not include cadets at West Point, who are inferior officers, and, for purposes of instruction, may be required to serve as officers, noncommissioned officers, or privates. *Babbitt v. United States (U. S.)* 16 Ct. Cl. 202, 203.

NONCONTINUOUS EASEMENT.

A "noncontinuous easement" is a non-apparent easement, or one which has no means specially constructed or appropriate to its enjoyment; one that is enjoyed at intervals, leaving between such intervals no visible sign of its existence, such as a right of way. *Fetters v. Humphreys*, 18 N. J. Eq. (3 C. E. Green) 260, 262.

A noncontinuous easement is one whose enjoyment depends on an actual interference of man at each time of enjoyment. *Tooth v. Bryce*, 25 Atl. 182, 190, 50 N. J. Eq. (5 Dick.) 589.

A noncontinuous easement is one to the enjoyment of which the act of the party entitled to the same is essential. *Bonelli v. Blakemore*, 5 South. 228, 231, 66 Miss. 136, 14 Am. St. Rep. 550.

A noncontinuous easement is one which requires an active interference to every instance of enjoyment, such as a way, which can be enjoyed only by actual use by the party, as by traveling on it. *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564, 571.

NONEXPERT.

The "nonexpert" is one who testifies as to conclusions which may be verified by the adjudicating tribunal, and gives the result of a process of reasoning familiar to everyday life. *Thompson v. Pennsylvania Ry. Co.*, 15 Atl. 833, 835, 51 N. J. Law (22 Vroom) 42 (citing 1 Whart. Ev. § 434); *Powers v. McKenzie*, 16 S. W. 559, 562, 90 Tenn. (6 Pickle) 167.

NONFEASANCE.

Nonfeasance is an omission to perform a required duty at all, or a total neglect of duty. *Minkler v. State*, 15 N. W. 330, 331, 14 Neb. 181; *Colte v. Lynes*, 33 Conn. 109, 115; *Ellis v. McNaughton*, 42 N. W. 1113, 1114, 76 Mich. 237, 15 Am. St. Rep. 308.

Nonfeasance is the omission of an act which a person ought to do. *Burns v. Pethcal*, 27 N. Y. Supp. 499, 503, 75 Hun, 437; *Illinois Cent. R. Co. v. Foulks*, 60 N. E. 890, 894, 191 Ill. 57; *Bell v. Josselyn*, 69 Mass. (3 Gray) 309, 311, 63 Am. Dec. 741; *Dudley v. City of Flemingsburg (Ky.)* 72 S. W. 327, 60 L. R. A. 575.

The failure of a city to repair a sidewalk after knowledge of its defective condition may be described as "nonfeasance." *Carr v. Kansas City (U. S.)* 87 Fed. 1, 2.

Misfeasance distinguished.

A distinction exists between "nonfeasance" and "misfeasance"; the one being a total omission to do an act which one gratuitously promises to do, and the other a culpable negligence in the execution of the act. If a party makes a gratuitous engagement, and actually enters upon the execution of the business, and does it amiss, through the want of due care, by which danger ensues to the other party, an action will lie for misfeasance. *Gregor v. Cady*, 19 Atl. 108, 82 Me. 131, 17 Am. St. Rep. 466.

A servant's careless or negligent act is called a "misfeasance." In its nature it is or becomes a trespass; but where an injury results to a third person because the servant failed to act it is called a "nonfeasance," in which case, generally, the servant is not personally liable, though his master is. In the event of a misfeasance, the servant is liable to any one injured thereby. *Cincinnati, N. O. & T. P. Ry. Co. v. Robertson (Ky.)* 74 S. W. 1061, 1062 (citing *Murray v. Usher*, 117 N. Y. 542, 23 N. E. 564; *Burns v. Pethcal*, 75 Hun, 437, 442, 27 N. Y. Supp. 499).

Bouvier defines "nonfeasance" to be the nonperforming of some act which ought to be performed. He defines "misfeasance" to be the performance of an act which might lawfully be done in an improper manner by which another person receives an injury. Where a carrier negligently billed freight so as to make it go to Richmond for Philadelphia via the Clyde Line of steamers, when he had in his possession rate sheets which showed that the Clyde Line of steamers would not receive freight in bulk, such as the freight in question was, the misbidding was an act of positive misfeasance, and not nonfeasance. *Illinois Cent. R. Co. v. Foulks*, 60 N. E. 890, 894, 191 Ill. 57.

NONFORFEITING POLICY.

Where a life policy indorsed by the insurer as nonforfeiting stipulated that in consequence of the nonpayment of annual payments, then upon a surrender of the same, if made within twelve months from default in payment, a new policy will be issued for

a certain sum, the right of the insured in the policy did not depend upon the surrender thereof within the time specified, for on a policy distinctly made nonforfeitable the stipulation cannot be construed to work a forfeiture. *Chase v. Phoenix Mut. Life Ins. Co.*, 67 Me. 85.

NONINTERVENTION WILL.

Wills which authorize the executor or executrix to settle and distribute the estate without the intervention of the court and without the giving of bonds are commonly designated as "nonintervention wills." In *re McDonald's Estate*, 69 Pac. 1111, 1112, 29 Wash. 422.

NONJUDICIAL DAY.

Sunday as, see "Sunday."

A "nonjudicial day" means one on which process cannot ordinarily issue or be executed or returned, and on which courts do not usually sit. *Whitney v. Blackburn*, 21 Pac. 874, 876, 17 Or. 564, 11 Am. St. Rep. 857.

NONJUDICIAL OATH.

There is an essential difference between a judicial and a "nonjudicial oath." A judicial oath is one taken before an officer in open court, and a nonjudicial oath is one taken before an officer ex parte, or out of court. In case perjury is assigned as having been committed on a judicial oath it is sufficient that the person acting is one of a class of officers having prima facie authority and does administer the oath with due formality and solemnity in the presence of the court, it having jurisdiction of the cause. In case of perjury assigned on a nonjudicial oath it is insufficient to maintain a conviction if the person administering the oath was not legally authorized to administer that particular oath. *State v. Dreifus*, 38 La. Ann. 877, 882.

NONLEVIABLE ASSETS.

Nonleviable assets are assets on which an execution would not be levied. *Farmers' Fire Ins. Co. v. Conrad*, 78 N. W. 582, 583, 102 Wis. 387.

NONMAILABLE MATTER.

"Nonmailable matter," as used in Act Sept. 26, 1888, § 2, declaring all matter upon the envelope or wrapper of which are found any epithets, terms, or language of an indecent, libelous, or threatening character, calculated to reflect injuriously on the character of another, to be "nonmailable," includes an obscene letter, although no obscene matter appears on the envelope. *United States v. Nathan (U. S.)* 61 Fed. 936, 938.

NONRESIDENT.

A nonresident is one who does not reside in, or is not a resident of, a particular place. One may be a resident of the United States, or a state, or a county, or any particular place. *Gardner v. Meeker*, 48 N. E. 307, 308, 169 Ill. 40. See, also, *Pacific Ry. Co. v. Perkins*, 54 N. W. 845, 846, 38 Neb. 456.

Comp. St. c. 16, § 100, provides that if, upon the location of a certain railroad, it shall be found to run through the lands of any "nonresident" owner, the railroad may give a certain notice to such proprietor, if known, and, if not known, by publication in some newspaper published in the county where such lands may lie, and, if such owner shall not thereafter apply within a certain time to have the damages assessed in the prescribed mode, the company may proceed to have damages assessed, subject to the same right of appeal as in the case of resident owners. Held, that the word "nonresident," as so used, means a nonresident of the state, and not of the land affected, or of the county where it is situated. The word "nonresident" is ordinarily used in connection with certain rights of creditors and property owners. Thus a person who does not reside in the school district in which he has property is a nonresident of such district; so, if he owns property in any village, city, or county in which he does not reside, he is a nonresident of such county, city, or village. In the broad sense it is applicable to every one who does not reside at a particular place named. The word, however, when applied to the bringing of an action, is used in a more limited sense. If personal service cannot be had within the boundaries of the state, constructive service by publication is permitted. If personal service can be had upon a defendant within the state, then service by publication cannot be made. In the general acceptance of the term as used in such connection, it means one who resided out of the state. *Pacific Ry. Co. v. Perkins*, 54 N. W. 845, 846, 38 Neb. 456 (citing *Frost v. Brisbin* [N. Y.] 19 Wend. 11, 32 Am. Dec. 423; *Pooler v. Maples* [N. Y.] 1 Wend. 65).

As used in Code, § 926, providing that when the ground of attachment is that the defendant is a foreign corporation, or a "nonresident of the state," the order of attachment may be issued without an undertaking, "nonresident" is synonymous with "not a resident of the state," as used in an affidavit for the attachment reciting that the defendant is not a resident of the state. *Nagle v. Loomis*, 50 N. W. 441, 442, 33 Neb. 499.

One who maintains his family in another state, and frequently resorts to his home there, may be deemed a nonresident of the state within the attachment laws, notwithstanding he has furnished apart-

ments in connection with his place of business in the state, and there lodges and takes his meals. *Murphy v. Baldwin* (N. Y.) 11 Abb. Prac. (N. S.) 407, 408.

If a resident of West Virginia, with fixed set intention to remove to another state and there reside, in pursuance of such intention goes out of the state, he is, within the meaning of the attachment law, a nonresident of the state directly he begins the removal of his person from the place of his residence, even before he gets outside the state, and to constitute him a nonresident he need not acquire either a domicile or residence in another state. *State v. Allen*, 35 S. E. 990, 992, 48 W. Va. 154, 50 L. R. A. 284, 86 Am. St. Rep. 29.

A debtor does not become a nonresident, so as to subject himself to a foreign attachment, by simply leaving his residence in the state and going into another state to seek a new residence, until he has obtained another place of abode with the intention of remaining there. *Appeal of Reed*, 71 Pa. (21 P. F. Smith) 378, 382.

Absence distinguished.

"Absence" and "nonresidence" are two entirely different things. Thus a man may reside on a homestead in one county, and yet be long absent therefrom in another county. *Webster v. Citizens' Bank of Omaha*, 96 N. W. 118, 120, 2 Neb. (Unof.) 353.

Actual presence.

Persons actually in a state, engaged in professional work, are not nonresidents within the meaning of Code Civ. Proc. §§ 537, 538, authorizing attachment in certain cases. *Egener v. Juch*, 35 Pac. 432, 101 Cal. 105.

The term "nonresident in this state" in Attachment Act, § 1, giving an attachment against such a person, means a debtor not actually present in person within the state. *Brundred v. Del Hoyo*, 20 N. J. Law (Spencer) 328, 332.

Decedent.

In Code, § 2533, providing that the time during which a defendant is a nonresident of the state shall not be included in computing any of the periods of limitation, the word "nonresident" implies that one so described holds a residence in another place, and cannot be construed to include a deceased person, for he holds a residence nowhere. To be a nonresident of the state one must be a resident elsewhere. *Savage v. Scott*, 45 Iowa, 130, 133.

Domicile as affecting.

"Nonresident," as used in a statute providing for the issuance of a writ of attachment against a nonresident of the state, should be construed to include one whose

domicile is within the state, though he resides, for business or other purposes, outside the state. To constitute one a nonresident within the meaning of the law, it is not necessary that he should have abandoned his domicile, for one may have a residence in one place and a domicile in another. *Morgan v. Nunes*, 54 Miss. 308, 310.

A nonresident within the meaning of the attachment statute is one who has a domicile elsewhere. One who has a domicile in the state cannot be a nonresident while temporarily absent from the state. "Not a resident" and "domicile" denote opposite conditions with reference to habitancy, but not differing in degree. *Charlton Co. v. Moberly*, 59 Mo. 238, 241.

A person may be a nonresident of the state, within the meaning of the statute relative to nonresident debtors, though his domicile continues within the state. *Haggart v. Morgan*, 5 N. Y. (1 Seld.) 422, 427, 55 Am. Dec. 350.

In Code, § 2533, relating to limitation of actions, and declaring that the time during which a defendant is a nonresident of the state shall not be included in computing any of the periods of limitation above described, the word "nonresident" contemplates one who has acquired a residence in another state, and not one who is merely sojourning in another state still holding his residence in Iowa. *Fowler v. Des Moines & K. C. Ry. Co.*, 60 N. W. 116, 119, 91 Iowa, 533.

The fact that a person who actually resided within New York for 18 months retained a legal domicile in another state did not make him a nonresident of New York, within Code Civ. Proc. § 636, authorizing the issuance of a warrant or attachment against the property of a nonresident. *Rosenzweig v. Wood*, 63 N. Y. Supp. 447, 449, 30 Misc. Rep. 297.

One whose family is occupying, and for several years has been occupying, a dwelling house in another state, hired by him, and who habitually passes the night of each day and the Sabbath with his family, is a nonresident of the state within the meaning of the statutes authorizing an attachment against a nonresident. *Chaine v. Wilson*, 14 N. Y. Super. Ct. (1 Bosw.) 673, 686.

Where defendant, a railroad contractor, retained a house occupied by his father, who was a member of his family, in one state, where his child, a young girl, also lived, and voted there, and returned there several times each year on visits, but all his business was done in another state, where he had an office and living apartments for the purpose of carrying on such business, with no definite idea of returning to the first state at any particular time, he is a nonresident from that state, within the meaning of the attachment laws, though retain-

ing his citizenship. *Southern R. Co. v. McDonald (Tenn.)* 59 S. W. 370, 373.

Foreign corporation.

As used in the statute providing that all persons doing business in the state of New York who are nonresidents shall be taxed on all sums invested in such business, "nonresident" means not only individuals, but embraces a foreign corporation. In *re Smyth (N. Y.)* 35 How. Prac. 126, 127.

A corporation organized under the laws of a foreign jurisdiction, although exclusively engaged in business in this district, having been organized for that purpose only, and having its secretary and treasurer here, is a nonresident, and subject to attachment as such. *Barbour v. Paige Hotel Co.*, 2 App. D. C. 174, 185.

Intention.

"Nonresidence," within the meaning of the attachment laws, means the "actual cessation to dwell within a state for an uncertain period, without definite intention as to a time for returning, although a general intention to return may exist." *Carden v. Carden*, 12 S. E. 197, 198, 107 N. C. 214, 22 Am. St. Rep. 876 (citing *Weitkamp v. Loehr*, 53 N. Y. Super. Ct. [21 Jones & S.] 79, 83).

One who had resided on a farm for a number of years, which he leased, reserving to himself certain rooms in the dwelling, where he continued to keep some of his household goods, and who went to another state with his family, where he engaged in work, and voted, and bargained for a house in which he went to housekeeping, was a nonresident of the state within the attachment law, though he stated that he never intended to change his residence. *Wolf v. McGavock*, 23 Wis. 516, 518.

"Nonresident," as used in Code, c. 138, § 2, requiring a nonresident plaintiff to give security for costs, means one who resides out of the state. One who has actually ceased to dwell within the state for eight months, without any definite intention as to a time or occasion for returning, is a nonresident. Nonresidence began as soon as she left the state with no then present intention of returning. *Dean v. Cannon*, 16 S. E. 444, 446, 37 W. Va. 123.

A Methodist preacher assigned to and living in a district outside his state is a nonresident within the meaning of attachment laws, though he intends to return and still claims a residence in the state, and visits it once or twice a year. *Carden v. Carden*, 12 S. E. 197, 198, 107 N. C. 214, 22 Am. St. Rep. 876.

Receivership.

Code, § 2533, provides that "the time during which a defendant is a nonresident

of the state shall not be included in computing any of the periods of limitation." Held, that the fact that a railroad company, after a cause of action against it had accrued, was turned over to a receiver appointed by a federal court at the instance of nonresident creditors, did not suspend the running of the statute, the company itself remaining a resident of the state during such receivership. *Fowler v. Des Moines & K. C. Ry. Co.*, 60 N. W. 116, 119, 91 Iowa, 533.

Temporary absence.

A person who leaves the state on business trips for brief periods of time, but without an intent to change his residence, is not a nonresident under Code, § 2533, which provides that the time during which defendant is a nonresident of the state shall not be included in computing the period of limitation. *Drake v. Stuart*, 54 N. W. 223, 87 Iowa, 341.

A member of Congress in attendance on the session of Congress for the purpose of discharging his official duties, but retaining the dwelling place in his state for domicile therein, is a nonresident of the District of Columbia, within the meaning of an adjudged law. *Howard v. Citizens' Bank & Trust Co.*, 12 App. D. C. 222, 234.

NONRESIDENT ALIEN.

As used in Code, § 2442, which provides that the widow of a nonresident alien shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser from decedent, "nonresident alien" means an alien not residing in the state. In *re Gill's Estate*, 44 N. W. 553, 554, 79 Iowa, 296, 9 L. R. A. 126.

"Nonresident alien," within Civ. Code, § 672, providing that, if a nonresident alien takes by succession, he must appear and claim the property within five years, means those who are neither citizens of the United States nor residents of the state. *State v. Smith*, 12 Pac. 121, 123, 70 Cal. 153.

NONRESIDENT OF COUNTY.

"Nonresidents of the county," as used in Code Civ. Proc. §§ 3268, 3269, requiring plaintiffs in the City Court of New York who are nonresidents of the county to give security for costs, is a more comprehensive term than "nonresidents of the state," as it necessarily includes the nonresidents of the state, and also includes all nonresidents of the county, whether they reside in other counties or states. *Beebe v. Parker*, 4 N. Y. Supp. 97, 98.

NONRESIDENT WITNESS.

A nonresident witness is one not within the jurisdiction of the court. *Baltimore*

Consol. Ry. Co. v. State, 46 Atl. 1000, 1003, 91 Md. 506.

The phrase "nonresident witness," as used in Rev. St. 1893, c. 51, relating to the taking of depositions of nonresident witnesses, refers to one not residing in the county in which the action is pending for which the deposition is to be taken. *Gardner v. Meeker*, 48 N. E. 307, 308, 169 Ill. 40.

NONRESIDENTOR.

The term "nonresidentor" was formerly used in the assessor's returns to distinguish between improved and vacant lots; the latter being designated by the term "nonresidentor." *Commercial Bank v. Woodside*, 14 Pa. (2 Harris) 404, 411.

NONSANE.

Littleton, § 405, speaks of a man of nonsane memory as one who is non compos mentis, upon which Lord Coke, in his Commentaries (Co. Litt. 246b, 247a), says: "Here Littleton explaineth a man of no sound memory to be non compos mentis." In *re Beaumont* (Pa.) 1 Whart. 52, 53, 29 Am. Dec. 33.

"Nonsane," when applied to the mind, means not whole, not sound, not in a healthful state; that is, broken, impaired, shattered, weak, diseased, unable either from nature or accident to perform the functions common to man upon the objects presented to it. *Den v. Vancleve*, 5 N. J. Law (2 Southard) 589, 601.

The words "persons of nonsane memory" in the statute of wills of Henry VIII meant persons of nonsane or unsound memory. It is held in the *Marquess of Winchester's Case*, 6 Coke, 23, that a person, to make a disposition of his land, must have a memory sufficiently sound and perfect to do the act or thing authorized by the statute; that is, to make a testamentary disposition of his lands with reason and understanding. In *re Forman's Will* (N. Y.) 54 Barb. 274, 286.

NONSUIT.

See "Compulsory Nonsuit"; "Involuntary Nonsuit"; "Motion for Nonsuit"; "Peremptory Nonsuit"; "Voluntary Nonsuit."

A "nonsuit" is the name of a judgment given against the plaintiff when he is unable to prove a case, or when he refuses or neglects to proceed to the trial of the cause after it has been put at issue without determining such issue. *Deeley v. Heintz*, 62 N. E. 158, 159, 169 N. Y. 129; *Laird v. Morris*, 42 Pac. 11, 12, 23 Nev. 34; *Herring v. Poritz*, 8 Ill. App. (6 Bradw.) 206, 211.

A nonsuit is where the plaintiff is adjudged not to follow or pursue his remedy as he ought to do, or is ordered, in consequence of a total or essential failure of necessary evidence, to go to a jury in proof of his claim or demand. *State v. Stark* (S. C.) 3 Brev. 101, 102.

A nonsuit is the mere neglect and default of the plaintiff to prosecute his suit. *Loomis v. Green*, 7 Me. (7 Greenl.) 386, 391; *Russell v. Rolfe*, 50 Ala. 56, 57.

A nonsuit is a mere default and neglect of the plaintiff. *Thompson v. Thompson* (Ky.) 65 S. W. 457, 459.

Blackstone says, if a plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law in any subsequent stage of the action, he is adjudged not to follow or pursue his remedy as he ought to do, and therefore a nonsuit or non prosecutur is entered. *Kahn v. Herman*, 3 Ga. (3 Kelly) 266, 272.

The word "nonsuited," as used in the statute which extends the period of limitations in a case of nonsuit, means that a plaintiff has been adjudged to have deserted his suit by default of appearance, or that he has neglected to deliver his declarations. *Herring v. Poritz*, 6 Ill. App. (6 Bradw.) 208, 211.

Effect as to subsequent action.

A "judgment of nonsuit" is a complete determination of the suit, but not an adjudication of the merits of the controversy, and does not make the merits of the controversy res adjudicata. *Wietaupt v. City of St. Louis*, 59 S. W. 960, 158 Mo. 655.

A judgment of nonsuit is not a judgment upon the merits; therefore it is not a bar to another suit upon the same cause of action. How the rule originated it may be impossible definitely to determine, but it seems likely to have had its origin in failure to distinguish between voluntary and involuntary nonsuit, as to which there is nothing in common but their general name. At common law an involuntary nonsuit was unknown, and the power to order it does not even now exist in the mother country. The English nonsuit was purely voluntary. It was merely a judgment against the plaintiff for not appearing on a day when they are demandable. At the time of the American Revolution, however, a practice had grown up in the English court, which in its practical operation was very similar to our peremptory order. When the plaintiff had introduced his evidence, if the court was of the opinion that it was insufficient to sustain his case, he would inform him of that opinion, and advise him to become nonsuited. A judgment upon an involuntary nonsuit order on the ground that plaintiff's own evidence conclusively showed that

plaintiff knew of the danger which caused his injury, and with such knowledge he assumed the risk therein as a matter of law, is a judgment on the merits, which is a bar on another action by the same party on the same cause. *Ordway v. Boston & M. R. R.*, 45 Atl. 243, 244, 69 N. H. 429.

The effect of a nonsuit is to defeat the action and give costs to the defendant, but the plaintiff may commence a new action for the same cause. It is a settled rule that a judgment of nonsuit is not a judgment on the merits, and therefore is no bar to another suit upon the same cause of action. *Laird v. Morris*, 42 Pac. 11, 12, 23 Nev. 34.

The plaintiff is not barred by a nonsuit from commencing a new action for the same cause. *Loomis v. Green*, 7 Me. (7 Greenl.) 386, 391.

The plaintiff after nonsuit is allowed to begin his suit again upon payment of costs. *Thompson v. Thompson* (Ky.) 65 S. W. 457, 459.

A nonsuit is no bar to another action for the same cause, unless made so by statute. *Russell v. Rolfe*, 50 Ala. 56, 57.

The granting of a motion for a nonsuit is simply a determination that upon the evidence then presented the plaintiff has not shown himself entitled to any relief, but its effect goes no further than that. It is not a determination that the plaintiff may not be entitled to relief in another action, based upon the same right, if he is able to produce sufficient evidence to establish his claim. It amounts simply to an adjudication that in the particular case, upon the facts which are made to appear on the evidence, the plaintiff is not entitled to recover. *Galletto v. Serafino*, 83 N. Y. Supp. 184, 185, 40 Misc. Rep. 671.

As voluntary or involuntary.

Nonsuits may be classed under two divisions: (1) Involuntary, as when awarded by the court against the plaintiff's objection; (2) voluntary, when allowed by the court on plaintiff's own motion. *Washburn v. Allen*, 77 Me. 344, 346.

A nonsuit is either a voluntary letting fall of the action, or the nonsuit is ordered in invitum for defect of evidence or failure in law; but in either case there must be a plaintiff in being in order to suffer a nonsuit. *Alexander v. Davidson* (S. C.) 2 McMul. 49, 51.

A nonsuit, strictly speaking, is the voluntary act of the plaintiff, and judgment against him is founded on his supposed neglect to bring on the issue to be tried according to the practice of the court. *Baker v. Delleesseline* (S. C.) 4 McCord, 372, 377.

A nonsuit is a neglect of a plaintiff to appear and prosecute his suit, or a voluntary withdrawal therefrom after appearance. When the plaintiff fails to make out a case the court directs him to be called, and it is usual to submit in such a case to a nonsuit, with liberty to set it aside; but if he thinks proper to answer when he is called he may do so, and insist on the matter being left to a jury. Therefore a justice of the peace cannot render a judgment of nonsuit against a plaintiff who appears, without his consent. *Smith v. Crane*, 12 Vt. 487, 490.

Demurrer to evidence.

Early in its history this court adopted the term "nonsuit" as the appropriate name for that proceeding known to the common-law practice as a "demurrer to the evidence." By a demurrer to the evidence the party demurring declares that he will not proceed because the evidence offered on the other side is not sufficient to maintain the issue. That the nonsuit of our practice is the same as the demurrer to the evidence of the common law is clearly pointed out by Mr. Justice Bleckley in *Anderson v. Pollard*, 62 Ga. 46, 50, where he says: "The want of necessary averments in the declaration is not cause for a nonsuit, for a nonsuit, under our practice, takes place for failure to support the declaration by evidence. We demur to the evidence as insufficient, and move to nonsuit the plaintiff. A motion of nonsuit is aimed at the evidence as compared with what the declaration is, not at the declaration as compared with what it ought to be. *Kelly v. Strouse*, 43 S. E. 280, 284, 116 Ga. 872 (citing *Reeves v. Jackson*, 113 Ga. 182, 38 S. E. 314; *Bray v. Chattanooga, R. & S. Ry. Co.*, 113 Ga. 308, 38 S. E. 849; *Barge v. Robinson*, 115 Ga. 41, 42, 41 S. E. 258).

Direction of verdict for defendant.

A direction to the jury in a civil case to find for defendant is in effect a nonsuit, and must be so treated. *Creek v. McManus*, 32 Pac. 675, 13 Mont. 152.

A direction of a verdict for defendant at the close of the evidence on the ground that plaintiff's evidence showed that he was guilty of contributory negligence is a nonsuit within the meaning of the Code, requiring judgment of nonsuit to be entered when plaintiff fails to prove a sufficient case for the jury. *McKay v. Montana Union Ry. Co.*, 31 Pac. 999, 1000, 13 Mont. 15.

Discontinue synonymous.

In an instruction that, if plaintiff was nonsuited by a justice of the peace, a case was discontinued before him, the word "nonsuit" was probably used as synonymous with "discontinue," and, though perhaps not technically correct, such use would not mislead the jury. *People v. Whaley* (N. Y.) 6 Cow. 661, 663.

Dismissal.

A "dismissal," as the term is used in modern practice, does not constitute a nonsuit. *Bullock v. Perry* (Ala.) 2 Stew. & P. 319.

Non prosequitur.

"Non prosequitur" in our practice is commonly called a "nonsuit," and covers judgment by non prosequitur, nolle prosequi, and technical nonsuits, and also judgments of nonsuit entered under statute or rules. *Buena Vista Freestone Co. v. Parrish*, 34 W. Va. 652, 654, 12 S. E. 817.

A "non pros." is, in effect, like a nonsuit, and is the same as in modern practice is a dismissal of an action for want of prosecution. By the common-law nonsuit the plaintiff goes out of court as to all the defendants, the same as he does by a non pros., and therefore, when he desires to go out of court only as to some of the defendants, or as to a part of the declaration, a nol. pros. is probably the most apt way of doing it, though we are little accustomed to that in civil cases. The nature of a nol. pros. in civil cases was not accurately ascertained and defined until modern times, some of the older authorities considering it a retraxit operating to release or discharge the action, and an absolute bar to another action for the same cause; but in later cases, which have been adhered to ever since, a nol. pros. is considered not to be in the nature of a retraxit, but only an agreement not to proceed further as to some of the defendants or as to some of the suit, but he is well at liberty to go on as to the rest. *Davenport v. Newton*, 42 Atl. 1087, 1092, 71 Vt. 11.

Retraxit distinguished.

"A retraxit," says Blackstone, "differs from a nonsuit in that one is negative and the other positive. A nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again on payment of costs; but a retraxit is an open, voluntary renunciation of his suit in court, and by this he forever loses his action." *Hallack v. Loft*, 34 Pac. 568, 570, 19 Colo. 74 (quoting 3 Bl. Com. 396); *United States v. Parker*, 7 Sup. Ct. 454, 458, 120 U. S. 89, 30 L. Ed. 601; *Herring v. Poritz*, 6 Ill. App. (6 Bradw.) 208, 211; *Thompson v. Thompson*, 65 S. W. 457, 458, 23 Ky. Law Rep. 1535.

Nonsuit is on default, but where plaintiff appears it is a retraxit. *South Branch R. Co. v. Long*, 26 W. Va. 692, 700.

NONSTREET USE.

Raising the level of a street by means of a viaduct for strictly street purposes results in no subsection of the street to a nonstreet use, and the situation lacks that element

which constitutes a taking of property, as in the case of elevated railways. *Sauer v. City of New York*, 83 N. Y. Supp. 27, 28, 40 Misc. Rep. 585.

NONTAXABLE.

The word "nontaxable," as used in Code, § 3875, imposing ad valorem taxes, and requiring every railroad company in the state to return all its property within and without this state, with its value, so that the assessors might know what value should be the basis of state, county, and municipal taxation, and providing further that all the property of such railroads, real and personal, taxable and nontaxable, shall be included, does not mean exempt property, but property like government bonds, that is not taxable at all. The word therefore creates no exemption, and does not describe exempt property. *Adams v. Yazoo & M. V. R. Co. (Miss.)* 24 South. 200, 222, 60 L. R. A. 33.

"Nontaxable" naturally means not taxable at all, and under Laws 1892, c. 202, providing that, in determining the amount of a tax on personal property, no reduction shall be made on account of any debt incurred in the purchase of nontaxable property, or for the purpose of exacting taxation, the term "nontaxable" does not apply to shares of stock of a domestic corporation liable to taxation which were purchased on credit, though the holder of such stock is not, under the statute, liable for a personal tax thereon. *People v. Barker*, 22 App. Div. 120, 122, 47 N. Y. Supp. 958

NONTRADING PARTNERSHIP.

There is no accurate definition of what is or is not a trading or nontrading or commercial or noncommercial partnership. A nontrading partnership is one engaged in the prosecution of some occupation or calling not of a commercial character. A partnership may be engaged in manufacture, and at the same time may be engaged in buying and selling manufactured articles not produced by themselves. As to the business exclusively relating to manufacture, the law as to nontrading partnership will apply, while, as to business of buying or selling the manufactures of others, the law of commercial or trading partnership will apply. *McNeal v. Gossard*, 50 Pac. 159, 161, 8 Okl. 363.

NONUSER.

Mere nonuser of an easement acquired by grant is not an abandonment of it so as to destroy it. To constitute such destruction, there must be an adverse use by the servient estate for a period sufficient to create a prescriptive right. The right to the use is not extinguished by mere failure to

exercise it. *Johnson v. Clark (Ky.)* 57 S. W. 474, 475 (citing *Jones, Easem.* § 863).

Nonuse of an easement, in order to operate as an extinguishment of the easement, must be the result of some conduct on the part of the owner of the servient estate adverse to and in defiance of the easement, and must continue for the statutory period, or the nonuse must originate in or be accompanied by some unequivocal acts of the owner inconsistent with the continued existence of the easement, and showing an intention on his part to abandon it; and the owner of the servient estate must have relied or acted upon such manifest intention to abandon the right, so that it would work harm to him if the easement was thereafter asserted. *Mason v. Horton*, 31 Atl. 291, 292, 67 Vt. 266, 48 Am. St. Rep. 817.

NONES.

The calendar of the Romans had a peculiar arrangement. They gave particular names to three days of the month. The 1st was called the "calends." In the four months of March, May, July, and October, the 7th day was called "nonas," and in the four former the 15th day was called "ides," and in the last the thirteenth was thus called. *Rives v. Guthrie*, 46 N. C. 84, 87.

NOON.

Noon is the middle of the day; midday; the time when the sun is in the meridian; 12 o'clock in the daytime. *Webst. Dict.* "Noon" has in common parlance a similar meaning, and refers to the middle of the day, not to a period after or before that. It is the beginning of the sidereal day used by the astronomers, as midnight marks the opening of the civil day. As used in a policy of insurance insuring property from 12 o'clock noon of a certain day, it will be held to mean noon by the meridian time, and not noon by the standard time, as fixed by the railroad. *Jones v. German Ins. Co.*, 81 N. W. 188, 189, 110 Iowa, 75, 46 L. R. A. 860.

NORMAL SCHOOLS.

In a statute providing that the board of education in each city shall select "the best scholar from each academy and each public school of their respective counties or cities as candidates for the university scholarship," by the words "public schools" the Legislature intended common schools only, and "normal schools" were not included. It is true that, in an enlarged sense, normal schools are public schools, inasmuch as any citizen of the state possessing the requisite qualifications, and being selected as provided by law, may be admitted to them. In the same sense, colleges are public schools, but

clearly they are not embraced in the act. The object of normal schools is to give instruction in the art of teaching. The distinction between them and the common schools is marked. They have been defined by the Court of Appeals as follows: These normal schools differ materially from the common schools to which the Constitution refers. They are not intended for the education of the children of the inhabitants of the districts where they are located, but for the training of teachers for all the common schools. They are not open to all, but only to such as may be selected at times and in the manner prescribed by the superintendent of public instruction. Each part of the state is entitled to its due representation. Applicants for admission are required to possess certain qualifications, which must be tested by the preliminary examinations. *Gordon v. Cornes*, 47 N. Y. 608, 616; *People v. Crissey* (N. Y.) 45 Hun, 19, 21. See, also, Board of Regents for Normal School Dist. No. 3 v. Painter, 14 S. W. 938, 940, 102 Mo. 464, 10 L. R. A. 493.

Normal schools, which are not provided for the education of the children of the inhabitants of the districts where they are located, but for the training of teachers of all the common schools, and which are not open to all, but only to such as may be selected at times and in a manner to be prescribed by the superintendent of public instruction, are not included within the term "common schools" as used in Const. 1846, art. 9, § 1, declaring that the revenues of the common school fund shall be applied to the support of the common schools. *Gordon v. Cornes*, 47 N. Y. 608, 616. See, also, *Collins v. Henderson*, 74 Ky. (11 Bush) 74, 82.

NORMALLY.

"Normally," as used in a claim for a patent in a machine for marking mail matter, the combination, with the supporting feed bed, of a stamp normally out of the path of the movement of the mail matter, and a stamp tripper or releaser normally in said path, means a tripper whose natural position when at rest is such that it is in the path of the advancing letter, and does not mean a tripper normally in a position where it can be brought in contact with the letter by another instrumentality than the letter itself. *Groth v. International Postal Supply Co.* (U. S.) 61 Fed. 284, 288, 9 C. C. A. 507.

NORTH.

In describing courses, the word "north" means true course, and refers to the true meridian, unless otherwise declared. *Pol. Code Mont.* 1895, § 4103; *Pol. Code Cal.* 1903, § 3903.

"North," as used in a deed conveying a lot described as commencing at a point on the northwesterly line of Harrison street, distant 125 feet north of the northeasterly line of Fourth street, and running thence northeasterly along the northwesterly line of Harrison street 25 feet, not being controlled or modified by any other words, means due north; such being its ordinary meaning. *Currier v. Nelson*, 31 Pac. 531, 96 Cal. 505, 31 Am. St. Rep. 239 (citing *Brandt v. Walton*, 1 Johns. 156).

The word "north" may mean northerly, northeasterly, or northwesterly. Its meaning depends on the context. Where a will described certain lands as "also one undivided half of the woodland north of this line," and the only woodland north of the line was an acre on the northwest of a certain field, and about 10 acres of old growth on the east side of another piece, the description excluded half of a certain pasture. *Weare v. Weare*, 59 N. H. 293, 296.

Northwardly distinguished.

The word "north," as distinguished from the word "northwardly," conveys a definite idea—that is, indicates a particular cardinal point—while the word "northwardly" means towards or approaching towards the north, rather than towards any of the other cardinal points. *Craig v. Hawkins' Heirs*, 4 Ky. (1 Bibb) 53, 54.

NORTH CAROLINA.

Current notes of, see "Current Notes."

NORTH HALF.

"North half," as used in a contract for the sale of real property, by which it is agreed to sell the north half of a certain irregular shaped piece of land, means the north half in quantity, unless it appears from the contract that something else was meant. *Au Gres Boom Co. v. Whitney*, 26 Mich. 42, 44.

The terms "north half" and "south half" were used by the owner of a triangular tract of land in making separate conveyances of different portions of the land; the first conveyance describing the north half as beginning in the middle of one of the sides, and running back parallel to another side of the triangle. After such conveyances the lots were conveyed by the description of "north half" and "south half," and were so assessed for taxes; and, upon failure of the owner of the south half to pay the taxes, it was sold at tax collector's sale and conveyed under the description of "south half." Held, in an action of ejectment, that the common grantor had fixed upon the words "north half" and "south half" a conventional meaning, and that they must be considered to

have been so used in the muniment of title under which both parties claimed, and the defendant could claim no greater portion than was designated to him. *Grandy v. Casey*, 6 S. W. 376, 377, 93 Mo. 595.

NORTH ONE-THIRD.

The description of land as the "north one-third of lots five and six" in block 77 in itself indicates a single tract. *La Selle v. Nicholls*, 76 N. W. 870, 56 Neb. 458.

NORTH PART.

A deed reciting that a tract of land conveyed the "north part" of a certain lot cannot be construed to mean the north half of the lot. *Langohr v. Smith*, 81 Ind. 495, 500.

NORTH SIDE.

"North side," as used in a plat locating a tract of land for purposes of settlement as wholly on the north side of a river, means the north side of the river according to its general and prevailing direction. *Parker v. Wallis*, 60 Md. 15, 22, 45 Am. Rep. 703.

A deed describing the land conveyed as the north side of the southwest quarter of a certain block should be construed to mean the north half of such quarter. *Winslow v. Cooper*, 104 Ill. 235, 243.

NORTHEAST PART.

A description of land in a school fund mortgage as the northeast part of a specified tract, containing 90 acres, is insufficient, and therefore an auditor's sale made thereunder is invalid. *Buck v. Axt*, 85 Ind. 512, 515.

A complaint in ejectment describing the lands as the northeast part of the northwest quarter of, etc., containing 35 acres, is bad on demurrer, as it is not sufficiently definite to describe the boundaries of the land. *Roberts v. Lanam*, 92 Ind. 380, 381.

NORTHEASTERLY.

There is no variance between a road petition describing one terminus of the road as northerly of a certain monument, and the report of the commissioners, describing the corresponding terminus as northeasterly of the same monument, as northeasterly of a monument is northerly of the same monument. *State v. Rye*, 35 N. H. 368, 376.

NORTHERLY.

There are very few words in our language more indefinite and uncertain in their meaning than the words "southerly," "east-

erly," and "northerly." The word "southerly," as applied to the course of a proposed highway, designating the course as thence southerly to avoid a certain creek, and thence easterly and northerly through certain lands, means nearly south; but how near, and whether east or west of south, it is impossible to tell without the use of other qualifying words; and so with regard to the words "easterly" and "northerly." It is impossible to determine with any certainty the course intended thereby. *Scraper v. Pipes*, 59 Ind. 158, 164.

As due north.

"Northerly" means due north, unless controlled by other words, or by lines, monuments, or natural objects. *Pol. Code Cal.* 1903, § 3904; *Pol. Code Mont.* 1895, § 4104.

Where a course in a deed is described as running northerly, the word "northerly" must be construed as meaning due north. *Proctor v. Andover*, 42 N. H. 348, 353.

The term "northerly" in a grant, where there is no object mentioned to direct the inclination of the course towards the east or west, is construed to mean due north. *Brandt v. Ogden* (N. Y.) 1 Johns. 156, 158; *Bosworth v. Danzien*, 25 Cal. 296; *Currier v. Nelson*, 31 Pac. 531, 532, 96 Cal. 505, 31 Am. St. Rep. 239 (citing *Brandt v. Ogden* [N. Y.] 1 Johns. 156); *Foster v. Foss*, 77 Me. 279, 280.

Where the terms "northerly," "northwesterly," "northeasterly," etc., are employed to designate a line in the description of a deed, such terms will be construed as equivalent to a call to run due north, due northwest, or northeast, as the case may be, in the absence of a call for visible monuments, or any other description of a line which locates it with reasonable certainty. *Irwin v. Towne*, 42 Cal. 328, 334.

"Northerly," as used in a description of a deed, does not mean due north, where the boundaries are also described by monuments in reference to which the line would not be due north. *Garvin v. Dean*, 115 Mass. 577, 578.

The word "northerly," in the description of a mining claim as commencing at the southwest boundary of another mining claim, having well-known, determined boundaries, thence northerly 1,500 feet, cannot, when the running of such line in the direct northerly direction will carry it across the latter claim, instead of along the side of it, be interpreted as meaning due north. The term includes and may mean any meridian line or course between a due north and northwest, and is defined and made certain by the posting of stakes or the building of monuments at the corners of the location, or along the lines thereof. Such stakes and monuments

would control the courses specified in the notice. Book v. Justice Min. Co., 58 Fed. 106, 115.

NORTHERN PASSAGE.

"Northern passage," as used in the Mediterranean fruit trade, and incorporated in a charter party to ship fruit from Sicily to Boston by the northern passage, has a distinct meaning, and its course is from Gibraltar north of the Azores, if possible; if not, just south of the islands, thence to the southern point or tail of the Great Banks, and then direct to port. The John H. Pearson (U. S.) 33 Fed. 845, 846.

NORTHWARD.

In construing a patent granting five great plains, "together with the woodland around such plains, that is to say, four English miles from the said plains eastward, four English miles northward from the said plains, four English miles westward from the said plains, and four English miles southward from the said plains," the court said: "The given object to start from is the plains; the distance to run is four miles; the courses are northward, southward, eastward, and westward; and it is a settled rule of construction that, when courses are thus given, you must run due north, south, east, and west." Jackson v. Reeves (N. Y.) 3 Caines, 293, 299.

NORTHWARDLY.

Courses in a grant indicated by the term "northwardly" run due north. Seaman v. Hogeboom (N. Y.) 21 Barb. 398, 404.

Distinguished from north.

The word "north," as distinguished from the word "northwardly," conveys a definite idea—that is, indicates a particular cardinal point—while the word "northwardly" means towards or approaching towards the north, rather than towards any of the other cardinal points. Craig v. Hawkins' Heirs, 4 Ky. (1 Bibb) 53, 54.

NORTHWEST.

Where the base of a description in a deed was parallel of north latitude, a line called to run northwest for quantity, to adjoin a claim on the north, should not be construed to mean running north or at right angles to the base given, but the survey should be projected northwest for quantity. Swearingen v. Smith, 4 Ky. (1 Bibb) 92, 94.

NOSCITUR A SOCIIS.

"Noscitur a sociis" is not a rule of interpretation by which the meaning of one word

or designation, or that of several, used in close connection, governs in determining the meaning of other words or designations used in the same connection. You may know a person by the company he keeps. You may know the meaning of a term by its associates,—what precedes, what follows it. When? Not in every case; but when not apparent from the language itself. It is a rule of construction to be resorted to where there is use for construction, not otherwise. Brown v. Chicago & N. W. Ry. Co., 78 N. W. 771, 778, 102 Wis. 137, 44 L. R. A. 579.

NOSTRUM.

A "nostrum" is defined to be a medicine, the ingredients of which are kept secret, for the purpose of restricting the profits of sale to the inventor or proprietor—a quack medicine. Commonwealth v. Fuller (Pa.) 2 Walk. 550, 551.

NOT.

The word "not," according to the lexicographers, expresses negation, denial, or refusal, and, as used in the term "not admit," clearly repels the idea of admission. Cowen v. Alsop, 51 Miss. 158, 164.

NOT ABLE TO WORK.

"Not able to work," as used in St. 59 Geo. III, c. 12, § 26, providing that the justices in petty sessions may make orders on the father, grandfather, etc., for the relief of every poor person not able to work, is not synonymous with the word "chargeable," and the expressions are not convertible terms, for a person might be able to work, and yet not able to earn enough for his maintenance, and so be chargeable to the parish. In re Morten, 5 Q. B. 591, 592.

NOT ACCEPTED.

As used in the constitution of a benefit society, providing that a member may be transferred to another lodge, but, if the transfer card is not accepted, the member retains his membership in the lodge issuing it, "not accepted" means "if rejected." Schlosser v. Grand Lodge Brotherhood R. Trainmen, 50 Atl. 1048, 1051, 94 Md. 362.

NOT ADMINISTERED.

The phrase "not administered," as used in the statement of the common-law rule that an administrator de bonis non succeeded to goods, chattels, and credits of a decedent which had not been administered, meant chattels, goods, and credits which had been property of the decedent at his death and remained in specie, unchanged and unconverted, when such administrator was ap-

pointed. Thus money received by the former executor or administrator in his representative capacity, and kept by himself separate from his own money, was regarded as not administered; but, if mixed and mingled with his own money, so that it had lost its identity, it was regarded as converted, and hence, so far as the administrator *de bonis non* was concerned, administered. The administrator *de bonis non* was regarded as taking the specific property of the decedent as his immediate successor, and not as succeeding to a prior executor or administrator. These rules of the common law have been changed or modified in most of the states. "They are here regarded as mere agents or trustees for those beneficially entitled to the property as creditors, legatees, heirs, or distributees," and hence an administrator *de bonis non* was entitled to recover and administer as assets of the estate undistributed personal property which was in fact intestate, though decedent's debts had all been paid, and the property delivered by the executor to the testamentary trustee. Appeal of Chamberlin, 39 Atl. 734, 737, 70 Conn. 363, 41 L. R. A. 204 (citing *Marvel v. Babbitt*, 143 Mass. 226, 9 N. E. 566).

NOT ADMIT.

Where defendant, in his answer, states that he does not admit certain specified allegations of the complaint, such phrase cannot be taken as an admission, under the statute. No ingenuity can make that expression amount to an admission. It is a direct exclusion of any such conclusion. In that phrase the word "not" is the qualifying word, which, according to the lexicographers, expresses negation, denial, or refusal, and clearly repels the idea of admission, and requires proof of the truth of the allegation in the bill. *Cowen v. Alsop*, 51 Miss. 158, 164.

NOT ASSIGNABLE.

"Before the Code, the term 'not assignable' had two different significations, one of which was that a particular thing was not the subject of an assignment; the other, that it was not assignable so as to vest in the assignee a right of action. A right of action for an injury to person or character was not the subject of an assignment. A nonnegotiable note at common law was not assignable, so as to enable the assignee to sue in his own name." *Thacker v. Henderson* (N. Y.) 63 Barb. 271, 279.

NOT BE GOOD.

The phrase "shall not be good," as employed in the statute of frauds, providing that certain contracts shall not be good, is equivalent to "shall be invalid." *Coombs v. Bristol & Exeter Ry. Co.*, 3 Hurl. & N. 510, 518.

NOT DOING A THING.

In a prosecution for homicide, the statement of defendant, in detailing the facts pertaining to the infliction of the deadly wound, that he was not doing a thing, was a statement of a fact, and not of a conclusion. *Pennington v. Commonwealth* (Ky.) 68 S. W. 451, 452.

NOT DOUBTING.

"Not doubting," as used in a will where testator makes an absolute gift of property, not doubting that it will be used in a certain way, is sufficient to raise a trust, where the subject and object of the trust are sufficiently certain. *Major v. Herndon*, 78 Ky. 123, 129.

NOT EXCEEDING.

"Not exceeding," as used in Gen. St. c. 33, § 9, authorizing a town or city to appropriate money "for suitable buildings or rooms, and for the foundation of a library, a sum not exceeding \$1 for each of its polls," does not limit and qualify the entire clause, but intends to limit only the sum to be expended for books, and not that to be appropriated for buildings or rooms. *Dearborn v. Inhabitants of Brookline*, 97 Mass. 466, 469.

Certificates of preferred stock, providing that the holders were entitled to receive each year from the surplus net profits of the company for the current year such yearly dividends as the board of directors might declare, up to, but not exceeding, 4 per cent., before any dividends should be set apart or paid on the common stock, means that the preferred stock should be noncumulative, and should receive 4 per cent., and no more, out of the net earnings. *Scott v. Baltimore & O. R. Co.*, 49 Atl. 327, 331, 93 Md. 475.

In the Constitution, declaring that every homestead not exceeding 80 acres of land, etc., shall be exempted from sale on execution or any other final process of the court, the term "not exceeding" imposes a limitation on the power of the Legislature to reduce the exemption thus prescribed below the quantity, but does not preclude the Legislature from increasing the amount; and therefore Act April 23, 1873, declaring that 160 acres should be exempted, was not unconstitutional, in so far as it authorizes an exemption of the excess over 80 acres declared by the Constitution. *David's Adm'r v. David*, 56 Ala. 49, 51.

NOT EXECUTED.

The words "not executed," as used in Code 1891, c. 124, § 2, which provides that "persons who commence suits, including writs of *scire facias*, *mandamus*, *quo war-*

ranto, certiorari, prohibition, and the alias of other process where the original is returned not executed," may be served by any credible person, refer only to the words "other process," used in the statute, and do not refer to the service of a summons. Therefore there is no inconsistency between this section and the statute providing that a summons may be served as a notice by any sheriff or any other person. *Hollandsworth v. Stone*, 35 S. E. 864, 865, 47 W. Va. 773.

NOT FOUND.

See "Find—Found."

NOT GIVEN.

The words "not given" are not necessarily equivalent to the word "refused." *Manhattan Life Ins. Co. v. Doll*, 80 Ind. 113, 116.

NOT GOOD FOR PASSAGE AFTER A CERTAIN DATE.

The words, "Not good for passage after" a certain date, "To be used by" a certain date, in a limited railroad passenger ticket, do not operate to require the passenger to complete his journey by the date mentioned, but he is only required to commence the journey by such time. *Gulf, C. & S. F. R. Co. v. Looney*, 19 S. W. 1039, 1042, 85 Tex. 158, 16 L. R. A. 471, 34 Am. St. Rep. 737.

NOT GOOD TO STOP OFF.

A railroad ticket for transportation from one city to another and return, which provides that it is not good to stop off, means "that the purchaser who accepts and uses it is bound to take a train which will carry him continuously through from one city to the other, both in going and returning, and not to stop off at an intermediate station while going either way." *Johnson v. Philadelphia, W. & B. R. Co.*, 63 Md. 106, 109.

NOT GUILTY.

It was said by Brickell, J., in *Lomb v. Pioneer Savings & Loan Co.*, 106 Ala. 591, 596, 17 South. 670, that the scope and extent of the plea of not guilty, in ejectment, is well defined. It casts on the plaintiff the burden of proving a legal right to the possession of the premises in dispute, and any consequence whatever which operates as a bar to his right of possession and causes him to fall, entitling the defendant to a verdict. In common-law ejectment, defendant, under such plea, can show that the title has passed from the lessor of plaintiff since the action began. *Etowah Min. Co. v. Henderson*, 29 South. 7, 8, 127 Ala. 663.

Not guilty is a plea which presents a general issue in ejectment, and in the stat-

utory substitute for that action. *Bynum v. Gold*, 17 South. 667, 668, 106 Ala. 427.

A verdict in an action of trespass on the case, "We, the jury, find for the defendants," is equivalent to a verdict of not guilty. *Peters v. Johnson*, 41 S. E. 190, 50 W. Va. 644, 57 L. R. A. 428, 88 Am. St. Rep. 909.

NOT HOME.

A statement to a person presenting a notice of rejection by an administrator of a claim against an estate that the claimant was not home does not apprise such person that the claimant was not absent temporarily, or was not at home to visitors. "Not home" is a common expression used by servants when a party does not wish to be seen, though in the house at the time. *Peters v. Stewart*, 21 N. Y. Supp. 993, 994, 2 Misc. Rep. 357.

NOT KNOWN OR USED BEFORE.

Patent Act Feb. 12, 1793, c. 11, § 1, requiring a person seeking a patent to file a petition alleging that the invention was "not known or used before the application," construed to mean that the patent was not known or used before the application by persons other than the petitioner. *Pennock v. Dialogue*, 27 U. S. (2 Pet.) 1, 18, 7 L. Ed. 327.

Patent Laws, Act July 4, 1836, § 6, allowing the issuance of patents for inventions, etc., "not known or used by others before his or their discovery thereof," does not include a use in a foreign country. *Bartholomew v. Sawyer* (U. S.) 2 Fed. Cas. 960, 961.

NOT LESS THAN.

A statute fixing the penalty not less than one or more than three hundred dollars meant, as the minimum, a penalty of one hundred dollars. *Worth v. Peck*, 7 Pa. (7 Barr) 268, 272.

Where a statute provides that bridges are parts of the public highways, and must be not less than 16 feet wide, we are not to understand that a bridge is in no case required to be built more than such width, and when built to constitute a part of the highway, so that, if a bridge is built 48 feet wide where the exigencies of travel seem to require it, it must be kept in good condition for its whole width, and keeping in repair a passageway 16 feet wide in the center of the bridge is not sufficient. *Rusch v. City of Davenport*, 6 Iowa (6 Clarke) 443, 455.

"Not less," as used in the uniformity of process act (2 Wm. IV, c. 39, § 3), directing that every writ of distringas shall be made returnable on some day in term, "not being less than 15 days after the teste thereof,"

means that 15 clear days must lapse between the teste and the return of the writ. *Chambers v. Smith*, 12 Mees. & W. 2, 4.

As not more.

St. 1877, c. 250, providing that a notice to a debtor to appear and submit to an examination touching his estate may be served on him not less than three days before the time of the examination, means only that the shortest notice must be three days. *Stewart v. Griswold*, 134 Mass. 391, 392.

Cr. Code, § 127, p. 470, providing that the fine for a certain offense shall "not be less than \$100," by implication gives the power to impose a fine for more than that sum. *Hankins v. People*, 106 Ill. 628.

Act Cong. 1842, providing a certain penalty of "not less than \$100" for the offense of marking the word "Patent" on unpatented articles, should be construed to require a penalty of \$100 and no more. *Stimpson v. Pond* (U. S.) 23 Fed. Cas. 101, 102.

NOT MORE HAZARDOUS.

Where the written portion of a fire policy covers a furniture store and repair shop connected therewith, and the furniture and upholstered goods, and other merchandise not more hazardous, usual to a retail furniture store, the phrase "not more hazardous" signifies such merchandise only, and has no reference to necessary articles, such as benzine, kept for use in the repair shop. *Faust v. American Fire Ins. Co. of Philadelphia*, 64 N. W. 883, 884, 91 Wis. 158, 30 L. R. A. 783, 51 Am. St. Rep. 876.

NOT NAVIGABLE.

The words "not navigable," in *Milldam Law*, § 1, applicable only to streams not navigable, should be construed, not in the common law sense, as including all rivers where the tide does not ebb and flow, but in the sense in which they have long been used in this country, as including only those which were not navigable in fact for any of the useful purposes of commerce, or such as had been declared to be navigable as public highways by the law itself. *Wood v. Hustis*, 17 Wis. 416, 417.

NOT OTHERWISE.

"Not otherwise," as used in Rev. St. 1841, c. 95, § 19, as amended by Laws 1863, c. 199, providing that all tenancies at will may be terminated by either party by three months' notice in writing for that purpose given to the other party, and not otherwise, except by mutual consent, refers rather to the acts of the parties to the tenancies, than to the effect of their acts by operation of law.

Seavey v. Cloudman, 38 Atl. 540, 542, 90 Me. 536.

"Not otherwise," as used in Rev. St. 1881, § 2508 (Horner's Rev. St. 1897, § 2508; Burns' Rev. St. 1894, § 2669), giving the wife an undivided third during the life of her husband whenever, as the result of a sale based on judicial proceedings in which her inchoate interest is not barred, the legal title of the husband in and to such real estate shall become absolute and vested in the purchaser thereof, his heirs or assigns, subject to the provisions of the act, and not otherwise, means that the wife's inchoate interest cannot become a vested interest during her husband's lifetime by the operation of the law upon other circumstances than those specified in the context. *Higgins v. Ormsby*, 59 N. E. 321, 322, 156 Ind. 82.

NOT A RESIDENT.

"Not a resident of the state," as used in an affidavit for an attachment reciting that the defendant is not a resident of the state, is equivalent to nonresident of the state, as used in Code, § 926, providing that when the ground of attachment is that the defendant is a foreign corporation, or a nonresident of the state, the order of attachment may be issued without an undertaking. *Nagel v. Loomis*, 50 N. W. 441, 442, 33 Neb. 499.

NOT SATISFIED.

"A return of 'Not satisfied' to a writ of fieri facias, is insufficient for the reason that it does not set forth the ground upon which the officer has failed to make the money. But it may nevertheless be a false return. For instance, suppose the officer had made the full amount required by the execution, and returned it 'Not satisfied,' such a return is clearly false. It may be that if he has made only a part of the amount, and, without any reference to the part received, returns it not satisfied, it would not be a false return, because, taking it literally, the execution is not satisfied, and the return may have referred to that part merely. But where the return is made to the part received, and sets forth the payment in January, and another in March, suppressing the fact of the other payment in February, then 'Not satisfied' is used in the sense of not satisfied as to the residue, and is necessarily false in respect to the payment suppressed, for in that case the return cannot be taken as having referred to the fact that it is not literally satisfied." *Martin v. Martin*, 50 N. C. 346, 348.

A return of not satisfied on a writ of execution conveys only the idea that it has not been paid, and is not equivalent to a

return of nulla bona. *Langford v. Few*, 47 S. W. 927, 930, 146 Mo. 142, 69 Am. St. Rep. 606; *Merrick v. Carter*, 68 N. E. 750, 751, 205 Ill. 647.

NOT SERVED FOR WANT OF PROPERTY.

A return upon an execution stating that it was not served for want of property is not equivalent to a return that the defendant had no goods or chattels whereof to levy the execution. Where the statute required the return of an execution unsatisfied to show that defendant had no goods or chattels whereof to levy the same, it was held that the form of return first above quoted did not meet the requirements of the statute, in that it failed to indicate any effort whatever to find property, nor negative the idea that the defendant in execution had property subject to the writ. *Reed v. Lowe*, 63 S. W. 687, 689, 163 Mo. 519, 85 Am. St. Rep. 578.

NOT SUFFICIENT.

The words "Not sufficient," written beneath an instruction, do not constitute a special finding to the instruction. The words "Not sufficient" cannot be considered as having the force of a special verdict, no special verdict being called for on the point involved, and they must be taken as the words merely of the juror who writes them. *Cooper v. Mills County*, 28 N. W. 633, 636, 69 Iowa, 350.

NOT TO BE PAID.

As used in Wag. St. p. 336, § 13, providing that no stockholder shall be personally liable for the payment of any debt contracted by any company formed under this chapter, "not to be paid within one year" from the time the debt was contracted, means one the collection whereof cannot be enforced within one year. *Dryden v. Kellogg*, 2 Mo. App. 87, 95.

NOT TO BE PERFORMED.

The words "not to be performed within one year," in the statute of frauds, relating to contracts, mean not to be performed by one party within the year. *Durfee v. O'Brien*, 16 R. I. 213, 215, 14 Atl. 857-859.

NOT TRANSFERABLE.

The words "Not transferable," when written across the face of a negotiable instrument, operate to destroy its negotiability. *Durr v. State*, 59 Ala. 24, 29.

NOT UNBRIBED.

The expression "a majority of those voting in favor of the subscription were not un-

bribed" is not equivalent to an allegation that a majority of these voting in favor of the subscription were bribed. *Woolley v. Louisville S. R. Co.*, 19 S. W. 595, 597, 98 Ky. 223.

NOTARY.

"The English notary is a civil and canon law officer appointed by the Archbishop of Canterbury." *Bank of Rochester v. Gray* (N. Y.) 2 Hill, 227, 229.

"A notary is defined to be an officer whose duty is to attest the genuineness of any deeds or writings in order to render them available as evidence of the facts therein contained. 2 Abb. Law Dict. p. 182. A notary is a public functionary authorized to receive all acts and contracts to which the parties wish to give the character of authenticity attached to the acts of public authority, to secure their date, their preservation, and the delivery of the acts." *Schmitt v. Drouet*, 8 South. 396, 397, 42 La. Ann. 1064, 21 Am. St. Rep. 408 (quoting 5 Dict. Droit. Civil, p. 27, "Notaire").

The word "notary" is equivalent to the words "notary public." Code W. Va. 1899, p. 133, c. 13, § 17; Code Supp. Va. 1898, § 5; Code Va. 1887, § 5.

NOTARY PUBLIC.

See "Civil Officer"; "County Officer"; "N. P."; "Officer."

A notary public is a person who is authorized to administer oaths. *Wheeler v. Burckhardt*, 56 Pac. 644, 645, 34 Or. 504.

"A notary public is an officer long known to the civil law, and designated as registrar, actuary, or scrivener. Anciently he was a scribe who only took notes and minutes, and made short drafts of writings or instruments, both public and private. At this day in most countries a notary public is one who publicly attests deeds or writings to make them authentic in another country, but principally in business relating to merchandise." *Kirksey v. Bates* (Ala.) 7 Port. 529, 531, 31 Am. Dec. 722.

"A notary public is an officer of the civil and commercial laws, and is unknown to the criminal law," and hence he has no authority to administer an oath to the complainant in a criminal case. *State v. Lauver*, 42 N. W. 762, 763, 26 Neb. 757.

A notary is a public officer appointed by the chief magistrate of the state, and is under bond for the faithful performance of his duties as such, and keeps a public record of his acts, certified copies of which may be received in evidence. *First Nat. Bank v. German Bank*, 78 N. W. 195, 197, 107 Iowa, 543, 44 L. R. A. 133, 70 Am. St. Rep. 216.

A notary public is an officer to whom, in many countries, resort is had for certificates of authentic copies of documents in public archives, and the seal of a notary public is one of which courts will take judicial notice. *Barber v. International Co. of Mexico*, 48 Atl. 758, 764, 73 Conn. 587.

Notaries are public officers whose duties are confined to a particular locality. They hold themselves out as trustworthy, and furnish bond to protect those who employ them against loss occasioned by their failure to discharge the duties with which they are intrusted. In accepting the office the notary contracts the obligation to fill it intelligently and honestly. *Stork v. American Surety Co.*, 33 South. 742, 743, 109 La. 713.

A notary public is a commissioned and sworn officer, clothed with certain powers, and in many states required to give bond for the faithful discharge of his duties, and, as he is supposed to be appointed with reference to his capacity and integrity, he is entitled to a certain degree of public confidence, but not so that his clerk, who is in no sense a public officer, can be made amenable to the public for an unfaithful act. The law therefore will not concede to the notary the power to delegate his authority to an irresponsible agent. *Miltnerberger v. Spaulding*, 33 Mo. 421, 424.

A notary public is an officer known to the commercial law, and his official duties and powers are recognized as extending to the authentication of commercial instruments. It does not lie within the scope of his authority or duty to administer oaths or affirmations not required in the transaction of commercial affairs, but such authority may be conferred upon him by statute. *Chandler v. Hanna*, 73 Ala. 390, 394.

As court or magistrate.

See "Court"; "Magistrate."

As judicial officer.

A notary public is not a "court," in the sense in which the term is used in the Constitution, vesting the judicial power of the state in certain courts. He is simply an executive officer who is chosen with reference to the duties to be performed by officers of that class. The general authority to be conferred under the statute is to take proof of deeds, to administer oaths, to protest commercial paper, and to exercise such other powers as by the law of nations and commercial usage may be performed by notaries public. These duties, including the mere taking of testimony by depositions, are not judicial in their character, and in the commercial world a notary has not been regarded as a judicial officer. He is designated as a court when clothed with the usual paraphernalia of such a tribunal. In *re Huron*, 48

Pac. 574, 575, 58 Kan. 152, 36 L. R. A. 822, 62 Am. St. Rep. 614.

A notary public, who takes depositions to be used as evidence before some judicial tribunal, is a judicial officer; his duty being to assist the court under whose commission he acts in administering justice. *Stirnerman v. Smith* (U. S.) 100 Fed. 600, 603, 40 C. C. A. 581.

Under Rev. St. 1899, § 2897, a notary public, in taking depositions, acts as a temporary substitute for the court in which the case is pending, and it has been held that in taking depositions he acts in a judicial capacity in determining whether or not the witness is privileged from answering certain questions. *Swink v. Anthony*, 70 S. W. 272, 273, 96 Mo. App. 420 (citing *National Bank of Fredericksburg v. Conway* [U. S.] 17 Fed. Cas. 1202; *Ex parte McKee*, 18 Mo. 599, 600).

As state officer.

A notary public is a well-known public official, whose duties are both administrative and judicial. In Ohio he is appointed by the Governor for three years, and receives a commission, on which he is required to indorse an oath of office. That he is an officer of the state, engaged in the administration of the law of the state, and that he exercises most important functions by authority of the state, cannot be denied, and he is not subject to the stamp tax imposed by the war revenue act of 1898 on a bond executed by him for the faithful discharge of his duties. *Bettman v. Warwick*, 108 Fed. 46, 47, 47 C. C. A. 185.

NOTE.

"The word 'note' has many significations. Among the 15 definitions given to it by Webster, the greatest lexicographer of the English language that has yet appeared, the twelfth is this: 'Annotation; commentary; as the notes in Scott's Bible; to write notes on Homer.' The third definition given by Dr. Webster is: 'A short remark; a passage or explanation in the margin of a book;' and his fourth definition is this: 'A minute, memorandum, or short writing intended to assist the memory.'" Notes of a reporter of court decisions, as used in the copyright act, embrace the summary of the points decided by the courts and any footnotes, and, in addition, will cover memoranda of the argument of counsel. *Little v. Gould* (U. S.) 15 Fed. Cas. 604, 609.

As indorse.

"Note thereon," as used in Rev. St. 1893. c. 78, § 17, making it the duty of the foreman of the grand jury to indorse each true bill as such, signing his name thereto as

foreman, and requiring him to note thereon the names of the witnesses upon whose evidence the same shall have been found, should be construed to have been complied with by the witnesses' names being indorsed upon it by the prosecuting attorney. *Bartley v. People*, 40 N. E. 831, 832, 156 Ill. 234.

As read and consider.

Where one wrote a letter to a creditor, requesting him to discharge a certain debtor, and look for payment to the writer alone, and the creditor replied that he had received the letter and noted the contents, the phrase "noted the contents" meant that the creditor had perused the letter, and understood and considered the contents, but did not import a promise to comply with the request. *Wildes v. Fessenden*, 45 Mass. (4 Metc.) 12, 13.

NOTE (In Commercial Law).

See "Accommodation Bill or Note"; "Bought Note"; "Cash Notes"; "Cotton Notes"; "Coupon Note"; "Current Notes"; "Good and Collectible Note"; "Legal Tender Note"; "Negotiable Note"; "Post Notes"; "Private Notes"; "Promissory Note"; "Satisfactory Note"; "Sealed Note"; "Sold Note"; "Treasury Note"; "United States Notes."

All notes, see "All."

"A note is the written promise to pay another a certain sum of money at a certain time." *Grissom v. Commercial Nat. Bank*, 10 S. W. 774, 779, 87 Tenn. (3 Pickle) 350, 3 L. R. A. 273, 10 Am. St. Rep. 669.

A note is a written promise made by a certain person to pay a certain sum of money to a certain person at a certain time. *Brown v. First Nat. Bank*, 115 Ind. 572, 577, 18 N. E. 56, 59.

"In matters of commerce, the word 'note' means an instrument recognized as a note in the mercantile sense of the word—a promise to pay money—unless the term is qualified." *People v. Tremayne*, 3 Pac. 85, 90, 3 Utah, 331.

A "note," as used in the statute defining forgery, means all that which, connected together, composes the promise or liability from the payor to the payee, and the making or altering any material part of this is termed forgery by the statute. *State v. McLeran* (Vt.) 1 Aikens, 311, 313; *State v. Millner*, 33 S. W. 15, 16, 131 Mo. 432.

The legal definition of a "note" is "an agreement for the direct payment of money." "The payment," says *Chit. Bills*, p. 152, "must be absolute, and not contingent, either as to the amount, credit, fund or person." An instrument acknowledging certain indebtedness, and stating that the debtor has

delivered certain notes to the creditor, to be collected by the latter, and his indebtedness to be deducted therefrom, is not a note. *Blevins v. Blevins*, 4 Ark. (4 Pike) 441, 442.

The following instrument: "\$1,000. Six months after date I promise to pay to the order of R. \$1,000, with interest from maturity, and, to further secure the payment of the same, the attached certificate, No. 184, for 20 shares of the stock of the Car. Sulph. Acid Mfg. Co., is herewith deposited as collateral. Jno. F. Jones"—is a note. *Rathburn v. Jones*, 25 S. E. 214, 47 S. C. 206.

As nomen collectivum.

Where there is a confession of judgment on several notes, a justice's judgment reciting that defendant has confessed judgment for a specified sum is good, although the word "note" be written instead of "notes"; the court saying that, in view of the Code provision that every intendment is in favor of the sufficiency and validity of proceedings before justices of the peace, where it appears on the face of the proceedings that the justice has jurisdiction of the subject-matter and of the parties, there was no difficulty in holding the word "note" to be nomen collectivum for the notes mentioned in the written confession of judgment. *Cowan v. Lowry*, 75 Tenn. (7 Lea) 620, 625.

As promissory note.

The word "notes," in an indictment charging the felonious taking of one pocket-book, containing \$50 in national currency and several notes on certain described persons, is used in the sense of promissory notes, and the indictment is a sufficient description of the property stolen. *Du Bois v. State*, 50 Ala. 139, 140.

A "note," as the word is used in Act 1809, c. 69, providing that where there are two or more securities in any note for the payment of money, and judgment has been rendered only against a part of them, or the money has been paid by one or more, it shall be lawful for each security on motion to have judgment against his co-surety, means a promissory note for the absolute payment of money, not under seal. *Owen v. Owen*, 22 Tenn. (3 Humph.) 325, 326.

The term "note," as used in the negotiable instrument law, means negotiable promissory note. *Rev. Laws Mass.* 1902, p. 653, c. 73, § 207; *Rev. Codes N. D.* 1899, § 1060; *Ann. Codes & St. Or.* 1901, § 4592; *Bates' Ann. St. Ohio* 1904, § 3178; *Code Supp. Va.* 1898, § 2841a.

As unsealed instrument.

A "note" means a written promise, not under seal, to pay money. *Walker v. McConnico*, 18 Tenn. (10 Yerg.) 228, 229.

The term "note" is descriptive of a paper not under seal. *Wilson v. Turk*, 18 Tenn. (10 Yerg.) 247, 249.

Before the distinction between sealed and unsealed instruments was abolished by Code, § 1804, it was uniformly held in this state that the word "note" signified an unsealed instrument. *Carter v. Wolfe*, 48 Tenn. (1 Heisk.) 694, 700.

A note is the evidence of debt in writing not under seal. Hence, where the summons of a justice of the peace described the cause of action as a "note of hand," a bond or writing obligatory cannot be received in evidence, for it is variant from the summons. *Madding v. Peyton* (U. S.) 16 Fed. Cas. 361.

A "note" is a technical term, the import of which is well known at law. A sealed instrument is never a note. *Brown v. Lockhart*, 1 Mo. 409, 410.

Bill.

An assignment for creditors provided that the assignee should pay and discharge "all accommodation notes subscribed or indorsed for the assignors by other persons than those above named, so as to exonerate the indorsers and makers of such notes from liability thereon." Held, that though the word "notes" in such provision did not mean promissory notes, so as to be exclusive, it included a bill of exchange issued by another for the accommodation of the assignors. "What were formerly called 'goldsmith's notes' were in form bills by which a person ordered his banker to pay a sum of money to another, or sometimes to the bearer." *Tassel v. Lewis*, 1 Ld. Raym. 743. In the case of *Pearson v. Garrett*, Skin. 398, "bill" and "note" are used as synonymous terms. These, to be true, are old cases, decided when commercial law had not made great progress in England, but, in *Grant v. Vaughn*, Lord Mansfield repeatedly speaks of an instrument which was a bill as a "note," which was in these words: "Pay to 'Ship Fortune' or bearer." 3 Burrows, 1516. And in *Bull. N. P.* (7th Ed.) 269, is the following passage: "Merchants' notes are in the nature of letters of credit passing between one correspondent and another, in this form: 'Pay to J. S., or order, such a sum, witness my hand,' etc." This is great authority, to which I will add that, in conclusion, when a promissory note is to be described, it is called a "promissory note," and not simply a "note." This appears from the form of declaration on a promissory note, in which it is set forth that the defendant made his certain note in writing, called a "promissory note." Therefore, since defendant's assignors did not make use of the expression "promissory notes," it would be hard that the accommodation drawer of a

bill should be exposed to loss. *Da Costa v. Guleu* (Pa.) 7 Serg. & R. 462, 465.

Act 1809, c. 69, § 3, provides that in all cases where there are two or more securities in any note, bill, bond, or obligation for the payment of money, and judgment has been rendered only against a part of the securities, or the money has been paid by one or more, or each has not paid his ratable part of the judgment, it shall be lawful for each security, on motion, to have judgment against his co-surety or sureties. Held, that the phrase "note, bill, bond, or obligation for the payment of money" does not include a bill of exchange. *Owen v. Owen*, 22 Tenn. (3 Humph.) 325, 328.

Check.

A note made payable at a bank where the maker keeps an account is equivalent to a check drawn by him on the bank, and the bank, if in funds, owes him a duty to pay it on presentation. *Riverside Bank v. First Nat. Bank* (U. S.) 74 Fed. 276, 277, 20 C. C. A. 181.

"Notes," as used in Rev. Laws, p. 234, making void all notes or securities given to any companies which without authority of law shall "issue notes," receive deposits, make discounts, or transact any other business which incorporated banks may or do transact, does not apply to a transaction whereby a company loaned a sum of money which was to be obtained by a presentment of their checks, the issuing of such checks not being the issuing of notes. *Utica Ins. Co. v. Pardow*, 2 N. Y. Super. Ct. (2 Hall) 552, 557.

Code, § 1761, providing that all "bills or notes" payable to an existing person or bearer must be construed as if payable to such person or order, applies to checks. *First Nat. Bank v. Nelson*, 16 South. 707, 708, 105 Ala. 180.

Sand. & H. Dig. c. 18, forbids the creation or circulation of any "note, bill, bond, check, or ticket" purporting that any money or bank notes shall be paid to the holder, and that it will be received in payment of debts, or to be used as a means of currency and money. Under this statute it was held that checks issued by a company to its employés, redeemable in merchandise at the company's store, were not "notes, bills, bonds, checks, or tickets" within the meaning of the statute. *Martin-Alexander Lumber Co. v. Johnson*, 66 S. W. 924, 925, 70 Ark. 215.

This court, in *Whiteman v. Childress*, 25 Tenn. (6 Humph.) 303, 304, adopted the definition of Mr. Story in his work on *Promissory Notes*, c. 1, §§ 1, 17, as strictly accurate, which is: "A 'promissory note' may be defined to be a written engagement by one per-

son to pay another person therein named, absolutely and unconditionally, a sum of money certain, at a time specified therein;" and so held a note payable in current bank notes not to be a promissory note. This definition has been held in our state to apply to duebills and like papers, as implying fairly an absolute undertaking to pay the sum named in money. Corporation checks, or orders drawn by the proper officers of a municipal corporation on the treasurer, and by him accepted by indorsement, are not notes of hand or promissory notes. *City of Nashville v. Fisher* (Tenn.) 1 Shan. Cas. 345, 351.

As debt.

See "Debt."

Draft.

The term "bills or notes," in a statute providing that no banking association shall issue or put in circulation any bills or notes, etc., means any circulating bill or note deposited and likely to be used as a substitute for money. The term does not include a draft not payable by its terms to order or bearer, although expressed in dollars and not in foreign coin, and drawn on a domestic and not a foreign place. *Curtis v. Levitt* (N. Y.) 17 Barb. 309, 341.

As merchandise.

See "Merchandise"

Order.

Where an order is given to ship a safe to the party signing the order, the same to remain the property of the person shipping the safe, such order is not a "note" for the payment of the safe theretofore furnished, within the meaning of Rev. St. c. 111, § 5, providing that no agreement that personal property bargained and delivered to another, for which a "note" is given, shall remain the property of the payee till the note is paid, is valid unless it is made and signed as a part of the note, and recorded, like a chattel mortgage. *Morris v. Lynde*, 73 Me. 88, 90.

NOTE BROKER.

A note broker is a broker "who negotiates the purchase and sale of bills of exchange and promissory notes." *City of Little Rock v. Barton*, 33 Ark. 436, 444; *Gast v. Buckley* (Ky.) 64 S. W. 632, 633.

NOTE OF HAND.

"Notes of hand," in a will bequeathing all testator's notes of hand, includes "promissory notes, properly speaking, single bills, and bonds. It is a name given generally by the unlearned in common to all those evi-

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dences of debts which are verified under the hand of the debtor, and which the creditor keeps. It is not an apt legal term to describe a debt by judgment, nor is it ever used in that sense as its popular one." *Perry v. Maxwell*, 17 N. C. 488, 496.

In a will providing that "it is my will as I have made some advances of money and property to my children as will appear by 'notes of hand' and by my book accounts, I hold of long or short standing to be considered as so much of their portion individually"—"notes of hand" and "book accounts" mean only such debts as were evidenced by notes of hand or book accounts, and should not be construed to embrace a debt due from one of the devisees to the testator, evidenced by a bond and a mortgage. *Hopkins v. Holt*, 9 Wis. 228, 230.

An unconditional acceptance is a "note of hand," within Code, § 4123, prescribing the jurisdiction of justices of the peace. *Powers v. Nahm*, 54 Tenn. (7 Heisk.) 583.

NOTE OR MEMORANDUM IN WRITING.

See "Memorandum."

NOTE SHAVERS.

"Note shavers," within the meaning of Act June 14, 1895, imposing a privilege tax on note shavers, does not include the purchaser of a note for less than the face thereof. *Mace v. Buchanan* (Tenn.) 52 S. W. 505.

NOTES USED FOR CIRCULATION.

"Notes used for circulation," as used in Act Feb. 8, 1875, c. 86, § 19, 18 Stat. 311 [U. S. Comp. St. 1901, p. 2249], requiring every person, firm, association, other than national banking associations and other corporations, etc., to pay a tax on the amount of their notes used for circulation, means negotiable promissory notes payable in money. *Hollister v. Zion's Co-operative Mercantile Institution*, 4 Sup. Ct. 263, 111 U. S. 62, 28 L. Ed. 352.

"Notes used for circulation are negotiable notes, payable in money, which are intended to and do represent money, and do the work of money in business transactions, and on a day named therein become money." *People v. Tremayne*, 3 Pac. 85, 90, 3 Utah, 331.

NOTICE.

See "Actual Notice"; "Constructive Notice"; "Due Notice"; "Express Notice"; "Further Notice"; "Immediate Notice"; "Implied Notice"; "Judicial Notice"; "Legal Notice"; "Original No-

"tice"; "Personal Notice"; "Presumptive Notice"; "Previous Notice"; "Proper Notice"; "Public Notice"; "Reasonable Notice"; "Waiving Demand and Notice."

"Notice" means "exclusive or special consideration; observant care." *Manier v. Appling*, 20 South. 978, 980, 112 Ala. 663 (quoting *Webst. Dict.*; *Cent. Dict.*).

"Notice" is defined by Webster to mean "intelligence, by whatever means communicated; knowledge given or received." *White v. Fleming*, 114 Ind. 560, 573, 18 N. E. 487.

"Notice" means information, by whatever means communicated; knowledge given or received; also a paper that communicates information. *United States v. Foote* (U. S.) 25 Fed. Cas. 1140, 1141 (citing *Webst. Dict.*; *Worc. Dict.*).

"Notification" or "notice" is the information given in writing of some act done, or the interpellation by which some act is required to be done. *Civ. Code La.* 1900, art. 3556, subd. 19.

"Notice," as used in the article relating to the sheriff, includes all papers and orders (except process) required to be served in any proceeding before any court, board, or officer, or when required by law to be served independently of such proceeding. *Pol. Code Cal.* 1903, § 4175; *Pol. Code Idaho* 1901, § 1644; *Pol. Code Mont.* 1895, § 4380; *Rev. St. Utah* 1898, § 574.

Actual or constructive.

"Notice," in its general classification in the books, is of two kinds—actual and constructive. "Actual notice," says Prof. Pomeroy, "is information concerning the fact, * * * directly and personally communicated to the party." "In short," says he, "actual notice is a conclusion of fact, capable of being established by all grades of legitimate evidence." 2 *Pom. Eq. Jur.* § 595. Constructive notice assumes that no information concerning the prior fact, claim, or right has been directly and personally communicated to the party, but is only inferred by operation of legal presumption. *Id.* § 604. *Levins v. W. O. Peoples Grocery Co.* (Tenn.) 38 S. W. 733, 740.

In contemplation of law, and as applied to a purchaser with notice of right in another, "notice" is information given by one authorized or derived from some authentic source, and may be either actual or constructive. *Kirklin v. Atlas Savings & Loan Ass'n* (Tenn.) 60 S. W. 149, 157. See, also, *Jones v. Vanzandt* (U. S.) 13 Fed. Cas. 1047, 1049; *United States v. Foote* (U. S.) 25 Fed. Cas. 1140, 1141.

"Notice" is: (1) Actual, which consists in the express information of a fact; (2)

constructive, which is imputed by law. *Civ. Code Mont.* 1895, § 4666; *Code Civ. Proc. Mont.* 1895, § 3464.

Notice is of two kinds, actual and constructive. Actual notice may be either express or implied. If the one, it is established by direct evidence; if the other, by proof of circumstances from which it is inferable as a fact. Constructive notice is, on the other hand, always a presumption of law. Express notice embraces not only knowledge, but also that which is communicated by direct information, either written or oral, from those who are cognizant of the fact communicated. Implied notice which is equally actual notice, arises where the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him, by the exercise of due diligence, to a knowledge of the particular facts; or, as defined by the Supreme Court of Missouri in *Rhodes v. Outcalt*, 48 Mo. 370, a notice is to be regarded in law as actual when the party sought to be affected by it knows of the particular fact, or is conscious of having the means of knowing it, although he may not employ the means in his possession for the purpose of gaining further information. *City of Baltimore v. Whittington*, 27 Atl. 984, 985, 78 Md. 231.

Notice may be divided into two classes, constructive and actual. Constructive notice is that imparted by the record, and is a matter of statute. Actual notice exists when knowledge is actually brought home to the party to be affected thereby. It also includes implied notice, which is notice to the authorized agent of the party sought to be bound by the notice. *Strahorn-Hutton-Evans Commission Co. v. Florer*, 54 Pac. 710, 712, 7 Okl. 499.

Actual notice is that which consists in express information of a fact, and constructive notice is that which is implied by law. *Prouty v. Devin*, 50 Pac. 380, 381, 118 Cal. 258.

Notice may be generally classified into actual and constructive. Notice is actual when there is positive information of a fact, and constructive when the information is either conclusively or prima facie presumed from certain existing facts;—when not conclusive, being strictly implied or inferred notice. Conclusive constructive notice allows no proof of want of information, but when implied the presumption may be rebutted; either when established, having the same legal effect. *Cleveland Woolen Mills v. Sibert*, 1 South. 773, 776, 81 Ala. 140.

The notice that an employer should have of a defect in the machinery or an appliance furnished by him in order to make him liable for injuries occasioned by such defect does not mean an actual notice. It does not

necessarily mean that some person went to the employer and told him that the machine or appliance was bad, or that he saw it and therefore knew it was bad or unsafe, but constructive notice is sufficient. *Newton v. Vulcan Iron Works*, 49 Atl. 339, 199 Pa. 646.

The notice to a transferee of property in fraud of the grantor's creditors of the fraud which will avoid the conveyance in his hands may be either actual or constructive. *Kansas Moline Plow Co. v. Sherman*, 41 Pac. 623, 626, 3 Okl. 204, 32 L. R. A. 33.

The five days' notice to township trustees of defects in public highways, required by Gen. St. 1899, c. 16, § 17, in order to charge the townships with damages occasioned by such defects, means actual notice, and not notice inferable from the notoriety or long continuance of the defects. *Hari v. Ohio Tp., Saline County*, 62 Pac. 1010, 1011, 62 Kan. 315.

To constitute "notice" of an infirmity in a negotiable instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. *Wedge Mines Co. v. Denver Nat. Bank (Colo.)* 73 Pac. 873, 875.

Facts putting on inquiry.

"Notice or knowledge," such as would affect the bona fide character of a transaction, does not mean that the party having notice or knowledge must have actual knowledge or notice; but it is sufficient if it is shown that he had the means of knowledge; that is, that he had notice of such facts as would lead a prudent man to further inquiry, which inquiry, if pursued, would disclose facts which would affect the bona fide character of the transaction. But this doctrine does not apply to commercial paper. In transfers of commercial paper the notice or knowledge, in order to affect the bona fide character of the transaction, must be such that the party accepting the paper under the circumstances would be guilty of actual fraud. *National Bank v. Young*, 7 Atl. 488, 490, 41 N. J. Eq. 531.

Whatever puts a party upon inquiry is a sufficient notice, where the means of knowledge are at hand; and if a party omits to inquire, he is then chargeable with all the facts which by a proper inquiry he might have ascertained. *Thomas v. City of Flint*, 81 N. W. 936, 938, 123 Mich. 10, 47 L. R. A. 499.

To constitute notice of an adverse claim or title to property, it is not necessary that it should be in the shape of a distinct and formal communication, and it will be implied in all cases where a party is shown to have

had such means of informing himself as to justify the conclusion that he has availed himself of it. Whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, and to enable him to ascertain their nature by inquiry, will operate as notice. *Martel v. Somers*, 26 Tex. 551, 560.

With reference to vendor and purchaser, whatever puts a purchaser on inquiry amounts to notice, provided the inquiry would become a duty, as it always is with a purchaser, and would lead to a discovery of the requisite fact by the exercise of ordinary diligence and understanding. *United States v. Silney (U. S.)* 21 Fed. 894, 896.

Notice may consist merely of information as to collateral facts sufficient to incite inquiry, and which an ordinarily prudent person would follow to a knowledge of the main facts. *Osborne v. Alabama Steel & Wire Co.*, 33 South. 687, 689, 135 Ala. 571.

The general rule is that whatever puts a party upon inquiry amounts, in judgment of law, to notice of all such facts as, by the exercise of ordinary duty and diligence, would be developed by the inquiry. *Walker v. Neil*, 45 S. E. 387, 393, 117 Ga. 733.

Whatever puts a person on inquiry is in equity a notice to him of all the facts which such inquiry would have disclosed. *Collins v. Davis*, 43 S. E. 579, 582, 132 N. C. 106 (citing *Bolles v. Chauncey*, 8 Conn. 389).

In an action to recover personalty from an alleged fraudulent vendee, it is not necessary to charge defendant with notice to prove positive knowledge or belief, but proof that the circumstances known to him were such as ought reasonably to have excited his suspicion and led him to inquire is sufficient. *Pringle v. Phillips*, 7 N. Y. Super. Ct. (5 Sandf.) 157, 165.

In proceeding under a statute by the unsuccessful defendant in ejectment for improvements made by him in good faith prior to his having had notice of an adverse title, the term "notice" is not confined to notice in writing, but embraces any such information as would put a man of ordinary prudence upon inquiry. *Lee v. Bowman*, 55 Mo. 400, 404.

Within the meaning of the statute providing that a cause of action for fraud shall be deemed to have occurred at the time of the discovery of the fraud, that the time of discovery means notice of the fraud, and as to what constitutes notice, the court quotes with approval the statement of the federal Supreme Court to the effect that "whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led." *Irwin v. Holbrook*, 73 Pac. 360, 362, 32 Wash. 349.

Under Civ. Code, § 2176, declaring that a passenger or consignor, by accepting a contract for carriage with knowledge of its terms, assents to any limitation of liability stated therein, it was error, in an action for the loss of a trunk, to refuse to charge that if, when a receipt which limited the carrier's liability was delivered to plaintiff, the circumstances were such that a prudent man would have read the limitation as to liability, then he had notice thereof, and that it would not excuse him to say that he did not read the notice of limitation. *Merrill v. Pacific Transfer Co.*, 63 Pac. 915, 917, 131 Cal. 582.

Notice includes whatever fairly puts one on inquiry, where the means of knowledge are at hand. As used in *Sess. Laws 1887, Act No. 264*, relating to rights of action against townships for injuries caused by defective roads, etc., and providing that in all actions brought under the act it must be shown that such township has had reasonable time and opportunity after knowledge by or notice to such township that such highways, etc., have become unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein after such knowledge or notice, "notice" is not synonymous with the word "knowledge." *Moore v. Kenockee Tp.*, 42 N. W. 944, 947, 75 Mich. 332, 4 L. R. A. 555.

As information or knowledge.

The words "knowledge" and "notice" are not synonymous, to the extent, at least, that the two words are not always interchangeable in meaning. "Notice," in one sense, means legal instrumentality by which knowledge is conveyed, or by which one is charged with knowledge. One having "knowledge" that he is a defendant in a suit is not bound to appear until there is brought home to him the legal instrumentality of knowledge with proper notice. But, on the other hand, where the Code speaks of actual and constructive "notice," it means no more than that, under the indicated circumstances, the man is legally chargeable with knowledge. *Merrill v. Pacific Transfer Co.*, 63 Pac. 915, 917, 131 Cal. 582.

"Knowledge" and "notice" are not synonymous, although the effects produced by notice are the same in many cases as result from actual knowledge. *Levins v. W. O. Peoples Grocery Co.* (Tenn.) 38 S. W. 733, 740.

"Notice" has been held to mean "knowledge," as one of its usual and appropriate significations. *Parker Mills v. Jacot*, 21 N. Y. Super. Ct. (8 Bosw.) 161, 169 (citing *Goodman v. Simonds*, 61 U. S. [20 How.] 343, 15 L. Ed. 934).

It is a well-settled principle of law that "notice" is the equivalent of "knowledge."

Strahorn-Hutton-Evans Commission Co. v. Florer, 54 Pac. 710, 712, 7 Okl. 499.

Knowledge is equivalent to notice in cases where it is not required to be in writing. *Jones v. Vanzandt* (U. S.) 13 Fed. Cas. 1047, 1049.

The word "notice," as used in Pub. Acts 1897, imposing a liability on a city for an injury from a defective bridge after notice of the defect, is not used as synonymous with the word "knowledge." *Thomas v. City of Flint*, 81 N. W. 938, 933, 123 Mich. 10, 47 L. R. A. 499.

As used in Act Cong. Feb. 12, 1793, § 4, making any person liable for penalty of \$500 who conceals any person held to service of labor in one of the states who escapes into another after notice that he is a fugitive from labor, "notice" means "knowledge." "A specific notice, either written or parol, need not be given. It is enough if the defendant knows that the person he is harboring is a fugitive from labor." *Van Metre v. Mitchell* (U. S.) 28 Fed. Cas. 1036, 1040.

"Notice of facts" which impeach the validity of a negotiable instrument means knowledge of those facts, and by "facts" it is intended facts which of themselves impeach the transaction, and not other facts which tend to prove fraud, or which excite suspicion. *Credit Co. v. Howe Sewing-Mach. Co.*, 8 Atl. 472, 476, 54 Conn. 357, 1 Am. St. Rep. 123.

"Notice," in the act of Parliament (2 & 3 Vict. c. 29) relating to persons who shall issue execution with notice of an act of bankruptcy committed by the debtor, means "knowledge," for if a person were to see another commit an act of bankruptcy, though no one told him of it, either by notice in writing or by verbal communication, he would, notwithstanding, have "notice" thereof within the meaning of the act. *Bird v. Bass*, 6 Man. & G. 143, 147.

"Notice," with reference to a purchaser from a fraudulent vendee for value and without notice of the fraud, is not equivalent to and synonymous with "knowledge." *Cleveland Woolen Mills v. Sibert*, 1 South. 773, 776, 81 Ala. 140.

The terms "knowledge" and "notice" are not synonymous or interchangeable, and should not be confounded the one with the other. That which clearly does not amount to positive knowledge may often in a legal sense constitute actual notice. Accordingly, in applying a statute which contemplates that only actual notice shall affect the rights of one acting in good faith, the language used, expressly or by necessary implication, negating the idea that he is chargeable with constructive notice as well, the mere fact that he did not have precise and definite knowledge concerning the matter in

question cannot be considered as having any real importance whatever. On the contrary, the distinction to be drawn in a case calling for the application of such a statute is that between actual and constructive notice, and not between actual knowledge and constructive notice. *Clarke v. Ingram*, 33 S. E. 802, 804, 107 Ga. 565.

The word "notice," in a charge that defendant has harbored and concealed fugitive slaves with notice of such fact, means "knowledge." *Driskill v. Parrish* (U. S.) 7 Fed. Cas. 1100, 1103.

"Notice" is not the equivalent of "knowledge," within the rule that wantonness in the doing of or omission to do an act, the probable result of which will be to injure, can only be predicated upon actual knowledge of the existing conditions attending the act or omission that caused the injury; and hence a complaint alleging that an engineer allowed his engine to propel a car against other cars with great force, with knowledge or notice that plaintiff was between the cars, is bad as stating a cause of action for wantonness. *Southern Ry. Co. v. Bunt*, 32 South. 507, 508, 131 Ala. 591.

The word "notice," as used in an insurance certificate providing that assessments shall be payable within 30 days from the date of each notice, does not mean the printed paper mailed to the insured, but information thereby conveyed to the insured, so that the 30 days begin to run from the time the paper is received by the insured in the regular course of mail. *Ferrenbach v. Mutual Reserve Fund Life Ass'n* (U. S.) 121 Fed. 945, 947, 59 C. C. A. 307.

The word "notice," in a statute providing that no individual shall have any legal claim against the town for supplies or assistance furnished to a pauper before he has given notice of the condition of such pauper to one of the selectmen of the town where the pauper resides, is not to be considered as in any degree technical, but is equivalent to the words "information," "intelligence," or "knowledge," which are words of common use and plain meaning, neither of which, as applied to ordinary transactions between men, is understood to import the highest degree of certainty. *Wile v. Town of Southbury*, 43 Conn. 53, 54.

Personal service necessary.

Where a statute prescribes the giving of notice as a condition precedent to the doing of an act, personal service of the notice is necessary, in the absence of any provision as to the method. *McDermott v. Board of Police* (N. Y.) 5 Abb. Prac. 422, 437.

When a statute requires service of a notice on a person, it means personal service, unless some other service is specified

or indicated; and, if a statute requires personal notice of a village ordinance to be given to the owner of lots affected by such ordinance, a notice by mail, though it reaches the party, is not a compliance with the statute. *Rathbun v. Acker* (N. Y.) 18 Barb. 393, 395.

As summons or process.

The term "notice," in Comp. St. p. 621, c. 71, § 5, requiring a notice of appeal of a contested election to be served upon the adverse party, is used in the sense of the service of a paper, communication, or information that the dissatisfied party appeals from the judgment or order, or some part thereof; and any paper purporting to be a notice, which gives this information, ought to be held sufficient. *Baberick v. Magner*, 9 Minn. 232, 235 (Gil. 217, 220).

Under a statute relative to notice of appeal, it is held that the term "notice" has a meaning in some degree technical; that it imports something written and given to the party for the purpose of apprising him of the judgment or order. *Fry v. Bennett* (N. Y.) 7 Abb. Prac. 352, 355.

"Notice," as used in Code Civ. Proc. § 974, providing that a "notice of appeal" from a justice to a superior court shall be served on the adverse party, is strictly analogous to "summons," and serves the same function. It is the process for bringing the adverse party before the court, and service of such notice on a corporation can be made in the same manner as a summons. *Pac. Coast Ry. Co. v. Superior Ct. of San Luis Obispo County*, 21 Pac. 609, 79 Cal. 103.

The term "notice," as used in Acts 1872, p. 53, providing that the chancery court shall have exclusive jurisdiction in all cases when the equity of redemption is sought to be sold, and corporations shall have the same notice now provided for natural persons, does not apply to the service of process. It is more appropriate to publications to nonresident or unknown defendants. It may have been used to require notice to corporations in the same circumstances in which natural persons would be entitled to notice of a proceeding to subject an equity of redemption to sale, or the same length of time, or that corporations should be brought in by summons when natural persons had to be brought in by that means, or that publication should alike apply to both. The provisions of the Code for service of process on corporations in suits against them remained in force unaffected by the act of 1872. *Vicksburg & M. R. Co. v. McCutchen*, 52 Miss. 645, 649.

"Notice," within St. 1887, p. 29, § 2, providing for notice in proceedings for the

organization of an irrigation district, is for the purpose of bringing the party before the tribunal exercising judicial powers, and it must be given by some one authorized by the state to give it. "Notice," in the sense of the statute, does not mean "knowledge." Actual knowledge, or the want of it, cannot be shown. It means the statutory instrumentality of knowledge, or formal process emanating from the source, and served in the manner, prescribed by statute. The advertisement is the process, and the posting in the public place is the service. The notice itself must be issued by persons authorized by law to issue it. In re Central Irr. Dist., 49 Pac. 354, 357, 117 Cal. 382.

"Notice," in the sense of the statute requiring interested parties to be served with notice of condemnation proceedings, does not mean actual knowledge; it means the statutory instrument of knowledge, the formal process emanating from the source, and served in the manner, prescribed by the statute. Such notice must be issued by persons authorized by law to issue it, and this fact must be shown on its face by proper authentication, just as more formal process must show it. Minard v. Douglas County, 9 Or. 206, 210.

Verbal or written.

Within a statute providing that any party complaining of any interlocutory or other order previous to a final decree made by any vice chancellor may appeal within 15 days after notice of such order, "notice" means "a regular, formal written notice." Jenkins v. Wild, 14 Wend. 539, 545.

"Notice," in an agreement by which defendant undertook to produce a certain person if he received "seven days' notice" requiring the appearance of the said person, did not mean written notice, but was satisfied by verbal notice. Thompson v. Ayling, 4 Exch. 614.

As used in 1 St. 2 Wm. & M. c. 5, § 2, enacting that goods distrained for rent may be sold only where the tenant or owner of the goods so distrained shall not, within five days next after such distress and "notice thereof left" at the chief mansion house, replevy the same, does not mean parol notice, but requires the notice to be in writing. Wilson v. Nightingale, 8 Adol. & E. (N. S.) 1034, 1037.

Where, in a policy of insurance, there is a provision in general terms for notice of prior insurance upon the same property, without prescribing, either in terms or by necessary implication, the mode in which it should be given, a verbal notice suffices; but if the notice be a legal proceeding, then it should be in writing. McEwen v. Montgomery County Mut. Ins. Co. (N. Y.) 5 Hill, 101, 104.

There is evidently a difference between the words "notice" and "actual knowledge" of the proceedings in bankruptcy, as used in Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], providing that a discharge shall release the bankrupt, except as to such debts not scheduled, unless the creditor had notice or actual knowledge of the proceedings in bankruptcy. The notice is evidently a written notice delivered to the creditor, but the section evidently contemplates that the creditor may have actual knowledge of the proceedings from other sources than either of those provided by the statute. If it be clearly shown that the creditor had actual knowledge of the application for discharge, it makes no difference how this knowledge may have been acquired. Jones v. Walter (Ky.) 74 S. W. 249, 250.

NOTICE OF DISHONOR.

It is sufficiently early to charge the indorser of a promissory note living in a different state if a notice of the dishonor directed to him be put into the mail within a convenient time after the commencement of business hours on the day succeeding that of the dishonor. Chick v. Pillsbury, 24 Me. 458, 470, 41 Am. Dec. 394.

NOTICE OF LIS PENDENS.

The distinction between the term "lis pendens" and the phrase "notice of lis pendens" is not always observed. The former is a common-law term; the latter is regulated by statute. At common law the general rule is that all persons are bound to take notice, at their peril of suits affecting the title to property, and purchasers pendente lite, either with or without notice, take no better title than their grantor shall be adjudged to have. The hardship of this rule in cases of certain equitable liens and secret trust estates led to the adoption of statutes providing for the registry of the notice of the pendency of certain actions. This, it seems, is the statutory notice of lis pendens. Empire Land & Canal Co. v. Engley, 33 Pac. 153, 154, 18 Colo. 388.

NOTICE OF LOSS.

Proof of loss distinguished, see "Proof of Loss."

NOTICE OF MOTION.

A notice of motion is in effect a summons to the opposite party to appear in court and defend himself against a rule to be applied for, and therefore a "process" within the meaning of the statute forbidding the service on Sunday of any writ, process, order, judgment, or decree in civil causes. Field v. Park (N. Y.) 20 Johns. 140, 141.

When a statute speaks of "notice of a motion," it means written notice, or notice in open court, of which a minute is made by the clerk. *Borland v. Thornton*, 12 Cal. 440, 448.

NOTICE OF PROTEST.

A protest is a declaration in writ. *Id.*, made by a public officer under his oath of office, that the bill or note to which it relates was, on the day it began, duly presented for payment, and the payment was refused; and a notice of such protest is not merely a notice that this declaration was made, but that the facts so declared had really occurred. *Cook v. Litchfield*, 10 N. Y. Leg. Obs. 330, 338.

"Notice of protest" is knowledge of protest. No particular form of notice is requisite; a verbal notice is as good as a written one. *Wilcox v. Routh*, 17 Miss. (9 Smedes & M.) 476, 483.

"Notice of protest" of a bill of exchange, in common acceptance, implies presentment and dishonor. *First Nat. Bank v. Hatch*, 78 Mo. 13, 23 (citing 2 Daniel, Neg. Inst. § 983; 2 Edw. Bills & N. [3d Ed.] § 806).

Where a notary certified in a protest as follows: "Notices of protest given to the drawer and two first indorsers same day"—the term "notices" must be construed to mean notices in writing. *Roberts v. State Bank (Ala.)* 9 Port. 312, 315.

NOTICE OF SALE.

In case of a sale under execution, the words "notice of sale," appearing in the return of the officer making the sale, mean notice of the time and place of sale. *Frazee v. Nelson*, 61 N. E. 40, 179 Mass. 456, 88 Am. St. Rep. 391.

NOTICE TO ALL THE WORLD.

"Notice to all the world," as used in the maxim that "lis pendens is notice to all the world," is to be construed as meaning notice only to all persons within the jurisdiction or state where the suit is pending. *Shelton v. Johnson*, 36 Tenn. (4 Sneed) 672, 682, 70 Am. Dec. 265.

NOTICE TO QUIT.

The term "notice to quit" has a clear, well-defined, and settled meaning in the law. When it is used in a statute, it is to be taken and understood in its legal and technical sense, with all the qualities and incidents which the law regards as essential to it, unless it is qualified by express enactment. *Oakes v. Munroe*, 62 Mass. (8 Oush.) 282, 287.

The object of a notice to quit is to terminate the tenancy, and is only proper in cases where no agreement exists between the parties determining the period when or the contingency on which the tenancy shall cease. *Garner v. Hannah*, 13 N. Y. Super Ct. (6 Duer) 262, 270.

NOTICEABLE.

"Noticeable," as used in referring to a defect in a sidewalk that it was not a question whether all passers-by actually noticed the defect, but whether it was noticeable, means capable or susceptible of being noticed. *Rosevere v. Borough of Osceola Miss.* 32 Atl. 548, 553, 169 Pa. 555.

NOTIFY.

See "Judicially Notify."

"Notify," in its primary and literal meaning, means to make known, and, according to Worcester, its secondary meaning is to give notice to, to inform by words or writing, in person or by message, or by any signs which are understood. *Vindon v. Builders' & Manufacturers' Ass'n*, 9 N. E. 177, 178, 109 Ind. 351.

The statement of a witness, stating that he "notified" the parties to a certain contract, excludes the idea that he showed them the contract or read it to them. *Towne v. St. Anthony & D. Elevator Co.*, 77 N. W. 608, 610, 8 N. D. 200.

The word "notify," as used with respect to procuring the attendance of a juror, is equivalent to the word "summon," as used in the like connection in the same Constitution and laws. *Code Civ. Proc. N. Y.* 1899, § 3343, subd. 19.

"Notification" or "notice" is the information given in writing of some act done, or the interpellation by which some act is required to be done. *Civ. Code La.* 1900, art. 3556, subd. 19.

Under a by-law providing for the forfeiture of an insurance policy in case of non-payment of an assessment after notification thereof, and under Rev. St. 1898, § 1935, providing that, when an assessment is made, notices stating when it was levied and when it becomes due shall be published, and notice of the amount of loss and the sum due from the member as his share thereof shall be mailed to the members, a publication not stating the amount of the assessment, but merely that an assessment was made on a certain date and will be due on a certain date, and a mailed notice stating the loss for which the assessment was levied, did not constitute notification authorizing a forfeiture. The notification which is claimed to warrant forfeiture is the notification re-

quired to be given in case of an assessment by the statute. *Milwaukee Trust Co. v. Farmers' Mut. Fire Ins. Co.*, 91 N. W. 967, 969, 115 Wis. 371.

Actual knowledge.

"Notify," as used in a statute making it a condition precedent for a person, in order to be entitled to recover for injuries caused by a defective highway, to notify the municipal officers of the town by letter or otherwise in writing, setting forth his claim for damages, within 14 days after the injury, means "to make known." The statute requires that the municipal officers should have information or knowledge, and it is not enough for the injured party to write a notice, however formal; it is not enough for him to mail it, even within the 14 days. The writing and mailing of a notice within the time is not notifying the officers of the town as the statute requires. *Chase v. Inhabitants of Surry*, 34 Atl. 270, 272, 88 Me. 468.

In legal proceedings and in respect to public matters, the word "notified" is generally if not universally used as implying a notice given by some person whose duty it was to give it in some manner prescribed, and to some person entitled to receive it or to be notified. Such is its obvious import in the finding of a court that a person was in no manner "notified" of the hearing of an administrator's account. It does not include the idea that the petitioner and other persons interested had nevertheless actual knowledge. *Appeal of Potwine*, 31 Conn. 381, 384.

The word "notified," in a charter of a mutual insurance company providing that the members shall be notified of assessments by circular or verbally, means "informed." The mere mailing of a notice to a member is not sufficient, if the notice is not actually received. *Castner v. Farmers' Mut. Fire Ins. Co.*, 15 N. W. 452, 454, 50 Mich. 273.

Written notice.

"Notifying," as used in Code, §§ 2967, 6350, providing that corporate stock may be levied on by notifying the president or other officer of the corporation, means that the communication should be in writing. In common parlance the word "notify" or "notifying" may sometimes mean a mere verbal communication, yet, when applied to an official act, it can have no other meaning than that it should be in writing. *Moore v. Marshalltown Opera House Co.*, 46 N. W. 750, 751, 81 Iowa, 45.

The word "notify" never imports or implies of necessity a notice in writing, and as used in Act 1883, p. 140, § 5, which provides that in order to enable the mechanics or other persons furnishing materials or performing labor to a contractor to acquire a

lien he must, at or before the time he furnishes the material or performs the labor, "notify" the owner or his agent that he is furnishing the materials or performing the work for the contractor, it cannot be construed so as to require a notice in writing; a verbal notice is sufficient. *Vinton v. Builders' & Manufacturers' Ass'n*, 9 N. E. 177, 178, 109 Ind. 351.

NOTIFICATION OF TAXES DUE.

The term "notification of taxes due," in Act Cong. Jan. 9, 1815, § 28, enacting, with respect to property lying within any collection district not owned, etc., by some person residing in such district, and on which the tax shall not have been paid to the collector within 90 days, that the collector shall transmit lists, etc., and the collectors thus designated shall cause notifications of the taxes due as aforesaid and contained in the lists transmitted to them to be published for 60 days, etc., means "an advertisement giving notice to each owner of the land of the tax upon his land which remained unpaid, and that the list was in the hands of the designated collector." It seems to be implied in the very term "notification of the taxes" that notice was to be given to each owner that the tax on his land remained unpaid. Thus a notification from the collector that he has received lists of taxes due, and is authorized to receive them, without stating what taxes remained unpaid, is insufficient. *Eastman v. Little*, 5 N. H. 290, 293.

NOTIFIED IMPORTER.

"Notified importer," when stamped by a customs collector on an entry of goods at the customhouse, liquidated and "notified importer" on a certain date, means that the fact of the liquidation had been stated on a sheet of paper which was hung up in the customhouse for the information of the importer. *Merritt v. Cameron*, 11 Sup. Ct. 174, 175, 137 U. S. 542, 34 L. Ed. 772.

NOTIONS.

"Notions," as a technical term applied to merchandise, means small ware or trifles, and may be applied to needles. *J. A. Coates & Sons v. Hurst*, 65 Mo. App. 256, 260.

NOTORIOUS.

"The word 'notorious,' as defined by Webster, means generally known and talked of by the public; universally believed to be true; manifest to the world; evident, etc." *Leader v. State*, 4 Tex. App. 162, 164.

The word "notorious," in an instruction as to the burden of showing that the existence and course of a subterranean stream

was known or notorious, means that which is generally or publicly known and spoken of. *Wyandot Club v. Sells*, 9 Ohio Dec. 106, 107, 111.

The primary meaning of the word "notorious," as given by a leading lexicographer, is "generally known and talked of by the public." Thus, in accordance with the rule that a city will be chargeable with notice of a defect in the street on evidence of a fact tending to show the notoriety of the defect, evidence is admissible of what was said of a defect by persons looking at it when it was exposed during the process of certain work. *Chase v. City of Lowell*, 24 N. E. 212, 151 Mass. 422.

Badness imputed.

"Notorious," as used in a superscription on an envelope, after the name of a person, reading "Room 32, Pease House, Front St., City, The Notorious," appear to have been intended to designate the Pease House as "The Notorious," and not the person named. Assuming that the words apply to the person addressed, they do not necessarily reflect injuriously. Applied to a person without notoriety, they are meaningless. A man may be a notorious wit. Those who possess and exercise superior powers as orators, singers, or actors gain celebrity, and the holders of exalted positions are referred to as "noted persons." Applied to persons of such character, the words would be considered by those acquainted with their reputations as being in bad taste, but not as implying any bad imputation. *United States v. Jarvis* (U. S.) 59 Fed. 357, 358. See, also, *George Knapp & Co. v. Campbell*, 36 S. W. 765, 769, 14 Tex. Civ. App. 199.

General distinguished.

"General" means common to many, or the majority; extensive, though not universal; while 'notorious' means generally or commonly known, acknowledged, or spoken of." *McCorkendale v. McCorkendale*, 82 N. W. 754, 111 Iowa, 314.

As well known.

The word "notorious," in relation to entries of land, means well known to a majority of all those conversant in the neighborhood. *Seay's Heirs v. Walton's Devisees*, 21 Ky. (5 T. B. Mon.) 368, 370.

NOTORIOUS CHARACTER.

A "notorious character" means a general character, and evidence of general character is admissible under an indictment using the term "notorious bad character." *Leader v. State*, 4 Tex. App. 162, 164.

NOTORIOUS INSOLVENCY.

See "Open and Notorious Insolvency."

NOTORIOUS LIAR.

A declaration charged defendant with having said that plaintiff was a "notorious liar." Defendant pleaded justification, alleging the truth of the statement, and asserting facts tending to prove that plaintiff was guilty of having uttered falsehoods. It was held that such allegations would not constitute plaintiff a "notorious liar," the court remarking that it is not common for a party to acquire a notoriety for lying by merely uttering a single falsehood, but, on the contrary, the epithet is usually accorded to such parties only as have contracted such a habit for lying as to be generally considered to be utterly regardless of the truth. *Jones v. Cecil*, 10 Ark. 592, 596.

NOTORIOUS POSSESSION.

"Notorious," as used in defining "adverse possession," means that the possession or character of the holding must in its nature possess such elements of notoriety that the owner may be presumed to have notice of it and of its extent. *Watrous v. Morrison*, 14 South. 805, 806, 33 Fla. 261, 39 Am. St. Rep. 139.

NOTORIOUS REPUTATION.

Charging a man as having a "notorious reputation" is not defamatory in itself, and an innuendo is necessary in pleading the publication of such a charge in order to make out a case of libel. The word "notorious" would become libelous in itself only when qualifying some other word. It may be properly used in an innocent, and even in a laudatory sense, as being synonymous with "distinguished," "remarkable," "conspicuous," "noted," "celebrated," "renowned." The word being capable of a harmless meaning as well as an injurious one, it would be a question for the jury to decide which meaning was intended. *George Knapp & Co. v. Campbell*, 36 S. W. 765, 769, 14 Tex. Civ. App. 199.

NOTORIOUS RESISTANCE TO LAWFUL AUTHORITY.

"Notorious resistance to lawful authority," as used in a policy of fire insurance covering certain personal property and machinery located in a state penitentiary, and providing that the company shall not be liable for damage by fire which shall happen or arise by any person or persons engaged or concerned in "notorious resistance to lawful authority," means that there is an unusual and extraordinary state of affairs, a state of affairs in which, and for the time being, the usually constituted legal authorities are overpowered and inadequate to successfully contend with the existing emergency. It does not mean that the company

should be relieved from payment of the loss when the fire should happen during those occasions of resistance to the authorities which usually well-regulated governments are at all times prepared to overcome, even though well or publicly known. It does not mean that a trivial disobedience to the commands of an officer, if seen or heard by a multitude of people, is a case of notorious resistance. Where four or five convicts by their actions and threats put the guard or timekeeper and foreman in their power, they were in resistance to lawful authority of the prison, but they were not in notorious resistance to such authority, for the notoriety is not that which arises and flows from the results alone of the incendiary act, but there must be an existing and going on of a notorious resistance to the authorities. Webster defines "notorious" as "generally known and talked of by the public; universally believed to be true; manifest to the world," etc. *Straus v. Imperial Fire Ins. Co.*, 6 S. W. 698, 700, 94 Mo. 182, 4 Am. St. Rep. 368.

NOTORIOUS SURVEY.

Where the survey of an entry of land was made by a surveyor who was killed by the Indians as soon as he had completed his survey, and all of his field notes were then destroyed, and the cross-lines and corners of his survey were known only to those who were with him assisting in the survey, such survey was not "notorious" within the rule which permits an entry to be made by reference to a notorious private survey. *Seay's Heirs v. Walton's Devises*, 21 Ky. (5 T. B. Mon.) 368, 370.

NOTORIOUSLY.

"Notoriously" means well and generally understood. *Martinez v. Moll* (U. S.) 46 Fed. 724, 726.

NOTORIOUSLY AGAINST PUBLIC DECENCY.

Acts or conduct to be notoriously against public decency and good manners need not be committed in the public streets or exposed to the view of divers spectators. Such an exhibition is not necessary to satisfy the term "notorious" and portray its character. The requirements of the term "notoriously" or "notorious," in the constitution of an offense of the nature spoken of, is sufficiently answered if the act is done in such a manner or under such circumstances as necessarily to become public or generally known in the neighborhood. *Grisham v. State*, 10 Tenn. (2 Yerg.) 589, 596.

NOTORIOUSLY INSANE.

A person is said to be "notoriously insane" when his insanity is such that it must

necessarily be known by a party dealing with him. *Martinez v. Moll* (U. S.) 46 Fed. 724, 726.

In an action to compel compliance by defendant with the adjudication of real estate made to him, in which he defended on the ground that at the time plaintiff purchased the property his grantor was notoriously insane, it appeared that plaintiff never knew or saw his grantor, but dealt with the agent, and that his grantor was not suffering from habitual or general insanity, but merely from a mental excitement, thought to be temporary, which made him, without cause, judge harshly of himself, and feel so melancholy that he would engage in conversation with no one; and that no one considered him insane, not even his physician, though a short time thereafter he was adjudged insane. The court held that he was not "notoriously insane" within the meaning of the statute, providing that "no act, anterior to the petition for the interdiction, shall be annulled, except where it shall be proved that the cause for such interdiction notoriously existed at the time when the act, the validity of which is contested, was made or done." "Notoriously," in this article, means that the cause of interdiction was generally known by the persons who saw and conversed with the party. *Phelps v. Reinach*, 38 La. Ann. 547, 548; *Lalonde v. Lacoste*, 4 La. 114, 115.

NOVATION.

Novation is the substitution of a new obligation for an existing one. Civ. Code Cal. 1903, § 1530; *Stanley v. McElrath* (Cal.) 22 Pac. 673, 675; Civ. Code Mont. 1895, § 2070; Rev. Codes N. D. 1899, §§ 3828, 3830; Civ. Code S. D. 1903, §§ 1181, 1183. It means that, there being a contract in existence, some new contract is substituted for it, either between the same parties or between different parties, the consideration mutually being the discharge of the old contract. *Henry v. Nubert* (Tenn.) 35 S. W. 444, 448. A common instance of it in partnership cases is where, upon the dissolution of a partnership, the persons who are going to continue the business agree and undertake, as between themselves and the retiring partner, that they will assume and discharge the whole liability of the business, usually taking over the assets, and, if in that case they give notice of that arrangement to a creditor and ask for his accession to it, there becomes a contract between the creditor who accedes and the new firm, to the effect that he will accept their liability instead of the old liability, and, on the other hand, that they promise to pay him for that consideration. *Hard v. Burton* (Vt.) 20 Atl. 269, 271, 62 Vt. 314.

Novation is the substitution of a new obligation for the old one, which is thereby extinguished. *Workingman's Bldg. & Sav.*

Ass'n v. Williams (Tenn.) 37 S. W. 1019, 1022 (citing *Guichard v. Brande*, 57 Wis. 534, 15 N. W. 764; 16 Am. & Eng. Enc. Law, p. 862; *Munford v. Wilson*, 15 Mo. 540; *Stow v. Russell*, 36 Ill. 18; *Rhodes v. Thomas*, 2 Ind. [2 Cart.] 638); *Sharp v. Fly*, 68 Tenn. (9 Baxt.) 4, 10.

In the civil law there are three kinds of novation, one of which is where the debtor and creditor remain the same, but a new debt takes the place of the old one. *Adams v. Power*, 48 Miss. 450, 454.

The doctrine of novation in civil law is but the doctrine of merger at common law. *Sharp v. Fly*, 68 Tenn. (9 Baxt.) 4, 10.

Novation is a substitution of a new debt for an old one, or of a new debt instead of a former one. It is recognized in the law as a mode for the extinguishment of debt. *McCartney v. Kipp*, 33 Atl. 233, 235, 171 Pa. 644.

A "novation," under the rules of the civil law, whence the term has been introduced into the modern nomenclature of our common-law jurisprudence, was a mode of extinguishing one obligation by another; the substitution, not of a new paper or note, but of a new obligation in lieu of an old one, the effect of which was to pay, dissolve, or otherwise discharge it. If, since the debt was contracted, a new agreement has taken place between the creditor and debtor by which a longer time of payment has been given, or a new place for the payment appointed, or the debtor allowed the liberty of paying to another person than the creditor, or even by which the debtor should have bound himself to pay a larger sum or a lesser one, to which the creditor was willing to confine his demand, in all these cases and the like, according to the principle that the novation is not to be presumed, it must be decided that there is no novation, and the parties intended only to modify, diminish, or augment the debt, rather than extinguish it in order to substitute a new one to it, if they did not explain themselves. *McDonnell v. Alabama Gold Life Ins. Co.*, 5 South. 120, 125, 85 Ala. 401.

In every novation there are four essential requisites: First, a previous valid obligation; second, the agreement of all the parties to the new contract; third, the extinguishment of the old contract; and, fourth, the validity of the new one. *Clark v. Billings*, 59 Ind. 508, 509.

Loose statements of a person to the effect that he would settle the whole indebtedness on his return, and would pay the balance if a balance should remain after application of the proceeds of the sales, did not amount to the substitution of a new obligation upon the same parties, with the intent to extinguish the old obligation and interest thereon, and was not a novation. In *re Sul-*

lenberger's Estate, 14 Pac. 513, 514, 72 Cal. 549.

Novation is made: (1) By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation; (2) by the substitution of a new debtor in the place of the old one, with intent to release the latter; or (3) by the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former. Novation is made by contract, and is subject to all the rules concerning contracts in general. Rev. Codes N. D. 1899, §§ 3828-3830; Civ. Code S. D. 1903, §§ 1181-1183.

As a contract.

A novation is made by contract, and is subject to all the rules concerning contracts in general. *Market St. Ry. Co. v. Hellman*, 42 Pac. 225, 233, 109 Cal. 571; Rev. Codes N. D. 1899, §§ 3828, 3830; Civ. Code S. D. 1903, §§ 1181, 1183.

Novation is a contract containing two stipulations; one to extinguish an existing obligation, the other to substitute a new one in its place. Civ. Code La. 1900, art. 2185.

Novation requires the creation of new contractual relations, as well as the extinguishment of old. There must be a consent of all the parties to the substitution, resulting in the extinction of the old obligation and the creation of a valid new one. *Izzo v. Ludington*, 79 N. Y. Supp. 744, 746, 79 App. Div. 272.

A novation is a new contractual relation. It is based upon a new contract by all the parties interested. It must have the necessary parties to the contract, a valid prior obligation to be displaced, a proper consideration, and a mutual agreement. If A. owes B. a sum of money, and C. agrees to pay the debt of A. to B., and B. agrees to accept C. instead of A. as payor of the debt, and to discharge A. from his original obligation, this is a novation. *Sutter v. Moore Inv. Co.*, 70 Pac. 746, 747, 30 Wash. 333.

Intervention of new creditor.

Novation is a transaction whereby a debtor is discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor by the order of the original creditor. *Griggs v. Day*, 32 N. E. 612, 614, 136 N. Y. 152, 18 L. R. A. 120, 32 Am. St. Rep. 704. And, where several firms are mutually indebted to each other, they may, by agreement among themselves, vary their respective liabilities, and substitute one debt in place of another. *Comer v. Sheehan*, 74 Ala. 452, 456.

A novation may take place by the intervention of a new creditor, where the debtor, for the purpose of being discharged from liability by the order of that creditor, contracts

a new obligation in favor of the new creditor. *Crosby v. Jeroloman*, 37 Ind. 264, 272, 278.

"Novation" is a foreign word, and has its natural meaning only in the civil law. It implies the substitution of a debtor, of a creditor, and of a new contract. *Hamlin v. Drummond*, 39 Atl. 551, 91 Me. 175.

Novation of debt arises when a new contract is entered into with intent to dissolve a former engagement, or when a new debt is substituted for an old one. This novation takes place by the intervention of a new creditor. Where the debtor, for the purpose of being discharged from liability to his original creditor, by the order of that creditor contracts a new obligation in favor of a new creditor, it has all the elements of a novation of a debt, and hence is equivalent to payment of any original debt, if any there was. By the civil law it was known as "delegation of payment," and, where a note was given to borrow money from a new firm to pay a debt due the old firm, this was the creation of a debt to the new firm, and canceled a debt due to the earlier firm, and was a novation, and it was unimportant that some of the persons in the earlier firm were also members of the last firm. *Appeal of Shafer*, 99 Pa. 246, 247.

In the civil law there are three kinds of novation, one of which is where the debt and debtor remain the same, but a new creditor is substituted. *Adams v. Power*, 48 Miss. 450, 454.

Intervention of new debtor.

"In *Kelso v. Fleming*, 3 N. E. 830, 104 Ind. 180, it is said that novation means simply the substitution of one debtor, by mutual agreement, for another." "The consideration appears in the release of one party and the substitution of another." In *Bacon v. Daniels*, 37 Ohio St. 279, where the parties to a contract agreed with a third person that one of the parties should be discharged from the contract and a third person be substituted as vendee, there was a novation authorizing the other party to enforce the original contract according to its terms against the third party. *Bowen v. Young*, 75 N. Y. Supp. 1027, 1030, 37 Misc. Rep. 547.

To constitute novation, it must clearly appear, however, that, where another person becomes a debtor instead of a former debtor, he was so accepted by the creditor, who thereupon discharged the first debtor. In other words, it must be shown that the parties in interest assented to the extinguishment of the old debt. *McCartney v. Klipp*, 33 Atl. 233, 235, 171 Pa. 644.

The most frequent novation is the substitution of a new debtor, and his promise to pay the debt must be a valid and binding

promise to warrant a discharge of the old debtor, and, were it not for the statute of frauds, it would seem that the discharge of the old debtor would be a sufficient consideration to make valid the new promise; but where the discharge of the original debtor also works a discharge of the substituted debtor's debt to him in consideration of the substituted debtor's promise to pay the same to the creditor, the statute does not apply, because the new promise is still to pay his own debt, but to a substituted creditor, and works a complete novation. *Hamlin v. Drummond*, 39 Atl. 551, 91 Me. 175.

A novation takes place by the intervention of a new debtor where another person becomes debtor in his stead, and is accepted by the grantor, who discharges the original debt. *Wallace v. Axtell*, 39 Pac. 594, 595, 5 Colo. App. 432.

In the civil law there are three kinds of novation, one of which is where the debt remains the same but a new debtor is substituted. *Adams v. Power*, 48 Miss. 450, 454.

Continuance of one debtor's liability on release of co-obligor.

The release of one debtor with the consent of his co-obligor, under an agreement for the continuing liability of the latter upon the original contract, itself works what in the civil law is called a "novation," or the substituting a new contract between some or all of the parties in the place of the old one. *Hosack v. Rogers* (N. Y.) 8 Paige, 229, 238.

Extinguishment of old debt.

It is a necessary incident of a novation that the old debt shall have been destroyed by the new arrangement. The discharge of the old debt must be contemporaneous with and result from the consummation of the arrangement with the new debtor. *Bowen v. Young*, 75 N. Y. Supp. 1027, 1030, 37 Misc. Rep. 547 (citing *Kelso v. Fleming*, 3 N. E. 830, 104 Ind. 180).

Novation, at common law, is mainly the same as in the civil law. There must always be an old debt extinguished as a consideration for the new one. Where P. was indebted to S., who was indebted to C. & C., and S. took P.'s note for the amount, having it made payable to C. & C., stating to P. at the time that he desired to hand it to them in settlement of his own debt to them, and the note was accepted by C. & C., the several transactions operated, upon the principle of novation, as an extinguishment of P.'s debt to S., and of S.'s debt to C. & C., by the substitution of the debt created by the note from P. to C. & C. *Adams v. Power*, 48 Miss. 450, 454.

A novation is never presumed, but must be established by the full discharge of the original debt by the express terms of the agreement or the acts of the parties, whose

intention must be clear. So, when defendant purchased and received a deed of a mill site and mill of plaintiff, giving notes for a portion of the purchase money, and afterwards, discovering that another owned an undivided half of a larger tract which included the mill site, purchased such half, and then purchased plaintiff's half of the large tract, receiving a deed covering the whole of the large tract, including the mill site conveyed before, and gave new notes to plaintiff for his half of the large tract, there was not a novation and discharge of the first notes given, in the absence of an agreement to that effect. *Henry v. Nubert* (Tenn.) 35 S. W. 444, 448.

Novation takes place only when the contracting parties expressly disclose that their object in making the new contract is to extinguish the old contract, otherwise the old contract remains in force and the new contract is added to it, and each gives rise to an obligation still in force. *Hard v. Burton*, 20 Atl. 269, 271, 62 Vt. 314.

Presumption.

Novation is never presumed, and must be expressed. *Hamlin v. Drummond*, 39 Atl. 551, 91 Me. 175.

It was a principle of the civil law that there must be an express intention to novate — *animus novandi*. A novation is never presumed. *Sharp v. Fly*, 68 Tenn. (9 Baxt.) 4, 10.

To constitute novation it must clearly appear, however, that a substitution of a new debt for an old one was in fact intended. Novation is not to be presumed, and, in the absence of proof of a special agreement, the mere acceptance of the security of a third person is deemed a conditional payment or the receipt of collateral security. *McCartney v. Kipp*, 33 Atl. 233, 235, 171 Pa. 644.

NOVEL DESIGN.

The words "novel design," in the sense used in patent law, mean a thing of distinct and fixed individuality of appearance, a representation, a picture, a delineation, a device which addresses itself to the senses and taste, and produces pleasure or admiration in its contemplation. *New York Belting & Packing Co. v. New Jersey Car-Spring & Rubber Co.*, 11 Sup. Ct. 195, 137 U. S. 445, 34 L. Ed. 741. A patent on a design on rubber mats was construed, in view of the prior state of the art, to be limited to the individual design presented by the patent, and therefore that the inventor was not entitled to claim anything more than the mere design or patent shown in his drawing. *New York Belting & Packing Co. v. New Jersey Car-Spring & Rubber Co.* (U. S.) 53 Fed. 810, 814, 4 C. C. A. 21.

NOVELTY.

See "Patentable Novelty."

NOW.

The term "now" signifies time present. *Chapman v. Holmes' Ex'rs*, 10 N. J. Law (5 Halst.) 20, 26.

The word "now," in its ordinary acceptation, means at this time, or at the present moment, or at a time contemporaneous with something done. It relates to actual existence of the fact at the time and place mentioned. *Pike v. Kennedy*, 15 Pac. 637, 640, 15 Or. 420.

"Now," as used in a bond describing the mortgagee as being "now" of a certain place, he having at that date his temporary residence in such place, is merely explanatory of the temporary nature of his residence. *Varlick v. Crane*, 4 N. J. Eq. (3 H. W. Green) 128, 131.

"Now," as used by a debtor on the presentation of an obligation, accompanied by demand for payment, stating that he could not pay it "now," as he had two members of his family "now" to support, being used twice, suggests the purpose of future payment when the disability now existing may be removed. *Beeler v. Clarke*, 44 Atl. 1038, 1039, 90 Md. 221, 78 Am. St. Rep. 439.

"Now," as used in a bond in which J. agreed to make, execute, and deliver to H. a good and sufficient deed of conveyance of such interest "as I 'now' have acquired of said H. of the following described lands," etc., means at the present time. *Jeffrey v. Hursh*, 25 N. W. 176, 180, 58 Mich. 246.

A bill of exceptions in a criminal case, which was signed during a term, recited that: "To which ruling of the court the defendant then and there excepted, and time was given until 'now' in which to file his bill of exceptions." To the objection that the bill of exceptions did not show affirmatively that it was filed within the time limited, and that the word "now" was insufficient for that purpose, the court said: "The bill was signed and filed during the term, but it shows that the exception was taken at the time of the ruling, and that time was given until 'now,' which, according to Webster, means at the present time. We think that the bill of exceptions is properly in the record." *Fletcher v. State*, 49 Ind. 124, 135, 19 Am. Rep. 673.

In deed.

"Now," as used in a conveyance of a water right, with the power and appurtenances "as they now exist," means on the day of the execution of the deed. *Ferriss v. Knowles*, 41 Conn. 308, 312.

In lease.

"Now," as used in a lease whereby the lessee agreed to take the fixtures at a valuation, and the lessor agreed to take them at the expiration of the tenancy, "provided they are in as good condition then as they 'now' are," the word "now" referred to the commencement of the tenancy. It was clearly used in opposition to the word "then," which denoted the termination of the term. *White v. Nicholson*, 4 Man. & G. 95, 100.

In statute.

"Now," as used in the Bowman act, inhibiting the Court of Claims from exercising jurisdiction of congressional cases where the claim is "now" barred by virtue of any law, means at the present time; that is, at the time of the passage of the act. *Nutt v. United States* (U. S.) 26 Ct. Cl. 15, 17.

"Now," as used in Bankrupt Law Consolidation Act 1849, 12 & 13 Vict. c. 106, § 224, enacting that every deed or arrangement "now" or hereafter entered into between any such trader and his creditors, and signed by six-sevenths of them in number and value, whose debts amount to 10 pounds, shall be obligatory on all the creditors, is used in its ordinary sense, as importing the present time, and meant nothing more than this: that all arrangements of this description that shall hereafter be entered into and completed shall operate as the statute provides, and all those that have already been entered into shall also come within the scope and operation of the act, provided they are in such a condition that the three months' notice may be given which the act provides as one of the conditions necessary for the purpose of effectually doing justice between those who have been moving parties in the arrangement, in order that all may get the common benefit ever intended in an arrangement under bankruptcy. *Vaugh v. Middleton*, 18 Eng. Law & Eq. 545, 549.

The words "now existing," as used in Act Dec. 18, 1789, providing that all private rights of lands within a certain district shall be determined by the laws now existing in the state, signify the laws in force at the date of the enactment. Opinion of Chief Justice Bibbs. Judge Mills, at page 515, held that "now" referred to the laws in force when Kentucky became a state, and not those at the date of the enactment. *Beard v. Smith*, 22 Ky. (6 T. B. Mon.) 430, 453.

"Now" does not necessarily mean at the present time. For instance, where a statute provided that all instruments in writing now kept, etc., was approved on February 20th, it was nevertheless held that the word "now" referred to the time when the act regulating conveyances of real estate took effect in the subsequent October. In another case, in construing the provision of the bankrupt act of

1849 as to every deed or memorandum "now or hereafter" entered into, it was held that the provision did not apply to such instruments as were entered into and completed before the passing of the statute, but was held to have been used in the sense of "heretofore." *City of St. Louis v. Dorr*, 41 S. W. 1094, 1097, 145 Mo. 468, 42 L. R. A. 686, 68 Am. St. Rep. 575 (citing *Clark v. Lord*, 20 Kan. 390; *Waugh v. Middleton*, 8 Exch. 352).

The term "now," in any provision of a statute referring to other laws in force, or to persons in office, or to any facts or circumstances as existing, relates to the laws in force, or the person in office, or to the facts or circumstances existing, respectively, immediately before the taking effect of such provision. *Laws N. Y. 1892, c. 677, § 9.*

In will.

Under a bequest by a testator of his library of books "now in the custody of B.," books purchased by the testator subsequent to the making of the will, and placed in the custody of B., will pass under the bequest. *All Souls' College v. Coddington*, 1 P. Wms. 597.

"Now living," as used in a will providing that at the death of the testator's wife the property should be equally divided "between all my children that are now living," etc., should be construed to refer to the time of the execution of the will, in opposition to the time of the death of his wife; therefore the will embraced all the children who were living at the time of the execution of the will. *Whitehead v. Lassiter*, 57 N. C. 79, 81.

"Now," as used in a will reciting that it was the testator's intention to give to each of certain children an equal portion, and that the children "now" reside in a certain place, relates to the date of the will. *Jones v. Hunt*, 34 S. W. 693, 694, 96 Tenn. 369.

Testator, after having devised "all the freehold, copyhold and leasehold estates whereof I am now seized in any manner however," added a subsequent clause devising "all such manors, messuages and tenements whatsoever as well freehold, copyhold and leasehold in or now vested in me, or as to the said leasehold premises shall be vested in me at the time of my death." Held, that the concluding words showed that, according to testator's conception, the word "now" would not pass leaseholds of which he might become possessed thereafter, and hence its use, unqualified, in the first clause, operated only from the date of the execution of the will. *Cole v. Scott*, 16 Sim. 259, 264.

Where testatrix bequeathed to her legatee a certain number of shares of stock "now standing in my name on the books of the corporation," the word "now" referred to the time of the writing of the will, and was a be-

quest of the particular shares then standing on the books. *Appeal of Fidelity Ins. Trust & Safe-Deposit Co.*, 1 Atl. 233, 238, 108 Pa. 492, 502.

The word "now," as used in a will devising lands now owned by the testator, refers to the date of the will, and not to the time of the testator's death. *Quinn v. Hardenbrook*, 54 N. Y. 83, 87.

The word "now," in a will directing that a testator's business as now conducted shall be continued by his executor, must refer to the time of testator's death. *Appeal of Allen*, 17 Atl. 453, 125 Pa. 544.

NOW ATTACHES.

"Now attaches," as used in an indorsement on a marine policy, which recites that a vessel has gone out of the course for which it was insured, and that the policy "now attaches" to the vessel on the voyage which it is making, is to be construed as meaning "after and in view of the deviation mentioned." *Lincoln v. Boston Marine Ins. Co.*, 34 N. E. 456, 457, 159 Mass. 337.

NOW BELONGING TO G.

The phrase "now belonging to G.," following the word "park" on a plat of land platted by G., one portion of which is designated as a park "now belonging to G.," does not operate as precluding the instrument from constituting a valid dedication of the park to the city. *City of Bayonne v. Ford*, 43 N. J. Law (14 Vroom) 292, 293.

NOW BEQUEATHED.

"Now bequeathed," as used in a will bequeathing property to certain minors, and directing that they be well educated out of the profits arising from the estate now bequeathed unto them, should be construed as showing an intention on the part of testator that the property should vest in the beneficiaries on the death of testator. *Myers v. Myers* (S. C.) 2 McCord, Eq. 214, 259, 16 Am. Dec. 648.

NOW CONSTRUCTED.

The words "now constructed," in Code, § 1689, providing that, where a railroad is intended to be built between two points where a railroad is now constructed, the general direction and location of such new railroad shall be at least 10 miles from the railroad already constructed, cannot be construed to mean now being constructed, or in the process of construction, but means completely constructed, and therefore the statute does not preclude two railroads in the process of construction from being placed nearer together than 10 miles. *Macon & A. R. Co. v. Macon & D. R. Co.*, 13 S. E. 157, 158, 86 Ga. 83.

NOW LAST PAST.

The words "now last past," in an indictment for an offense on a day now last past, means a day last past before the caption of the indictment. *United States v. La Coste* (U. S.) 26 Fed. Cas. 826, 830.

NOW LIVING.

A devise to the male heirs of the body of B., now living, was held by the King's Bench, in *James v. Richardson*, 1 Vent. 334, which was affirmed in the House of Lords, 1 Eq. Cas. Abr. 214, to be a full description of the son of B. who was then alive, and it was adjudged that the estate vested in him although his father was also alive, the words "now living" being held a sufficient designation of the person who was to take under the will. *Heard v. Horton* (N. Y.) 1 Denio, 165, 167, 43 Am. Dec. 659.

NOW OCCUPIED.

"Now occupied," as used in Act Cong. Aug. 14, 1848 (9 Stat. 323), entitled "An act to establish the territorial government of Oregon," section 1 declaring that the title to land not exceeding 640 acres "now occupied" as missionary stations among the Indians in the territory should be confirmed and established in the several religious societies to which the missionary stations respectively belong, means held in possession, held or kept for use, and does not include lands which were not occupied at the date of the act, but which had been voluntarily abandoned 11 months before, and the occupancy of which the society never resumed, either for missionary or any other purpose. *Missionary Soc. of M. E. Church v. Dalles City*, 2 Sup. Ct. 672, 674, 107 U. S. 336, 27 L. Ed. 545.

"Now occupy," as used in a deed describing the premises as those which the grantors now occupy, and which states that a full description of the property will be found in deeds accompanying the deed, is a sufficient designation of the property as against the grantor and his heirs. *Campbell v. Morgan*, 22 N. Y. Supp. 1001, 1003, 68 Hun, 490.

NOW ON PASSAGE.

As used in a contract for the sale of merchandise described as "now on passage from Singapore and expected to arrive" by a particular vessel, the words "now on passage" constituted a warranty that the goods were then shipped and in process of transportation. *Gorrissen v. Perrin*, 2 C. B. (N. S.) 681, 697.

NOW PAST.

An allegation in an indictment that the act was done on a day of September "now

past" does not, in terms or by reference, state any year. *Commonwealth v. Griffin*, 57 Mass. (3 Cush.) 523, 525.

NOW PROVIDED BY LAW.

"Now provided by law," within the meaning of Pub. Acts 1895, p. 648, c. 308, § 4, requiring that votes on the question of licensing the sale of liquors, cast as by the act provided, shall be counted and returned as now provided by law, has reference to the methods used prior to its enactment, and does not authorize the rejection of double or marked license ballots, as it does not refer to section 9 of the general election law (Pub. Acts 1895, p. 619, c. 267), providing for the rejection of double or marked ballots cast for candidates for office or for educational purposes. *State v. Bossa*, 37 Atl. 977, 979, 69 Conn. 335.

NOW RESIDES.

In a petition for an allowance pending a suit for divorce, averring that the plaintiff now resides and for some while has resided in this county, the term "now resides" is equivalent to the expression "usually resides," required as an averment by Civ. Code, § 76. *Lochnane v. Lochnane*, 78 Ky. 467, 468.

"Now," in an affidavit for an order of publication of summons, stating that personal service could not be made on the defendants for the reason that they had departed and remained absent from the state for more than six consecutive weeks, and "now" reside at a certain place, means at this time, or at the present moment, they live or reside at that place; that is to say, that when the affidavit was made they were then actually living in that place. It is intended to emphasize the fact of actual presence at the place of residence at the time alleged. *Pike v. Kennedy*, 15 Pac. 637, 640, 15 Or. 420.

NOXIOUS.

In an indictment for maintaining a nuisance, the word "noxious" includes the complex idea both of insalubrity and offensiveness, and there was no need to specify particular instances of the effects of it. *Rex v. White*, 1 Burr. 333, 337.

NOXIOUS BUSINESS.

The term "noxious or offensive," in a conveyance of property which contains a provision that the premises are not to be used for any trade or business which may be noxious or offensive to neighboring inhabitants, will not be construed to include a building thereon for use as a residence for nurses, without evidence justifying a conclusion that the building so used will be more noxious to neighboring inhabitants than a building used as a common residence for any other class

of persons. To be included within the general terms mentioned, it must be found as a fact that it is the business which may be in any wise noxious or offensive to the neighboring inhabitants. The definition given to such a covenant by the Court of Appeals (*Rowland v. Miller*, 34 N. E. 765, 139 N. Y. 93, 22 L. R. A. 182) would seem to include the use to which the defendant intends to put these premises. In that case the court said: "We cannot suppose that the parties had in mind any business which might be offensive to a person of supersensitive organization, or to one of a peculiar or abnormal temperament, or to the small class of persons who are generally annoyed by sights, sounds, and objects not offensive to other people. They undoubtedly had in mind ordinary, normal people, and meant to prohibit trades and business which would be offensive to people in general, and thus render the neighborhood to such people undesirable as a place of residence." *Moller v. Presbyterian Hospital*, 72 N. Y. Supp. 483, 65 App. Div. 134.

Where a building is erected for the purpose of manufacturing paraffin oil, and in addition to the want of proper drainage and the smoke and soot, which are sometimes offensive, there is evidence that the treatment of the oil, after it has passed through the process of distillation, by mixing with it sulphuric acid, creates a pungent, offensive, and unwholesome odor, seriously affecting those residing in the immediate vicinity, it justifies a finding that the business carried on is "noxious," within a covenant in a deed that no noxious business shall be carried on on the premises. *Atlantic Dock Co. v. Libby*, 45 N. Y. 499, 502.

NOXIOUS SUBSTANCE OR LIQUID.

Pen. Code, § 216, providing that every person who, with intent to kill, administers or causes or procures to be administered to another any poison or other "noxious or destructive substance or liquid;" but by which death is not caused, shall be punished, does not mean merely such as might when administered be hurtful and injurious, but, like a poison, it must be capable of destroying life. It includes substances which act on the system mechanically so as to destroy life, as well as those which are capable of destroying life by their own inherent qualities. Pulverized glass or boiling water are included within "noxious or destructive substance or liquid," for when administered in sufficient quantities they will destroy life, but they are not poisonous. *People v. Van De-leer*, 53 Cal. 147, 148.

NUDUM PACTUM.

"Nudum pactum" is a voluntary promise, without any other consideration than

mere good will or natural affection. *Justice v. Lang*, 42 N. Y. 493, 497, 1 Am. Rep. 576.

An executory contract without a consideration is called "nudum pactum," or a naked promise. Civ. Code Ga. 1895, § 3656.

A "nude pact" is an agreement without consideration. *Wilmington & W. R. Co. v. Alsbrook*, 14 S. E. 652, 653, 110 N. C. 437.

A promise that cannot be enforced, either at law or in equity, is a mere nudum pactum. It has been held that a mere promise to do an act in the future is a sufficient consideration, even without performance, for an engagement by the other party. But the true principle underlying such doctrine is that the party making it must have incurred a liability to the party to whom it is made, in case he refuses to perform it, for which such other party may have an action for damages. *Wardell v. Williams*, 28 N. W. 796, 800, 62 Mich. 50, 4 Am. St. Rep. 814.

There is no question but that a writing which is a nudum pactum is not the subject of forgery; but a contract which a court will not enforce or even recognize, because it is against the policy of the law, cannot be termed a "nudum pactum." *People v. James*, 42 Pac. 479, 480, 110 Cal. 155. A forged contract, even if it covers a subject-matter which makes it void as against public policy on its face, may present such an appearance that if genuine it might injure another, and therefore it may be a subject of forgery. *People v. Munroe*, 85 Pac. 326, 327, 100 Cal. 664, 24 L. E. A. 33, 38 Am. St. Rep. 823.

NUISANCE.

See "Actionable Nuisance"; "Assize of Nuisance"; "Continuing Nuisance"; "Mixed Nuisance"; "New Nuisance"; "Permanent Nuisance"; "Private Nuisance"; "Public (or Common) Nuisance."

A "nuisance" is defined as anything that worketh hurt, inconvenience, or damage. *Veazie v. Dwinel*, 50 Me. 479, 481 (citing 3 Bl. Comm. 116); *State v. Haines*, 30 Me. (17 Shep.) 65, 74; *State v. Carpenter*, 31 N. W. 730, 732, 68 Wis. 165, 60 Am. St. Rep. 848; *Mohr v. Gault*, 10 Wis. 513, 517, 78 Am. Dec. 687; *Ellis v. Kansas City, St. J. & C. B. R. Co.*, 63 Mo. 131, 135, 21 Am. Rep. 436; *Kansas City v. McAleer*, 31 Mo. App. 433, 436 (citing *North Chicago City Ry. Co. v. Town of Lake View*, 105 Ill. 207, 44 Am. Rep. 788); *Baldwin v. Ensign*, 49 Conn. 113, 117, 44 Am. Rep. 205; *Hoadly v. M. Seward & Son*, 42 Atl. 997, 998, 71 Conn. 640; *Wolcott v. Mellick*, 11 N. J. Eq. (3 Stockt.) 204, 206, 66 Am. Dec. 790; *Meeker v. Van Rensselaer* (N. Y.) 15 Wend. 397, 398; *Rowland v. Miller*, 15 N. Y. Supp. 701; *Trustees of Cin-*

cinnati Southern R. Co. v. Commonwealth, 3 Ky. Law Rep. 639, 640; *Ellis v. American Academy of Music*, 15 Atl. 494, 495, 120 Pa. 608, 6 Am. St. Rep. 739; *Miller v. Burch*, 32 Tex. 208, 210, 5 Am. Rep. 242 (citing 3 Bl. Comm. 216; *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 665); *United States v. Debs* (U. S.) 64 Fed. 724, 739.

A "nuisance" is defined to be anything that unlawfully worketh hurt, inconvenience, or damage; and one of the writers says that the element of illegality should be added to the definition given as above, for many acts which would hurt, inconvenience, or damage, when legalized, cease to be a nuisance. *People v. Metropolitan Telephone & Telegraph Co.* (N. Y.) 11 Abb. N. C. 304, 317.

"Russell, in his treatise on Crimes, says, 'Nuisance' signifieth anything that worketh inconvenience.'" *State v. City of Mobile* (Ala.) 5 Port. 279, 311, 30 Am. Dec. 564 (citing 1 Russell on Crimes, 295).

Whatever unlawfully annoys or does damage to another is a nuisance. *United States v. Douglas-Willan-Sartoris Co.*, 22 Pac. 92, 94, 3 Wyo. 287.

A "nuisance," as ordinarily understood, is that which is offensive and annoys and disturbs. *Bohan v. Port Jervis Gaslight Co.*, 25 N. E. 246, 122 N. Y. 18, 9 L. R. A. 711.

A nuisance "is that which disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable," *Baltimore & P. R. Co. v. Fifth Baptist Church*, 2 Sup. Ct. 719, 726, 137 U. S. 568, 34 L. Ed. 784; or physically impossible, *Id.*; or materially uncomfortable, *Snyder v. Cabell*, 1 S. E. 241, 243, 29 W. Va. 48.

Where the thing done or maintained may be injurious to property and affect the free use of it, it is a nuisance. *North Point Canal. Irr. Co. v. Utah & S. L. Canal Co.*, 52 Pac. 168, 174, 16 Utah, 246, 40 L. R. A. 851, 67 Am. St. Rep. 607.

The term "nuisance," derived from the French word "nuire," to do hurt or annoy, is applied in the English law indiscriminately to infringements upon the enjoyment of proprietary and personal rights (citing *Add. Torts*, 155, "Nuisance"); something noxious or offensive; anything not authorized by law which maketh hurt, inconvenience, or damage. *Village of Cardington v. Frederick's Adm'r*, 21 N. E. 766, 767, 46 Ohio St. 442.

All acts put forth by men which tend directly to create evil consequences to the community at large may be deemed nuisances, where they are of such magnitude as to require the interposition of the courts. *Mohr v. Gault*, 10 Wis. 513, 517, 78 Am. Dec. 687.

"Nuisance" is a term for all practices, avocations, erections, establishments, etc.,

against which courts will give relief, although they are not intrinsically criminal, because of their tendency to create annoyance, ill health, or inconvenience. *Gifford v. Hulett*, 19 Atl. 230, 231, 62 Vt. 342.

Anything not warranted by law, which annoys and disturbs one in the use of his property, rendering its ordinary use and occupation physically uncomfortable to him, is a nuisance. If the annoyance is such as to materially interfere with the ordinary comfort of human existence, it is a nuisance. *Nolan v. City of New Britain*, 38 Atl. 703, 706, 69 Conn. 668.

"Nuisance," in legal phraseology, is a term applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his property, real or personal. Every enjoyment by him of his own property which violates the rights of another is, in an essential degree, a nuisance. *George v. Wabash Western R. Co.*, 40 Mo. App. 433, 438.

A "nuisance," in the ordinary sense in which the word is used, is anything that produces an annoyance—anything that disturbs one or is offensive; but in legal phraseology it is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or injury to a right of another or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage. *Ex parte Foote*, 65 S. W. 706, 707, 708, 70 Ark. 12, 91 Am. St. Rep. 63 (citing 1 Wood, Nuis. [3d Ed.] § 1); *Rowland v. Miller*, 15 N. Y. Supp. 701, 702; *State v. Beardsley*, 79 N. W. 138, 141, 108 Iowa, 396; *Henson v. Beckwith*, 37 Atl. 702, 703, 20 R. I. 165, 38 L. R. A. 716; *Farrell v. Cook*, 16 Neb. 483, 484, 485, 20 N. W. 720, 49 Am. Rep. 721. But not every use of one's own property that works an injury to the property of another will be declared a nuisance. The foundation of the interference of equity in restraint of nuisances rests in the necessity of preventing irreparable mischief and multiplicity of suits. *Bliss v. Grayson*, 56 Pac. 231, 240, 24 Nev. 422.

"Nuisances" may be thus classified: First, those which in their nature are nuisances per se, or so denounced by the common law or by statute; second, those which in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be conducted; third, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. *City of Carthage v. Munsell*, 67 N. E. 831, 832, 203 Ill. 474 (citing

Langel v. City of Bushnell, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266).

A nuisance is a tort. It is the use of one's own property which involves injury to the property or other right or interest of his neighbors. In short, it is an incident of the ownership of the property that the owner shall so use and control it that injury may not come to another's property or person. *Merrill v. City of St. Louis*, 83 Mo. 244, 255, 53 Am. Rep. 576.

A nuisance in a navigable water is an injury to a *jus publicum*, or common right of the public to navigate the waters. *The Idlewild*, 64 Fed. 603, 605, 12 C. C. A. 328.

The mere fears of men, although reasonable, will not constitute a nuisance. *Coulson v. White*, 3 Atk. 21. A nuisance presupposes something noisome to the neighborhood, or dangerous to the people in their common and legitimate walks, or obstructing common convenience. *Jarvis v. Pinckney* (S. C.) 3 Hill, 123, 138.

Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. *Comp. Laws Nev.* 1900, § 3346; *Code Civ. Proc. Cal.* 1903, § 731; *Courtwright v. Bear River & A. Water & Mining Co.*, 30 Cal. 573, 575, 576; *Rev. St. Utah*, 1898, § 3506; *Shroyer v. Campbell*, 67 N. E. 193, 194, 31 Ind. App. 83; *Paragon Paper Co. v. State*, 49 N. E. 600, 602, 19 Ind. App. 314; *State v. Herring*, 48 N. E. 598, 599, 21 Ind. App. 157, 69 Am. St. Rep. 351; *Northern Pac. R. Co. v. Whalen*, 13 Sup. Ct. 822, 824, 149 U. S. 157, 37 L. Ed. 686.

Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of life or property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. *Civ. Code Idaho* 1901, § 3373.

Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance. *Civ. Code Cal.* 1903, § 3479; *People v. Park & O. R. Co.*, 18 Pac. 141, 143, 76 Cal. 156; *Civ. Code Idaho* 1901, § 2964; *Civ. Code Mont.* 1895, § 4550.

A nuisance consists in unlawfully doing an act or omitting to perform a duty, which act or omission either (1) annoys, injures, or endangers the comfort, repose, health, or safety of others; or (2) offends decency; or

(3) unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake or navigable river, bay, stream, canal, or basin, or any public park, square, street, or highway; or (4) in any way renders other persons insecure in life or in the use of property. Rev. Codes N. D. 1899, § 5056; Civ. Code S. D. 1903, § 2393; Rev. St. Okl. 1903, § 3717; Ballinger's Ann. Codes & St. Wash. 1897, § 3086; State v. Paggett, 36 Pac. 487, 488, 8 Wash. 579.

A nuisance is anything that worketh hurt, inconvenience, or damage to another, and the fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, or such as would affect one of fastidious taste, but it must be one that would affect an ordinary, reasonable man. Civ. Code Ga. 1895, § 3861; *Phinizy v. City Council of Augusta*, 47 Ga. 260, 266.

Injury to health.

To constitute a nuisance, it is not necessary that the nefarious trade or business should endanger the health of the neighborhood. *Catlin v. Valentine* (N. Y.) 9 Paige, 575, 576, 38 Am. Dec. 567. See, also, *Rowland v. Miller*, 15 N. Y. Supp. 701, 702; *State v. Luce* (Del.) 32 Atl. 1076, 9 Houst. 396.

If one do an act of itself lawful, which, being done in a particular place, necessarily tends to the damage of another's property, it is a nuisance, or it is incumbent on him to find some other place to do that act where it will not be injurious or offensive. To constitute a nuisance, it is not necessary that the noxious trade or business should endanger the health of the neighborhood; it is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. *Coker v. Birge*, 9 Ga. 425, 428, 54 Am. Dec. 347.

A nuisance, to be indictable, must have within its range either the community generally, or those persons passing and repassing on a public road. It is not necessary, in order to make an alleged nuisance indictable, that it should be detrimental to the public health. It is sufficient for this purpose if it be generally offensive to the sense of smell, so far as concerns the public, or if in any other way it produces general physical discomfort. *West v. State*, 71 S. W. 483, 484, 71 Ark. 144.

Physical injury to property.

Nuisance is a species of invasion of another's property producing injury, or consequential injury, by agencies wrongfully operating outside of the property injured. Wood, Nuis. (2d Ed.) § 13. But to bring an actionable nuisance, either private or mixed,

within the act of 1892, 21 St. p. 18, providing that causes of action for and in respect to any and all injuries and trespasses to and on real estate shall survive both to and against the persons or representatives of deceased persons, the nuisance must produce some physical injury to the real estate of another, as distinguished from mere discomfort, or inconvenience, or bodily injury to the person of the owner. If the nuisance merely operates upon the mind or body of the owner, and does not injuriously affect the property itself in some material manner, it is not within the statute. For illustration, noise may, under certain circumstances, become a nuisance to the owner of a dwelling, but if the atmospheric vibrations merely cause annoyance to the owner through his sense of hearing, that would not be an injury to his real estate in the sense of the statute; but if the atmospheric vibrations wrongfully set in motion by another were such as to shake the owner's dwelling, so as to materially affect it as a dwelling place, or weaken its fastenings, or break the window glass, or crack the plastering, and the like, such physical injuries to the real estate would be fairly included within the language of the statute. So also smoke, dust, cinders, etc., may become a nuisance, but action therefor will not survive under the statute unless they injuriously and materially affect the physical condition of the real property, as distinguished from mere annoyance, discomfort, inconvenience, or injury to the person. *Allen v. Union Oil & Mfg. Co.*, 38 S. E. 274, 277, 59 S. C. 571.

Nuisance, to an extent, is a question of locality and degree. In considering whether an act is a nuisance, regard must be had not only to the thing done, but to the surrounding circumstances. What would be a nuisance in one neighborhood might not be so in another. A lawful trade may be so offensive that it should be carried on only in an out-of-the-way place. Blackstone defines "nuisance" as being anything to the hurt or annoyance of another. By "hurt or annoyance" here is meant not a physical injury necessarily, but an injury to the owner or possessor of premises as respects his dealings with or his mode of enjoying them. *Rowland v. Miller*, 15 N. Y. Supp. 701, 702.

Nuisances arise from a misuse of property, real or personal, or from a person's own improper conduct, but the idea of a "nuisance" generally is associated with and more commonly arises from the wrongful use of real property. It is only in special and infrequent instances that it arises otherwise. Nuisances are always injuries that result as a consequence of an act done outside of the property injured, and are the indirect and remote effects of an act, rather than a direct and immediate consequence. It is a species of invasion of another's property by

agencies operating entirely outside of the property itself, and imperceptible and invisible except in the results produced, which are often even themselves not visible, and whose presence at times is only appreciable by one of the senses, and that, generally, not by the sense of seeing. *Durfee v. Granite Mountain Min. Co.*, 33 Pac. 3, 4, 13 Mont. 181.

The erection of a wharf, a railroad bridge, a planing mill, a stable, a cotton gin, blacksmith shop, or a distillery, will not be enjoined as a nuisance where the injury is only a possible and contingent one. *Pfingst v. Senn* (Ky.) 23 S. W. 358, 360, 21 L. R. A. 569.

The law will not declare a thing a nuisance because it is unsightly and disfigured, nor because it is not in a proper and suitable condition, nor because it is unpleasant to the eye and a violation of the rules of propriety and good taste, nor because the property of another is rendered less valuable. No fanciful notions are recognized. The law does not cater to men's tastes, nor consult their convenience merely. It guards and upholds their material rights, and shields them from unwarrantable invasion. *Woodstock Burying-Ground Ass'n v. Hager*, 35 Atl. 431, 432, 68 Vt. 488.

Material injury.

It has always been the law that, in order to subject one to an action for nuisance, the injury must be material and substantial. It must not be a figment of the imagination; it must be tangible. In *Columbus Gaslight & Coke Co. v. Freeland*, 12 Ohio St. 392, the court said: "What amount of annoyance or inconvenience will constitute a nuisance, being a question of degree, dependent on various circumstances, cannot be precisely defined. Only conduct which is a nuisance *per se* is at all times and under all circumstances a nuisance, though there are some lawful trades which, by reason of unavoidable noxiousness and offenses, are *prima facie* nuisances." *Eller v. Koehler*, 67 N. E. 89, 90, 68 Ohio St. 51.

Persons affected.

A thing may be a nuisance although it affects only one person. *Emory v. Hazard Powder Co.*, 22 S. C. 476, 481, 53 Am. Rep. 730.

The inquiry in determining whether or not a business is a nuisance is not whether the business is obnoxious to this or that individual, but whether it is of such a character as to be obnoxious to mankind generally, similarly situated. Before the court can condemn a trade or calling as a nuisance, it must appear that it cannot be carried on without working injury or harm to another, and that injury or harm must be such as

would affect all reasonable persons alike, similarly situated. *Westcott v. Middleton*, 11 Atl. 490, 494, 43 N. J. Eq. (16 Stew.) 478.

A charge of a nuisance, if it be of a thing offensive to persons generally, cannot be escaped by showing that to some persons it is not at all unpleasant or disagreeable. The standard to be followed in determining whether anything is a nuisance is the ordinary standard of comfort and convenience, and not particular or exceptional cases above, nor, it may be added, below. Regard should be had to the notions of comfort and convenience entertained by persons generally, of ordinary tastes and susceptibilities. *Columbus Gaslight & Coke Co. v. Freeland*, 12 Ohio St. 392, 399.

Purpresture distinguished.

See "Purpresture."

Violation of right.

The test of nuisance is not injury and damage simply, but injury and damages resulting from the violation of the legal right of another. If there is no right violated, there is no nuisance, however much of injury and damage may ensue; but if a right is violated, there is an actionable nuisance, even though no actual damage results therefrom. *Paddock v. Somes*, 14 S. W. 748, 749, 102 Mo. 226, 10 L. R. A. 254.

A nuisance consists in the omission or commission of an act whereby others are annoyed and their rights violated. More briefly, it is unlawful annoyance of others. There must be an annoyance as well as a wrong done, otherwise every wrong would be a nuisance. A violation of right must attend the annoyance, for, if the law justifies the act, no one has a right to say that he is annoyed by it. *State v. Commissioners of Cross Roads* (S. C.) 3 Hill, 149, 152.

Banking without authority.

The exercise of a banking privilege without authority is not a nuisance. It is not necessarily injurious to the public health, convenience, or morals. *Attorney General v. Bank of Niagara* (N. Y.) Hopk. Ch. 354, 360.

Billiard room or bowling alley.

A pool and billiard room, or like place of amusement, kept for games, may or may not be a nuisance, according to the nature of the amusement, and manner in which the place is conducted, and its location. Allegations by certain neighboring residents in a large city of the former use of certain premises as a pleasure resort garden with tenpins and band music till early morning, that the noise kept the neighborhood awake, and caused crowds of idle and disorderly persons to be attracted and become a nuisance in the streets, are held not to clearly

make out a case of nuisance. *Pfingst v. Senn* (Ky.) 23 S. W. 358, 360, 21 L. R. A. 569.

A nuisance is any kind of place dedicated to sports or amusements having no useful end, and notoriously fitted up, and continued with a view to make a profit for the owner; and hence a bowling alley kept and run for gain is a public nuisance at common law, for establishments of such kind are at best, or even when used without hire, very noisy, and have a tendency to collect idle people and detain them from their business. When built and kept on foot for gain, the owner is interested to invite and procure as full an attendance as possible day after day, and for this purpose temptations beyond mere amusement are often resorted to, such as drinking and gambling, and it is none the less a public nuisance because the play is conducted under the supervision of the owner and gambling therein is expressly prohibited. *Tanner v. Village of Albion* (N. Y.) 5 Hill, 121, 124, 40 Am. Dec. 337.

Brickyard.

A brickyard in which bricks were burned by the use of mineral coal as a fuel, generating in quantities sulphurous acid gas, which, being poisonous to vegetation, destroyed ornamental trees on improved adjoining lands, held to be a nuisance. *Campbell v. Seaman* (N. Y.) 2 Thomp. & C. 231, 239.

Building on land of another.

A tollhouse abandoned by a turnpike company, which had erected it partly on the land of another, under license, in consideration of permitting the owner to use the road, became a nuisance on such abandonment, both on the road and on the land. *Lancaster Turnpike Co. v. Rogers*, 2 Pa. (2 Barr) 114, 115, 44 Am. Dec. 179.

Cattle and hog pens.

Cattle and hog pens, erected near a hotel and boarding house, held to constitute a nuisance. *Ohio & M. Ry. Co. v. Simon*, 40 Ind. 278, 284, 285.

What constitutes a nuisance is a question of law for the determination of the court. There may be some difficulty in some cases in determining what is a nuisance. The term has not been very distinctly defined in the books, and it is said that a slight inconvenience will not create a nuisance for which an action will lie. But while cases may be imagined and stated in which the amount of inconvenience or injury might be important in determining whether the acts charged constituted a nuisance or not, a case arising from the unwholesome vapors caused by a distillery, with sties in which a large quantity of hogs are kept, rendering the waters of a creek adjoining unwholesome, is not one of them, such facts constituting a

nuisance. *Smiths v. McConathy*, 11 Mo. 517, 518.

Debauchery in rooms of boarding house.

A wrong which arises from the unreasonable or unlawful use by a person of his own premises, or from his own indecent or unlawful personal conduct, and works an injury to the rights of another, is a nuisance. See Wood, Nuls. § 1, and cases cited. Smith, in his Manual of the Common Law, says a nuisance is something done which has the effect of prejudicially and unwarrantably affecting the enjoyment and rights of another person. See, also, *Aldrich v. Howard*, 8 R. I. 246. Of course, it must arise from some unlawful act, for that which is lawful can never be a nuisance. Some legal right must be violated, and some material annoyance, injury, or damage sustained thereby. But where there is a material injury, damage is implied, and it results from the violation of a legal right; and hence one who wrongfully injured the good name of a boarding house by using rooms therein for purposes of debauchery was guilty of an actionable nuisance. *Sullivan v. Waterman*, 39 Atl. 243, 244, 20 R. I. 372, 39 L. R. A. 773.

Disorderly house.

A mere doggery, or any kind of a disorderly house, is a nuisance, even though it is licensed to sell liquor. *Wishart v. Newell*, 4 Pa. Co. Ct. R. 141, 145.

Fire engine house.

A fire engine house in a city is not a nuisance. *Van de Vere v. Kansas City*, 17 S. W. 695, 696, 107 Mo. 83, 28 Am. St. Rep. 396.

Frame building.

It is held that though a frame building erected in a closely built up portion of the town, in violation of a lawful ordinance prohibiting it, may be said to be a nuisance, owing to the danger from fire, it is not such a nuisance as would justify a private person in abating it. *Klingler v. Bickel*, 11 Atl. 555, 558, 117 Pa. 326.

Gambling and lotteries.

The term "nuisance," at common law, included both gambling and lotteries. In re Smith, 39 Pac. 707, 708, 54 Kan. 702.

Horse at large.

A horse or colt at large on the highway, contrary to law, is a nuisance. Where such an animal is at large, causing injury to persons or property, the owner is liable, without reference to the question whether the animal is vicious. The damage is regarded as the consequence of the negligence of the owner in allowing the animal to be im-

properly at large. *Baldwin v. Ensign*, 49 Conn. 113, 117, 44 Am. Rep. 205.

Hubstones.

The term "nuisance" imports something that annoys the public, and does not embrace hubstones, which are useful, if not necessary, appliances in streets to keep trucks in their proper place and prevent them from sliding into places where they may receive and do damage. *Jordan v. City of New York*, 55 N. Y. Supp. 716, 718, 26 Misc. Rep. 53.

Insertion of joists in adjoining wall.

A nuisance is said to be a wrongful act or neglect of one man, in the use or management of his land, which occasions damages to the possession or easement of his neighbor, or to a public easement. *Gibbon*, 360. The act of one who, in building a house, inserts his joists in the wall of an adjoining building, without license, is not necessarily a technical nuisance. *Rankin v. Charles*, 19 Mo. 490, 493, 61 Am. Dec. 574.

Invasion of franchise.

It seems that at common law the invasion of a ferry franchise is a nuisance, and the party aggrieved has his remedy at law by an action on the case for a disturbance, and in modern practice he usually resorts to chancery to stay the injurious interference and to prevent a multiplicity of suits. A party may have a franchise though it be not exclusive of the right of the state to grant another, and, having it, no reason is apparent why he should not have it protected against infringement by another who has no franchise. *Green v. Ivey* (Fla.) 33 South. 711, 714.

Jacks and stallions.

The keeping and standing of jacks and stallions within the immediate view of a private dwelling, the noise of the animals being heard both day and night, held to be a nuisance. *Hayden v. Tucker*, 37 Mo. 214, 221.

Hospital.

The use of a building, in a portion of a city entirely given up to residences, as a hospital for the care of sick infants, and any who may develop, after admission, contagious diseases, is a nuisance. *Gilford v. Babies' Hospital*, 1 N. Y. Supp. 448, 449, 21 Abb. N. C. 159.

Milldam.

A milldam is not necessarily a nuisance, but it becomes a nuisance when it obstructs the water to such an extent that it overflows its banks and the surrounding country, and stagnates and becomes dead in pools, whereby the air is infected with noxious and unwholesome vapors, and the health of the adjoining country is sensibly impaired. The

fact that the particular dam complained of is not more injurious to the public health or enjoyment of life than is common to such structures does not prevent it from being a nuisance, nor does the fact that it was erected before any inhabitants had settled along the margin of the stream flowed by it affect the question. *Douglass v. State*, 4 Wis. 387, 390.

Noises, odors, gases, and smoke.

The pollution of the atmosphere with noxious or offensive effluvia, gases, stench, or vapors, thereby producing material discomfort and annoyance, or injury to health or the enjoyment of property, is such an invasion of a right as to create a nuisance. *Kolb v. Knoxville* (Tenn.) 76 S. W. 823, 824.

Smells and odors that contaminate and pollute the air so as to substantially render the adjacent property unfit for enjoyment constitute a nuisance, and it is not necessary that the adjacent owner be actually driven from his dwelling. *Bohan v. Port Jervis Gaslight Co.*, 122 N. Y. 18, 32, 25 N. E. 246, 9 L. R. A. 711.

Nuisances in one's own dwelling are all acts done by another from without which render life within the house uncomfortable, whether it be by affecting the air with noisome smells or by gas injurious to the health; and where a railroad company permitted a horse, killed by its locomotive, to remain on the side of the track so near a house occupied by plaintiff as to render its occupancy unwholesome, it was guilty of private nuisance. *Ellis v. Kansas City, St. J. & O. B. R. Co.*, 63 Mo. 131, 135, 21 Am. Rep. 436.

A nuisance may be offensive to the sense of smell, sight, or hearing. In the prosecution of a business, offensive odors may be cast off, unusual and offensive noises may be given out, fluid substances may escape into a neighbor's well, and one may do or cause to be done that which is offensive to the eye. In either case it may become a nuisance. *North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.*, 52 Pac. 168, 174, 16 Utah, 246, 40 L. R. A. 851, 67 Am. St. Rep. 607.

Any business which necessarily and constantly impregnates large volumes of the atmosphere with disagreeable, unwholesome, or offensive matter is a nuisance. *Pennoyer v. Allen*, 14 N. W. 609, 56 Wis. 502, 43 Am. Rep. 728.

"The term 'nuisance' includes any trade or business carried on in a town or populous neighborhood, or near a road or highway, which produces obnoxious or offensive smells, to the annoyance of the neighborhood or persons traveling along a public road. It is not necessary that the smells should be injurious to the health; it is sufficient if they are of-

fensive to the senses." *State v. Luce* (Del.) 32 Atl. 1076, 9 Houst. 396.

Nuisances in one's dwelling are all the acts done by another, from without, which render life within the house uncomfortable, either by infecting the air with noisome smells, or with gases injurious to the health. *San Antonio & A. Ry. Co. v. Gwynn* (Tex.) 15 S. W. 509, 511.

Blackstone says: "If one does any * * * act, in itself lawful, which being done in that place necessarily tends to the damage of another's property, it is a nuisance." That a nuisance may be created by smoke, noise, noxious vapors, or other physical disturbance of the enjoyment of property is a proposition in accordance with sound principles, and is well supported by authority. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739; *Wood, Nuis.* § 611, and cases cited; *Jeffersonville, M. & I. R. Co. v. Esterle*, 76 Ky. (13 Bush) 667; *Bangor & P. R. Co. v. McComb*, 60 Me. 290. Consequently, any business carried on by a natural person upon his own land, which by reason of the noise, smoke, and vibration caused by the operation of powerful machinery materially diminishes the enjoyment of the property of another, and renders it less desirable as a residence, and depreciates its market value, is a nuisance at common law. Const. art. 1, § 17, provides that no person's property shall be taken or damaged for public use without adequate compensation being paid; meaning thereby that the Legislature shall not authorize a corporation to do an act for a public use which, if done by an individual without legislative sanction, would be actionable, and at the same time exempt it from liability to respond in damages to the owner whose property had been injured. Held, under such construction of the Constitution and the definitions of "nuisance" above given, that one could recover for damages to the value of his property arising from the noise, smoke, and noxious vapors produced by the operation of a railroad near the property. *Gainesville, H. & W. R. Co. v. Hall*, 14 S. W. 259, 260, 78 Tex. 169, 9 L. R. A. 298, 22 Am. St. Rep. 42.

As a general proposition, the carrying on of any business obnoxious to the neighborhood by reason of smoke, clinders, offensive odors, or noxious gases is a nuisance. A person is entitled to the enjoyment of pure air and water on his premises, and that which pollutes either, in passing over or through his premises, to the extent of rendering life uncomfortable, may be considered a nuisance. The question is whether the annoyance is such as to materially interfere with the comfort of human existence. It is not sufficient that the injury is accidental and occasional, but it must be permanent and repeated. The inconvenience must not be fan-

ciful, or one of mere delicacy or fastidiousness, but an inconvenience inconsistent with the ordinary comforts of human existence, and not merely according to delicate habits of life, but according to the plain, simple habits among the English people. Smoke and noxious odors do not always constitute a nuisance. In determining this question, everything must be looked at from a reasonable point of view. An injury which affects a person's comfort and happiness may or may not be a nuisance according to the locality in which it operates. If one voluntarily moves into a town or neighborhood where smoke and noxious gases abound, it may be presumed that he does so for sufficient reasons, and he should not be permitted to go into a court of equity and restrict the industries already established, and on which the business interests and welfare of the community may depend. *Tuttle v. Church* (U. S.) 53 Fed. 422, 425.

Object frightening horse.

An object in a street which is of such form or character that it is calculated to frighten horses of ordinary gentleness is an obstruction in the nature of a nuisance, and any one who shall place or maintain it is ordinarily liable for the consequences likely to arise. *Tinker v. New York, O. & W. R. Co.*, 24 N. Y. Supp. 977, 980, 71 Hun. 431.

A handcar left on the road, on which were hanging buckets and clothing, by reason of which the horses of people passing the road were frightened, constituted a nuisance. *Cincinnati Southern Ry. v. Commonwealth*, 3 Ky. Law Rep. 639, 640; *Cincinnati R. Co. v. Same*, 80 Ky. 137, 138.

Obstruction in highway.

Any act or obstruction which unnecessarily incommodes or impedes the lawful use of a highway of the public is a nuisance. *State v. Carpenter*, 31 N. W. 730, 732, 68 Wis. 165, 60 Am. Rep. 848 (citing Ang. Highw. § 223). Thus it is a nuisance at common law to dig a ditch, or make a hedge, or erect a gate or fence across it, or a building on it. An actual encroachment upon a highway is a nuisance, even though it does not operate as an actual obstruction of public travel. *Commonwealth v. McNaugher*, 18 Atl. 934, 935, 131 Pa. 55. A city creating such an obstruction in its streets is as guilty of creating a nuisance as an individual would be. *Hughes v. City of Fond du Lac*, 41 N. W. 407, 408, 73 Wis. 380.

A nuisance in a highway must be some encroachment or erection therein which hinders, impedes, or obstructs the use of the road by the public. *Strickland v. Woolworth* (N. Y.) 3 Thomp. & C. 286, 287.

A nuisance is something wrongfully done or permitted which injures or annoys

another in the enjoyment of his legal rights. The unauthorized or unlawful obstruction of a street is a nuisance, while that which is authorized by competent legal authority cannot in law constitute a nuisance. In *Garrett v. Lake Roland Elevated Ry. Co.*, 29 Atl. 830, 79 Md. 277, 24 L. R. A. 896, it was held that the location of an abutment in a public street, to be used as an approach to an elevated railway, when authorized by the ordinance of a city, was not a nuisance. Therefore, when the authorities of a municipality, invested by the Legislature with authority so to do, constructed an improvement in a public street, such improvement is not a nuisance, though it causes damage to adjacent property and interferes with the owner's enjoyment thereof, and though such improvement was negligently constructed. *City of Omaha v. Flood*, 77 N. W. 379, 881, 57 Neb. 124.

Any contracting of a highway is a nuisance, it not being essential that the road should be unsafe or impassable. Any obstruction left in the road, or omission to repair it, whereby it is less convenient for public use, falls within the same category; but while an encroachment upon a highway is a nuisance, it is not in all cases a public nuisance such as will justify its removal by any individual. *Anderson v. Young*, 21 N. Y. Supp. 172, 174, 66 Hun, 240.

The obstruction of a public highway is without doubt a public nuisance, but this of itself is not sufficient to justify the interposition of equity in behalf of a plaintiff, unless he sustains some private, direct, and material damage beyond the public at large. *Luhre v. Sturtevant*, 10 Or. 170, 171.

A permanent encroachment on a public street for a private use is in law a nuisance. An awning in a street, erected pursuant to the order of a city council conferring authority on the person to erect the awning, is a nuisance where the order conferring the authority is contrary to the charter. *Hibbard, Spencer, Bartlett & Co. v. City of Chicago*, 50 N. E. 256, 257, 173 Ill. 91, 40 L. R. A. 621.

Every obstruction in a common and public highway is not necessarily a nuisance. Trees, awning posts, hay scales, and hydrants meet the traveler at every step, and yet no one regards them as nuisances. A flight of steps from the street to the second story of a house would not be a nuisance as a matter of law. The definition of a "nuisance" necessarily implies annoyance or offensiveness to the public. *People v. Carpenter*, 1 Mich. (Man.) 273, 288.

Any building erected or continued on any town or private way is a nuisance. St. 1821, c. 118, §§ 25, 26; In re *Sevey*, 6 Me. (6 Greenl.) 118, 123.

Pen. Code, § 385, defines a "nuisance" as consisting, among other things, of an act which "unlawfully interferes with, or obstructs or tends to obstruct, . . . a public street or highway." A wall of masonry erected along the middle of the highway by a surface railroad company to connect its tracks with those of an elevated railroad company, without any competent legal authority for such erection, constitutes a nuisance. *Eldert v. Long Island Electric Ry. Co.*, 51 N. Y. Supp. 186, 189, 28 App. Div. 451.

Same—Railroad.

A railroad running through the streets of a city, not materially interfering with the use of the street for ordinary purposes, nor injuring the value of the abutting property, cannot be deemed a nuisance. *Hamilton v. New York & H. R. Co.* (N. Y.) 9 Paige, 171, 173.

Gen. St. § 2373, provides that anything which is injurious to health or an obstruction to the free use of property, so as to interfere with the comfort and enjoyment of life or property, is a nuisance. And under this statute it is held that a steam railroad and railroad track laid on wooden ties and rails 6 or 8 inches above the level of the street, and running along the middle of a street 80 feet wide, is not such a special and peculiar injury to the residents of that street, different in its nature as to danger of fire, danger to vehicles, foot passengers and children, from that sustained by the general public, as will warrant its abatement as a nuisance. *Fogg v. Nevada C. O. Ry. Co.*, 23 Pac. 840, 841, 20 Nev. 429.

A railroad within a city, so constructed as not to occupy the street in which it is placed, or any portion of it, exclusively—every part, as well that in which the rails are placed as the rest, being generally open and free for ordinary purposes—cannot be deemed either a purpresture or a nuisance. *Lexington & O. R. Co. v. Applegate*, 38 Ky (8 Dana) 289, 299, 33 Am. Dec. 497.

Obstruction of navigation.

An obstruction placed in a public way, such as a public navigable river, without right, is a nuisance, and the courts will not inquire whether the advantage arising from the obstruction will compensate for the injury and inconvenience which the public will suffer from it. *People v. Vanderbilt* (N. Y.) 38 Barb. 282, 287.

All erections and impediments made by the owners of adjacent lands to the free use of rivers which are navigable for boats and rafts are deemed nuisances. *Veazie v. Dwinel*, 50 Me. 479, 482 (citing 3 Kent, Comm. 411).

A nuisance does not consist in obstructing a river, but in obstructing the use of the river as a navigable stream by the public. One may have no right whatever to erect a building over a stream that may obstruct its navigation, and by so doing he may be technically guilty of a public wrong, and still not create a nuisance which equity will restrain. *State v. Carpenter*, 81 N. W. 730, 732, 68 Wis. 165, 60 Am. Rep. 848.

Every citizen has a right to the free navigation of the public waters of the United States, and any interruption or obstruction of this free use by any kind of a structure is *prima facie* a nuisance. But the power of Congress to regulate commerce among the states comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States, and the railroads engaged in interstate commerce. Interstate commerce by rail has grown to be more extensive and important than that carried on upon the navigable waters of the country. To promote and facilitate the commerce by rail, which has to cross navigable streams, it has become common for Congress to authorize the construction of bridges over the navigable rivers of the United States. Congress has the power to determine the location, plan, and mode of construction of such bridges, and a bridge constructed over a navigable river in accordance with the requirements of the act of Congress is a lawful structure, however much it may interfere with the public right of navigation. *Texarkana & Ft. S. Ry. Co. v. Parsons* (U. S.) 74 Fed. 408, 410, 20 C. C. A. 481.

Outflow of private sewer.

The outflow of a private sewer on the land of another is not a nuisance within the meaning of Pub. St. c. 80, § 28, providing that land, not in a city, which is wet, rotten, spongy, or covered with stagnant water, shall be termed a "nuisance," so as to authorize the board of health to abate the same by construction of drains across the land. *Huse v. Amesbury Board of Health*, 39 N. E. 1023, 163 Mass. 240.

Overhanging wall.

A wall so built as to overhang the property of another is a nuisance. *Langfeldt v. McGrath*, 33 Ill. App. 158, 161.

Place of unlawful sale of liquor.

A place used as a place of resort where intoxicating liquor is unlawfully sold, furnished, or given away, or is kept for selling, furnishing, or giving away unlawfully, is a common nuisance, kept in violation of law. *State v. McGill*, 27 Atl. 480, 481, 65 Vt. 547.

A "nuisance" is defined by Act 1876, entitled "An act to abate and suppress nuisances," to be every saloon, restaurant, gro-

cery, cellar, shop, billiard room, drinking place, or room used as a place of public amusement, where spirituous or malt liquors of any kind, or intoxicating drinks, are unlawfully sold, furnished, or given away, or kept for selling or giving away unlawfully. *State v. Lincoln*, 50 Vt. 644, 648.

"The crime of nuisance consists in the keeping or use of a building or place in which intoxicating liquors are kept with unlawful intent and are sold for forbidden purposes. It is the use of a place in which the inhibited acts are done, rather than the doing of those acts, which constitutes an offense; and hence a bank selling bills of lading to whoever might apply at the bank, enabling the purchaser to obtain liquor at a freight depot, is guilty of maintaining a nuisance." *State v. Snyder*, 78 N. W. 807, 808, 108 Iowa, 205.

Powder magazine.

A powder magazine located near the shaft of a colliery, and originally not in a residence locality, but around which the population had settled, and of which complaint had not been made during its 30 years of existence, and in which explosives were kept only for use in the mine and in small quantities, is not a nuisance, so as to render its owners liable for an injury to one living near by in an explosion caused by lightning. *Tuckachinsky v. Lehigh & W. Coal Co.*, 49 Atl. 308, 309, 199 Pa. 515.

The storing of large quantities of powerful explosives in the immediate vicinity of dwelling houses is held to be a nuisance. *Rudder v. Koopman*, 116 Ala. 832, 847, 22 South. 601, 87 L. R. A. 489.

Private residence.

The Legislature has no power to declare, or to authorize the municipal authorities to declare, private residences to be nuisances, because the same had a tendency to depreciate in value the property of persons near by, or to obstruct the view of the same, or to keep the breeze therefrom. *Quintini v. City of Bay St. Louis*, 1 South. 625, 64 Miss. 488, 60 Am. Rep. 62.

Public swearing.

See "Public Swearing."

Slaughterhouse.

A slaughterhouse in use in a populous part of a city is *prima facie* a nuisance, though not a nuisance per se. *Reichert v. Geers*, 98 Ind. 73, 75, 49 Am. Rep. 736.

To constitute a nuisance, it is not necessary that the nefarious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. Therefore the occupancy of

a building in a city as a slaughterhouse is *prima facie* a nuisance to the neighboring inhabitants. *Catlin v. Valentine* (N. Y.) 9 Paige, 575, 576, 38 Am. Dec. 567.

Stable.

A private stable near a church does not belong to the class of erections which are unavoidably and in themselves nuisances. It may become a nuisance, but the question whether it will prove to be one depends in a great measure upon its proximity to the church, the manner in which it is built, the number of horses placed in it, and the degree of care with which it may be kept. *Albany Christian Church v. Wilborn*, 66 S. W. 285, 286, 112 Ky. 507.

The erection of a livery stable near a hotel is held a nuisance. *Coker v. Birge*, 9 Ga. 425, 428, 54 Am. Dec. 347.

Stationary steam engine.

A stationary steam engine is not in itself a nuisance, even though erected and used in the midst of a populous city, unless it interferes with the safety and convenience of the public in the use of the streets. Where the only complaint made against such engine is its liability, in common with all other steam boilers, to explode, and that it is used in a business in which combustible materials are necessarily brought in dangerous proximity to the fire of its boiler, and it therefore subjects buildings and merchandise in that vicinity to increased danger from fire, raising the premiums of insurance thereon, and incites the fears of neighboring owners for the safety and security of their property, neither one nor all of such circumstances make it a nuisance. *City of Baltimore v. Radecke*, 49 Md. 217, 227, 83 Am. Rep. 239.

A steam engine used to drive the machinery of a mill adjoining private dwellings in a densely populated part of the city, the working of which shook the adjacent houses, and particularly two of the houses owned by one person, and the business there carried on caused smoke, steam, vapor, and unwholesome stenches, does not constitute *prima facie* a nuisance—the business being a lawful one—on account of its danger to life from explosion. There may be circumstances where even the noise of the steam engine may become a private nuisance. The authorities are abundant to sustain the position that an individual cannot erect, in a densely settled portion of a city or town occupied by private dwellings, any kind of manufacturing establishment and so use the machinery to carry on the business as to render living in the neighborhood uncomfortable, either on account of the noise of its agents, or of the smoke or offensive smells. The question of nuisance in such a case is a matter of fact to be determined by the

evidence. *Davidson v. Isham*, 9 N. J. Eq. (1 Stockt.) 186, 187.

Undertaking establishment.

An undertaker's establishment for the sale of caskets and furnishing goods for funerals, also for embalming bodies for autopsies and post-mortem examinations, the cutting and dissecting of dead bodies for the ascertainment of the cause of death, and for the reception and temporary deposit of human remains awaiting funeral rites and burial, is both "injurious and offensive," within the meaning of a covenant against the use of premises for any injurious or offensive purpose, and constitutes a nuisance; it being held that anything that is hurtful, noxious, disturbs happiness, impairs rights or prevents the enjoyment of them, is injurious, and if it causes displeasure, or gives pain or unpleasant sensations, it is offensive. *Rowland v. Miller*, 15 N. Y. Supp. 701, 702.

Violation of public statute.

The general definition of a "nuisance" given by Blackstone is anything that works hurt, inconvenience, or damage. It is generally true that nuisances arise from violation of the common law, and not from the violation of a public statute; but it is true only where the statute grants a right or imposes an obligation, and affixes a penalty for its violation, or gives a specific remedy which, by the terms of the statute or by construction, is exclusive. But the principle stated has no application where the statute itself prescribes that a particular act or property used for a noxious purpose shall be deemed a nuisance. *Lawton v. Steele*, 23 N. E. 878, 879, 119 N. Y. 226, 7 L. R. A. 134, 16 Am. St. Rep. 818.

Work authorized by Legislature.

A work authorized by the Legislature cannot be adjudged a nuisance, providing it be executed in an authorized manner in an authorized place. *Easton v. New York & L. B. R. Co.*, 24 N. J. Eq. (9 C. E. Green) 49, 55.

Working streets by convicts.

"Nuisance" means, literally, an annoyance; anything that would hurt or injure. But the working of its streets by convicts, or any other class of people who can be secured for that purpose, produces no damage or inconvenience to the city or its inhabitants, or to any one else. On the contrary, the fair presumption is that the condition of the streets will be ameliorated by such work without injury to anybody, and a bill proceeding on the idea that the presence of convicts in the streets is a nuisance as tending to create a disturbance of the peace is without foundation. *Ward v. City of Little Rock*, 41 Ark. 526, 530, 48 Am. Rep. 46.

NUISANCE PER SE.

"Nuisances per se" have been defined to be such things as are nuisances at all times, under all circumstances, irrespective of location or surroundings, as things prejudicial to public morals, or dangerous to life, or injurious to public rights. *Hundley v. Harrison*, 26 South. 294, 123 Ala. 292.

A nuisance per se is that which is a nuisance in itself, and which therefore cannot be so conducted or maintained as to be lawfully carried on or permitted to exist. *Windfall Mfg. Co. v. Patterson*, 47 N. E. 2, 4, 148 Ind. 414, 37 L. R. A. 381, 62 Am. St. Rep. 532.

Unless the thing of itself, because of its inherent qualities, without complement, is productive of injury, or by reason of the manner of its use or exposure threatens or is dangerous to life or property, it cannot be said to be a nuisance per se at common law. *Kinney v. Koopman*, 22 South. 593, 594, 116 Ala. 310, 37 L. R. A. 497, 67 Am. St. Rep. 119.

To constitute any particular thing a legal nuisance per se (apart from statutory nuisances), as between lessor and lessee and the servants of the lessee, the thing must work some unlawful peril to health or safety of persons or property, as defective sewers and drains, walls and chimneys liable to fall, etc.; and a fixed inert mass of metal which is harmless when at rest, placed upon a solid foundation upon one's own land, was not in itself a nuisance as between a lessor and a lessee or his servants. *Whitmore v. Orono Pulp & Paper Co.*, 39 Atl. 1032, 1035, 91 Me. 297, 40 L. R. A. 377, 64 Am. St. Rep. 229.

Bees.

Neither the keeping, owning, nor raising of bees is in itself a nuisance. Bees may become a nuisance in a city, but whether they are so or not is a question to be judicially determined in each case. An ordinance undertaking to make the owning, keeping, or raising of bees in the city a nuisance, without regard to the fact whether it is so or not, or whether bees in general have become a nuisance in the city, is too broad, and is invalid. *Town of Arkadelphia v. Clark*, 11 S. W. 957, 958, 52 Ark. 23, 20 Am. St. Rep. 154.

Blacksmith or carriage shop.

A blacksmith shop may be so constructed with a view to deaden the noise of the anvil or other noises, and the forges may be so placed, and the smoke and gas may be so conducted away, that the shop would not be regarded by law as a nuisance; so a blacksmith shop is not a nuisance per se. *Faucher v. Grass*, 15 N. W. 302, 60 Iowa, 505.

The trade and occupation of carriage making or of a blacksmith is a lawful and useful one, and a shop or building erected for its exercise is not a nuisance per se. But blacksmith shops or forges have been classed by courts as those erections which by their position and use may become nuisances. And if such building, though erected on the builder's own land, and occupied in the usual manner, be in an improper place, where its use will probably result in an injury to another, this is of itself a wrongful act, for which the wrongdoer is responsible to one essentially injured thereby. *Whitney v. Bartholomew*, 21 Conn. 213, 217.

Bowling alley.

A bowling-alley game for gain, in common use, is to be regarded as a common nuisance per se. *State v. Haines*, 30 Me. (17 Shep.) 65, 75.

Buildings containing nuisances.

Nuisances arise from pursuing particular trades in populous neighborhoods, from acts of public indecency, keeping a disorderly house and gaming house, a livery stable, and the like. 2 Bouv. 248. The buildings in which the particular trades are carried on, or the houses which may be kept in a disorderly manner or used for unlawful purposes, are not per se nuisances, but it is an abuse of them only which constitutes a nuisance. *Miller v. Burch*, 32 Tex. 203, 210, 5 Am. Rep. 242.

Disorderly house.

A disorderly house is a nuisance per se. *Windfall Mfg. Co. v. Patterson*, 47 N. E. 2, 4, 148 Ind. 414, 37 L. R. A. 381, 62 Am. St. Rep. 532.

Lawful business.

A business lawful in itself cannot be a nuisance per se, although, because of surrounding circumstances, or because of the manner in which it is conducted, it may become a nuisance. A plant for the manufacture of brick and tiling, even with a gas well on the property for supplying fuel, is therefore not a nuisance per se. *Windfall Mfg. Co. v. Patterson*, 47 N. E. 2, 4, 148 Ind. 414, 37 L. R. A. 381, 62 Am. St. Rep. 532.

If an occupation be lawful, and by care and precaution it can be conducted without danger or inconvenience to another, the occupation is not per se a nuisance. *Kinney v. Koopman*, 22 South. 593, 594, 116 Ala. 310, 37 L. R. A. 497, 67 Am. St. Rep. 119.

Limekiln.

The burning of lime is not an unlawful business or trade, and is not a nuisance in its nature per se, irrespective of location. On the contrary, it is one of the multitude of most useful and necessary processes for

the benefit of society, and for its material improvement, but which may, from mere local conditions, become nuisances. Or, as said in *Aldred's Case*, 9 Coke, 59a, the building of a limekiln is good and profitable, but if it be built so near a house that, when it burns, the smoke thereof enters into the house, so that none can dwell there, an action lies for it. Whether a particular limekiln is a nuisance or not is a mixed question of law and fact. *State v. Mott*, 61 Md. 297, 306, 48 Am. Rep. 105.

Obstruction of highway or river.

An obstruction to a highway of a navigable stream is a nuisance per se. *Windfall Mfg. Co. v. Patterson*, 47 N. E. 2, 4, 148 Ind. 414, 37 L. R. A. 381, 62 Am. St. Rep. 532.

Any permanent structure which materially encroaches on a public street and impedes travel is a nuisance per se, notwithstanding space is left for the passage of the public. Expediency forbids any other rule, but, even if it did not, the rule is well founded in principle, for it is well settled that the public are entitled not only to a free passage along the highway, but a free passage along any portion of it not in the actual use of some other traveler. *People v. Harris*, 67 N. E. 785, 788, 203 Ill. 272, 96 Am. St. Rep. 804 (citing *Elliott, Roads & S.* 478).

An unauthorized obstruction of a public highway by an individual is a nuisance per se, because it is a thing that cannot be authorized. *City of Valparaiso v. Bozarth*, 153 Ind. 536, 55 N. E. 439, 47 L. R. A. 487. This rule does not apply to the use of the highway by quasi public corporations for purposes within the right of the municipality to grant. *Town of Newcastle v. Lake Erie & W. R. Co.*, 155 Ind. 18, 57 N. E. 516. In doubtful cases, where a thing may or may not be a nuisance, depending on a variety of circumstances requiring judgment and discretion on the part of the town authorities in the exercise of their legislative functions in controlling the streets, their decision is conclusive. *Rushville Natural Gas Co. v. Town of Morristown*, 66 N. E. 179, 181, 30 Ind. App. 455.

Powder magazine or manufactory.

A powder magazine maintained within the limits of an incorporated town, in violation of its ordinances, is a nuisance per se. *Lafin & Rand Powder Co. v. Tearney*, 23 N. E. 389, 390, 131 Ill. 322, 7 L. R. A. 262, 19 Am. St. Rep. 34.

A house for the manufacture of gunpowder or dynamite, etc., constitutes a nuisance per se. *The Stockton Laundry Case* (U. S.) 26 Fed. 611, 613.

Gunpowder kept in large quantities in public places is not dangerous, and per se

a nuisance, without regard to the manner of its use or keeping. *Kinney v. Koopman*, 22 South. 593, 594, 116 Ala. 310, 37 L. R. A. 497, 67 Am. St. Rep. 119.

Railroad in village.

A railroad passing through a populous village is not per se a nuisance. *Hentz v. Long Island R. Co.* (N. Y.) 13 Barb. 646, 647.

Slaughterhouse.

A slaughterhouse constitutes a nuisance per se. *The Stockton Laundry Case* (U. S.) 26 Fed. 611, 613.

A slaughterhouse in use in a populous part of a city is not a nuisance per se. *Reichert v. Geers*, 98 Ind. 73, 75, 49 Am. Rep. 736.

A slaughterhouse is not a nuisance of course, but it may become so through the way it is managed, or through neglect. *State v. Wilson*, 43 N. H. 415, 420, 82 Am. Dec. 163.

Steam whistle.

A lawful business may be conducted in such a manner as to make the same a nuisance. The use of a steam whistle is not per se a nuisance, but it may be so used as to make it a nuisance. *Parker v. Union Woolen Co.*, 42 Conn. 399, 402.

Tannery.

A tannery is not per se a nuisance, and an action of a judicial nature is required to determine whether an occupation, lawful in itself, is so conducted as to become liable to abatement as a nuisance. *Marshall v. Street Com'rs of City of Trenton*, 36 N. J. Law (7 Vroom) 233, 235.

Tomb.

A tomb erected on one's own land is not necessarily a nuisance to a neighbor, but may become such from locality and other extraneous facts. *Barnes v. Hathorn*, 54 Me. 124, 126.

Undertaking establishment.

The business of an undertaker in a populous place is not a nuisance per se. *Westcott v. Middleton*, 11 Atl. 490, 494, 43 N. J. Eq. (16 Stew.) 473.

Unightly building.

An unsightly building not necessarily interfering with the comfortable use or enjoyment of the premises of an adjoining landowner, or necessarily offensive to any of the senses, is not a nuisance per se. *Trulock v. Merte*, 34 N. W. 307, 72 Iowa, 510.

Wooden building.

A wooden building is not of itself a nuisance, but may become so when it injures

surrounding buildings. *Baumgartner v. Hasty*, 100 Ind. 575, 582, 50 Am. Rep. 880.

NUL TIEL RECORD.

An old plea of nul tiel record created an issue which was tried by the court by inspection of the record, and was fully met by production of the record, properly authenticated. Under the former practice, if defendant intended to go further and impeach the judgment for fraud or want of jurisdiction, he might by a special plea allege facts showing that the court in which the judgment was rendered had no jurisdiction either of the subject-matter or of the person. The plea is a direct attack upon a jurisdiction by affirmative averment showing its absence. It is, in other words, an impeachment of the record declared on. *Hoffheimer v. Stiefel*, 39 N. Y. Supp. 714, 715, 17 Misc. Rep. 236.

NULL AND VOID.

"Null and void," as used in 5 Stat. U. S. p. 456, § 12, providing that "all assignments and transfers of the right [to a land patent] hereby secured prior to the issuing of the patent shall be null and void," means voidable. *Franklin v. Kelley*, 2 Neb. 79, 88.

"Null and void," as used in Sand. & H. Dig. § 6149, providing that articles of a railroad association should be null and void unless there should be filed in the office of the Secretary of State a preliminary survey of the road, etc., means voidable; that is, that in case of default the corporation may be dissolved through appropriate legal proceedings by the proper officers. *Brown v. Wyandotte & S. E. Ry. Co.*, 56 S. W. 862, 864, 68 Ark. 134.

The terms "voidable" and "null and void" are not the same, and therefore Turnpike Act, 3 Geo. IV, c. 146, empowering turnpike road trustees to let the tolls for rent, to be payable to their treasurer, and in default of such payment every lease should be "null and void," could not be construed as meaning that the leases were only voidable on failure to pay. *Pearse v. Morrice*, 2 Adol. & El. 84.

The words "null and void," as used in the act of 1895, declaring that all acts of indorsing, selling, pledging, and hypothecating done by the cashier or other officer or employee of a bank without authority from the board of directors shall be null and void, does not mean absolutely null and void, but voidable; and so the assignment of a note by the president of a bank without authority of the board of directors, contrary to the provisions of the act, was voidable, and hence capable of ratification, and, when ratified, its legal effect was the same as if the authority to make the assignment had existed in the be-

ginning. *Hume v. Eagon*, 73 Mo. App. 271, 276.

NULLA BONA.

"Nulla bona" has a well-defined meaning in law, signifying that the defendant in the execution has no goods which could be subjected to its satisfaction. *Reed v. Lowe*, 63 S. W. 687, 689, 163 Mo. 519, 85 Am. St. Rep. 578.

The return of "nulla bona" has a defined meaning in law, and signifies that the officer made strict and diligent search, but was unable to find any property of the defendant, liable to seizure under the writ, whereon to levy the same. *Langford v. Few*, 47 S. W. 927, 930, 146 Mo. 142, 69 Am. St. Rep. 606.

The term "nulla bona" means "no goods," and, in a return on an execution, imports that the defendant had no goods which could be subjected to its satisfaction; and the term is insufficient where the execution requires that it be made out of the property of the defendant, as the return may have been nulla bona, and yet he may have been in possession or the owner of real estate from a sale of which satisfaction could have been obtained. *Woodward v. Harbin*, 1 Ala. 104, 108.

The words "not satisfied," upon the return of an execution, are not synonymous with "nulla bona." *Merrick v. Carter*, 68 N. E. 750, 751, 205 Ill. 73.

NULLITY.

See "Absolute Nullities."

A nullity is such a defect as renders the proceedings in which it occurs totally null and void; of no avail or effect whatever, and incapable of being made so. It is very difficult to give a concise and yet sufficiently comprehensive definition of a "nullity." It may be defined as a proceeding that is taken without any foundation for it, or that is essentially defective. *Salter v. Hilgen*, 40 Wis. 363, 365 (citing *McNamara, Nullities & Irregularities*, p. 4).

"In Spanish law, 'nullity' is defined in the absolute and relative. The former is that which arises from the law, whether civil or criminal, the principal motive for which is the public interest, and the latter is that which affects one certain individual. 'Nullity' is not to be confounded with 'rescission.' Nullity takes place when the act is valid, with a radical defect which prevents it from producing any effect, as where an act is in contravention of good morals, or where it has been executed by a person who cannot be supposed to have any will, as a child under the age of seven years, or a madman." *Sunoh v. Hepburn*, 1 Cal. 254, 281.

Irregularity distinguished.

An irregularity is either the omitting to do something necessary for the due and orderly conducting of a legal proceeding, or doing it in an unseasonable time or improper manner. It is said to be, in its most general sense, a technical term for every defect in practical proceedings or the mode of conducting an action or defense, as distinguished from faults in pleadings; and that a nullity is the highest degree of an "irregularity," in the most extensive sense of that term, and is such a defect as renders the proceedings in which it occurs null and void, and of no avail or effect whatever, and incapable of being made so. A failure to revive a judgment belonging to the estate before issuance of the execution was a mere irregularity. *Jenness v. Lapeer County Circuit Judge*, 4 N. W. 220, 222, 42 Mich. 469.

It is sometimes difficult to distinguish between an "irregularity" and a "nullity," but the safest rule to determine what is an irregularity and what is a nullity is to see whether a party can waive the objection. If he can waive it, it amounts to an irregularity; if he cannot, it is a nullity. *Johnson v. Hines*, 61 Md. 122, 130; *Jenness v. Lapeer County Circuit Judge*, 4 N. W. 220, 222, 42 Mich. 469 (citing *Holmes v. Russell*, 9 Dowl. 487).

NULLITY SUIT.

A "nullity suit," as the term is used in reference to a suit to annul a pretended marriage, has for its purpose a decree that a marriage that is void or voidable shall be judicially declared to be void. It differs from a "divorce suit," which is for the purpose of dissolving a marriage which the parties thereto had legal capacity to contract. *Pyott v. Pyott*, 61 N. E. 88, 91, 191 Ill. 280.

NUMB.

The word "numb" means enfeebled in or destitute of the power of sensation and motion, and is held to be a term not limited to sensation, but including motion, so as to render competent the testimony of a witness as to whether a limb of another person seemed numb. *Will v. Village of Mendon*, 66 N. W. 58, 60, 108 Mich. 251 (quoting *Webst. Dict.*).

NUMBER.

Where an indictment charged that defendants feloniously took and carried away sundry United States treasury notes, the number and denomination of which are to the grand jury unknown, the word "number" should be construed as expressing or relating to the number of bills, and not to the numbers on the bills. *Duvall v. State*, 63 Ala. 12, 17.

Act Cong. 1874, § 12, relating to bankruptcy, provides that, in computing the number of creditors who shall join in a competition for involuntary bankruptcy, those whose debts do not exceed \$250 shall not be reckoned. "Judge Blatchford has decided that the word 'number' in this clause is to be construed 'number and amount.' In re Hymes (U. S.) 12 Fed. Cas. 1136. Judge Brown has held that 'number' means 'number.' In re Hadley (U. S.) 11 Fed. Cas. 148. My impression is that the latter decision is to be preferred." In re *Currier* (U. S.) 6 Fed. Cas. 988, 990.

A complaint against the city for negligence in allowing ice and snow to remain on a sidewalk "a number of days," or for some days, did not show that it had remained there for a length of time greater than two days, and hence did not necessarily allege notice of the defect to the city. *Chase v. City of Cleveland*, 9 N. E. 225, 226, 44 Ohio St. 505, 58 Am. Rep. 843.

NUMERALS.

"Numerals," when used as a short method of identifying the several members of a class, and distinguishing one of them from another, are, in substance and effect, descriptive terms—the number conveys to the reader details which otherwise would have to be amplified in words—and their use will not be protected as a trade-mark. *Humphreys' Homeopathic Medicine Co. v. Hilton* (U. S.) 60 Fed. 756, 758.

NUMERICAL LOTTERY.

The American Encyclopedia says that "lottery" may be distinguished into the Genoese or "Numerical," and the Dutch or "Class" lottery. The former is described as a scheme by which, out of 90 consecutive numbers, 5 are to be selected or drawn by lot. The players have fixed on certain numbers, wagering that one, two, or more of them would be drawn among the five, or that they would appear in a certain order. In the Dutch or "Class" lottery, the number and value of the prizes are regularly estimated. All the ticket holders are interested at once in the play, and chance determines whether a prize or a blank shall fall to a given number. *Fleming v. Bills*, 8 Or. 286, 291.

NUNC PRO TUNC.

The phrase "nunc pro tunc" signifies "now for then," or that a thing is done now that shall have the same legal force and effect as if done at the time it ought to have been done. A court may order an act done nunc pro tunc when it, or some one of its immediate ministerial officers, has done some act which for some reason has not been en-

tered of record or otherwise noted at the time the order or judgment was made or should have been made to appear on the papers or proceedings by the ministerial officer. *Secou v. Leroux*, 1 N. M. 388, 389.

The object of a judgment *nunc pro tunc* is not the rendering of a new judgment and the ascertainment and determination of new rights, but is one placing in proper form on the record the judgment that had been previously rendered, to make it speak the truth, so as to make it show what the judicial action really is, not to correct judicial errors; such as to render a judgment which the court ought to have rendered in place of the one it did erroneously render, nor to supply nonaction by the court, however erroneous the judgment may have been. *Wilmerding v. Corbin Banking Co.*, 28 South. 640, 641, 126 Ala. 268.

A *nunc pro tunc* entry is one made now of something which was actually, previously done, to have effect as of the former date. Its office is not to supply omitted action by the court, but to supply an omission really had, but omitted through inadvertence or mistake. *Perkins v. Hayward*, 31 N. E. 670, 672, 132 Ind. 95.

Except as to the rights of third parties, a judgment *nunc pro tunc* is retrospective, and has the same force and effect, to all intents and purposes, as if it had been entered at the time when the judgment was originally rendered. *Burns v. Skelton*, 68 S. W. 527, 29 Tex. Civ. App. 453.

NUNCUPATIVE WILL

A "nuncupative will," so termed—a "nuncupando"; that is, from naming an executor by word of mouth—is a verbal testamentary declaration or disposition. By the common law it was as valid in respect to personal estate as a written testament. A will could not only be made by word of mouth, but the most solemn instrument in writing might be revoked orally. In a rude and uncultivated age, to have required a written will would have been a great hardship; but with the growth and progress of letters the reason for permitting a verbal testament diminished in force, until finally an effort to establish such a will by means of gross fraud and perjury gave rise to the provisions of St. 29 Car. II, passed in 1676, termed the "statute of frauds." Originally nuncupative wills were valid, though not made in sickness. Afterwards, when writing became general, verbal dispositions were regarded with disfavor, and ultimately were considered invalid, unless made in the last sickness. The only nuncupative wills now allowed are those made by soldiers and sailors. *Ex parte Thompson*, 4 Bradf. Sur. 154, 155.

A nuncupative will is defined by Perkins, in his book published under Henry VIII, to be properly when the testator "lieth languishing, for fear of sudden death dareth not to stay the writing of his testament, and therefore he prayeth his curate and others, his neighbors, to bear witness of his last will, and declareth by word what his last will is," *Prince v. Hazleton* (N. Y.) 20 Johns. 502, 511, 514, 11 Am. Dec. 307. The same definition is approved by Chancellor Kent. In *re Hebden's Will*, 20 N. J. Eq. (5 C. E. Green) 473. The essentials are (1) that at the time of uttering the words relied on the testator had a present, consistent intention that the very words uttered should constitute his will, and that the witnesses so understood his language; (2) that the testator shall have indicated by his own language, before pronouncing the will, to those about him, or some of them, that they were to witness that the very words he presently uttered were to constitute his last testament. In *re Male's Will*, 24 Atl. 370, 376, 49 N. J. Eq. 266.

A nuncupative will has always been held by the English courts to mean a will not committed to writing by the direction of the testator; one whose efficacy depends upon its being declared verbally to be his will. Directions or instructions for a will, reduced to writing by the testator or by some other person by his direction, have never been considered as nuncupative or oral wills, but have always been treated and proved as written wills. If the authorities are correct, and they are supported by the literal meaning of the word, a nuncupative will can only be one verbally declared and made in the presence of witnesses called into notice it, and not reduced to writing by the testator. He must intend at the time that the verbal declaration so declared shall be his will. *Sykes v. Sykes* (Ala.) 2 Stew. 364, 367, 20 Am. Dec. 44.

To constitute a nuncupative will the words must be spoken in extremis, must have legal certainty, and be intended as a will. *Sykes v. Sykes* (Ala.) 2 Stew. 364, 367, 20 Am. Dec. 44.

A nuncupative will is a verbal declaration, made by one in his last sickness as to the disposition of his property after death, made with intent and purpose to dispose of his property, and made also in the hearing and presence of two credible persons, who shall attest the same, and who, or at least some of them, were then by the testator specially called on to hear and bear witness to such declarations. *Tally v. Butterworth*, 18 Tenn. (10 Yerg.) 502.

A nuncupative will is defined by the law as one which depends merely on oral evidence, being declared by the testator

in extremis, before at least three competent witnesses, and afterwards reduced to writing within 30 days, under the provisions of our Code, after the speaking of the same. *Ellington v. Dillard*, 42 Ga. 361, 379.

A will that is signed by the maker thereof cannot be said to be nuncupative. As Swinburne says: "A nuncupative testament is when the testator without any writing doth declare his will before a sufficient number of witnesses." *Stamper v. Hooks*, 22 Ga. 603, 606, 68 Am. Dec. 511.

Civ. Code, art. 1574, providing that a nuncupative testament under signature "must be written by the testator himself, or by any other person from his dictation, * * * or it will suffice if, in the presence of the same number of witnesses, the testator presents the paper on which he has written his testament, or caused it to be written, out of their presence," was complied with where the testatrix handed a notary a paper, which she stated contained her last intentions, drawn up by her order, and which the notary copied and read to her, whereupon she again declared it to be her will. *Succession of Morales*, 16 La. Ann. 267, 268.

A nuncupative will only applies to personal property, and until recently was limited to small amounts. *Newman v. Bost*, 29 S. E. 848, 850, 122 N. C. 524.

A nuncupative will must be made as a matter of necessity, and not as a matter of choice, and must be made when the testator is in extremis. If it appears that the deceased had plenty of time and opportunity to execute a formal written will, a nuncupative will is invalid. *Scaife v. Emmons*, 84 Ga. 619, 10 S. E. 1097, 20 Am. St. Rep. 383.

A nuncupative will might be made without the assistance of the notary, under Civ. Code La. arts. 1571, 1574. *Clark v. Hammerle*, 27 Mo. 55, 69.

NURSE.

The verb "to nurse," used with reference to an adult, conveys the idea that the object

of care is sick or is an invalid. It means more than general watchfulness. So that, in an action for board furnished and nursing done to decedent, where a special interrogatory was whether there was any agreement that claimant should receive pay for board furnished to or care bestowed upon decedent, which was answered, "No," and the general verdict was in favor of claimant, it will be presumed that the jury must have understood the word "nurse" in its most comprehensive sense, and so gave an answer not intended. *Van Hook v. Young's Estate*, 64 N. E. 670, 671, 29 Ind. App. 471.

"Nursing," as used in a notice to a town reciting that the relief furnished a pauper consisted of board and nursing, means aid rendered in sickness. *Peterborough v. Lancaster*, 14 N. H. 382, 391.

NURSE CHILDREN.

Children are counted "nurse children" for eight years. *Dumbelton v. Beckford*, 2 Salk. 470.

NURSERY.

The well-known signification of the word "nursery," as used in respect to horticulture, is a place where young trees are propagated, for the purpose of being transplanted into orchards, plantations, etc. *Attorney General v. State Board of Judges*, 38 Cal. 291, 295.

NURTURE.

In reference to a guardian's duty to nurture his ward, "nurture" means to educate; to train; to bring up. *Regina v. Clarke*, 7 El. & Bl. 186, 193.

NUT LOCK.

"Nut lock" is defined to be a device for fastening a bolt nut in place and preventing its becoming loose by the jarring or tremulous motion of machinery. *Chicago Ry. Equipment Co. v. Interchangeable Brake Beam Co.* (U. S.) 99 Fed. 777, 779.

O

O/A.

"o/a," as used in mercantile accounts, means "our account." *Ogden v. Astor*, 6 N. Y. Super. Ct. (4 Sandf.) 311, 338.

O. K.

The letters "O. K.," attached to the signature of parties to an order for goods, is ambiguous, and may be explained by parol evidence. *Penn Tobacco Co. v. Leman*, 84 S. E. 679, 109 Ga. 428.

"O. K.," as used on a bill of lading, means that the goods are all right or in good condition. *Morganton Mfg. Co. v. Ohio River & C. Ry. Co.*, 28 S. E. 474, 121 N. C. 514, 61 Am. St. Rep. 679.

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See "Affidavit."

Affirmation included.

"Oath" includes "affirmation." Pen. Code Ga. 1895, § 2. See, also, *Rev. St. Wyo.* 1899, §§ 2724, 5190; *Rev. St. Me.* 1883, p. 59, c. 1, § 6, subd. 11; *Rev. Codes N. D.* 1899, §§ 1176, 5135, 8507; *Civ. Code S. D.* 1903, § 2469; *Code Cr. Proc. S. D.* 1903, § 640; *Gen. St. Minn.* 1894, § 1511; *Rev. St. Fla.* 1892, § 1; *Rev. St. Okl.* 1903, §§ 2808, 5148; *Cobbey's Ann. St. Neb.* 1903, § 2376; *Pen. Code Tex.* 1895, art. 30; *Rev. St. Tex.*

1895, arts. 3270, 5064; *Mills' Ann. St. Colo.* 1891, § 4185, cl. 7; *Horner's Rev. St. Ind.* 1901, § 1285; *Ind. T. Ann. St.* 1899, § 4900; *Hurd's Rev. St. Ill.* 1901, p. 1493, c. 120, § 292, subd. 10; *Id.* p. 1720, c. 181, § 1, subd. 12; *Civ. Code Ala.* 1896, § 1; *Shannon's Code Tenn.* 1896, § 62; *Gen. St. N. J.* 1895, p. 3195, § 35; *Comp. Laws Mich.* 1897, § 1940; *Pub. St. R. I.* 1882, p. 77, c. 24, § 10; *Bates' Ann. St. Ohio* 1904, § 6794; *Rev. St. Utah* 1898, § 2498; *U. S. Comp. St.* 1901, pp. 3, 3419; *Rev. St. Mo.* 1899, § 9123; *Ballinger's Ann. Codes & St. Wash.* 1897, § 1658; *Civ. Code S. C.* 1902, § 285.

Unless the context shows that another sense was intended, the word "oath" includes an affirmation. *Bates' Ann. St. Ohio* 1904, §§ 1536-907, 4947.

"Oath" includes "affirmation" or "declaration." *Pen. Code Cal.* 1903, § 7; *Civ. Code Cal.* 1903, § 14; *Code Civ. Proc. Cal.* 1903, § 17; *Pol. Code Mont.* 1895, § 16; *Pen. Code Mont.* 1895, § 7; *Code Civ. Proc. Mont.* 1895, § 3463; *Civ. Code Mont.* 1895, § 4662.

The word "oath" includes "affirmation" in any case in which it may be substituted for an oath. *Sand. & H. Dig. Ark.* 1893, § 7218. See, also, *Code Iowa* 1897, § 48, subd. 12; *Gen. St. Kan.* 1901, § 7342, subd. 12; *Comp. Laws Mich.* 1897, § 50, subd. 11; *Pub. St. N. H.* 1901, p. 64, c. 2, § 24; *V. S.* 1894, 13; *Code Miss.* 1892, § 1510; *Gen. St. Minn.* 1894, § 255, subd. 10; *Comp. Laws N. M.* 1897, § 2900; *Code Va.* 1887, § 5; *Code N. C.* 1883, § 3765, subd. 5; *Rev. Code Del.* 1893, c. 5, § 1, subd. 9; *Gen. St. Conn.* 1902, § 1; *Rev. Laws Mass.* 1902, p. 88, c. 8, § 5, subd. 14; *Ky. St.* 1903, § 451; *Rev. St. Wis.* 1898, § 4971.

The term "oath" includes an affirmation and every other mode authorized by law of attesting the truth of that which is stated. *Pen. Code Cal.* 1903, § 119; *Pen. Code Idaho* 1901, § 4635; *Laws N. Y.* 1892, c. 677, § 14; *Ballinger's Ann. Codes & St. Wash.* 1897, § 7186; *Rev. St. Utah* 1898, § 4123; *Pen. Code S. D.* 1903, § 157.

The term "oath," as used in the Penal Code, defining the crime of perjury, includes an affirmation, and every other mode of attesting the truth of that which is stated, which is authorized by law, except so much of an oath of office as relates to the future performance of official duties. *Rev. St. Okl.* 1903, §§ 2075, 2076.

Wherever an "oath" is required by the Code, an affirmation shall be sufficient, if made by a person conscientiously scrupulous of taking an oath. *Pub. Gen. Laws Md.* 1888, p. 2, art. 1, § 8.

The word "oath" includes "affirmation"; and, whenever an oath is required or authorized by law, an affirmation in lieu thereof

may be taken by any person having conscientious scruples to taking an oath; and an affirmation has the same force and effect as an oath. Bates' Ann. St. Ohio 1904, § 1.

A solemn affirmation shall be equivalent to an oath in all cases, unless otherwise expressly provided, and the word "oath" shall be deemed to include an affirmation. Code W. Va. 1899, p. 132, c. 13, § 11.

Belief in God.

An oath is an appeal to God by the witness for the truth of what he declares and an imprecation of divine vengeance upon him if his testimony be false. Hence a witness must believe in the existence of God, and it is also held that a person who disbelieves in any punishment in a future state, though he believes in the existence of a Supreme Being and that men are punished in this life for their sins, is not a competent witness. *Atwood v. Welton*, 7 Conn. 66, 70.

If the witness believes in some superior being, whom he recognizes as a God who will punish for false swearing, an oath made, etc., according to his belief and such obligations will satisfy the requirements of a bill of rights providing that no religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing therein should be construed to dispense with oaths, since such oath binds the witness' conscience so as to influence him to speak the truth. The obligation is to be so administered as to most certainly bind the conscience. An oath is no more a part of Christianity than of any other religion in the world. "Yet," says Lord Stair, in his *Institutes of the Laws of Scotland*, "it is the duty of the judges, in taking oaths of witnesses, to do it in those forms that will most reach the consciences of the swearers according to their persuasion and custom." And this though the God of the witness' faith is according to the Christian belief a false God. As defined by Willes, C. J., in the case of *Omlchund v. Barker*, Willes, 538, where the testimony of a person sworn according to the Gentoo religion was received, it may be stated: "All persons are competent to be witnesses who believe in the existence of a God who will punish him if he swears falsely." This rule in no way conflicts with liberty of conscience in matters of religious faith, as secured in the Bill of Rights. Liability to civil punishment alone for perjury, and the fear of such punishment, are held not to supply that sense of moral and conscientious obligation under which a witness is required to state facts as evidence, and which enlightened men believe to be secured by the sanctions of an oath, taken by one entertaining a belief that the God of his faith will punish false swearing. The purpose of

the oath is not to call the attention of God to the witness, but the attention of the witness to God; not to call upon Him to punish the false swearer, but on the witness to remember that He will assuredly do so. By thus laying hold of the conscience of the witness, and appealing to his sense of accountability the law best insures the utterance of truth. Under the Ohio Constitution, the character of a man's religious belief is not permitted to affect his competency as a witness; yet, to render him competent to take oath as a witness, his moral nature must be strengthened, and his conscientiousness be quickened, by a belief in a Supreme Being, who will certainly, either in this life or the life to come, punish perjury. Where the oath or affirmation cannot be dispensed with, the authorities all concur in the propriety of administering the oath to a witness in the mode by the witness believed to be most binding on his conscience. *Clinton v. State*, 33 Ohio St. 27, 32.

By Chief Justice Abbot "an oath is declared to be a call upon God to witness that what is said by the person sworn is true, and invoking the divine vengeance upon his head if what he says is false." Upon interrogatories put to the judges it was said that, "if the witness states he considers the oath binding on his conscience, it is perfectly unnecessary and irrelevant to ask any further questions." In many of our elementary treatises it is laid down as the infallible rule that, before a witness takes the oath, he may be asked whether he believes in the existence of a God, the obligations of an oath, and in a future state of rewards and punishments, and if he does not he cannot be sworn. It may be considered as pretty generally settled, both in England and the United States, that whoever believes in the moral influence and control of an overruling power in this life, and that oath is binding on his conscience, is competent to testify; for, aside from the penalties imposed by civil enactments, if the witness believes in the moral obligations of an oath, the reward of good and punishment of evil action by some power is irresistibly implied. Though a witness disbelieve in a future state of rewards and punishments, or the existence after death, it is consistent with the most perfect conviction of a superintending power or belief in the obligation of an oath, morally considered, and the influence of God's providence and government in this life, and hence he is competent to take oath to testify. *Brock v. Milligan*, 10 Ohio, 121, 123.

In construing the competency of a witness who did not believe in rewards and punishments after death, but who believed that the Almighty punished mankind for their misdeeds, but that there was no punishment, but universal and everlasting happiness, in the world to come, and he believed in a God,

the obligation of an oath, and that divine justice would punish perjury and all other offenses during this life, the court said: "If we consider the source of the obligation of an oath, it appears strange that the question should be raised in this enlightened age of the world. An oath is a solemn adjuration to God to punish the affiant if he swears falsely. The sanction of the oath is a belief that the Supreme Being will punish falsehood; and whether that punishment is administered by remorse of conscience, or in any other mode in this world, or is reserved for the future state of being, cannot affect the question, as the sum of the matter is a belief that God is the avenger of falsehood." *Blocker v. Burness*, 2 Ala. 354, 355, 356.

OATH OF ALLEGIANCE.

Act Cong. June 12, 1858, § 3 (11 Stat. 336), provides that it shall be lawful for any commissioned officer of the army to administer the prescribed oath of enlistment to recruits. Act Cong. Aug. 3, 1861, § 11 (12 Stat. 280), declares that in all cases of enlistment and re-enlistment in the military service of the United States the prescribed oath of allegiance may be administered by any commissioned officer of the army. Held, that "oath of allegiance" and "oath of enlistment," as used in the two statutes, refer to one and the same oath, inasmuch as only

one oath is prescribed by law to be taken by a person enlisted or enlisting in the service of the United States, which is an oath of allegiance. It is therefore properly called an oath of enlistment, as well as an oath of allegiance. Nor can there be any doubt that the intention and effect of the act of 1861 was to give to a commissioned officer of the army the power to administer the prescribed oath of allegiance in all cases of enlistment and re-enlistment in the military service of the United States. In *re Ferrens* (U. S.) 8 Fed. Cas. 1158, 1160.

OATH OF ENLISTMENT.

See "Oath of Allegiance."

OBEDIENT.

"Obedient" means to be submissive to authority, yielding compliance to commands, orders, or injunctions, performing what is required, or abstaining from what is forbidden. The word is of similar import to the word "amenable," and therefore a bond conditioned to render obedience to the order and process of the court is in compliance with Cr. Code, § 77, requiring such bonds to be conditioned that the defendant at all times render himself amenable to the orders and process of the court. *Miller v. Commonwealth* (Ky.) 1 Duv. 14, 17.

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in extremis, before at least three competent witnesses, and afterwards reduced to writing within 30 days, under the provisions of our Code, after the speaking of the same. *Ellington v. Dillard*, 42 Ga. 361, 379.

A will that is signed by the maker thereof cannot be said to be nuncupative. As Swinburne says: "A nuncupative testament is when the testator without any writing doth declare his will before a sufficient number of witnesses." *Stamper v. Hooks*, 22 Ga. 603, 606, 68 Am. Dec. 511.

Civ. Code, art. 1574, providing that a nuncupative testament under signature "must be written by the testator himself, or by any other person from his dictation, * * * or it will suffice if, in the presence of the same number of witnesses, the testator presents the paper on which he has written his testament, or caused it to be written, out of their presence," was complied with where the testatrix handed a notary a paper, which she stated contained her last intentions, drawn up by her order, and which the notary copied and read to her, whereupon she again declared it to be her will. *Succession of Morales*, 16 La. Ann. 267, 268.

A nuncupative will only applies to personal property, and until recently was limited to small amounts. *Newman v. Bost*, 29 S. E. 848, 850, 122 N. C. 524.

A nuncupative will must be made as a matter of necessity, and not as a matter of choice, and must be made when the testator is in extremis. If it appears that the deceased had plenty of time and opportunity to execute a formal written will, a nuncupative will is invalid. *Scaife v. Emmons*, 84 Ga. 619, 10 S. E. 1097, 20 Am. St. Rep. 383.

A nuncupative will might be made without the assistance of the notary, under Civ. Code La. arts. 1571, 1574. *Clark v. Hammerle*, 27 Mo. 55, 69.

NURSE.

The verb "to nurse," used with reference to an adult, conveys the idea that the object

of care is sick or is an invalid. It means more than general watchfulness. So that, in an action for board furnished and nursing done to decedent, where a special interrogatory was whether there was any agreement that claimant should receive pay for board furnished to or care bestowed upon decedent, which was answered, "No," and the general verdict was in favor of claimant, it will be presumed that the jury must have understood the word "nurse" in its most comprehensive sense, and so gave an answer not intended. *Van Hook v. Young's Estate*, 64 N. E. 670, 671, 29 Ind. App. 471.

"Nursing," as used in a notice to a town reciting that the relief furnished a pauper consisted of board and nursing, means aid rendered in sickness. *Peterborough v. Lancaster*, 14 N. H. 382, 391.

NURSE CHILDREN.

Children are counted "nurse children" for eight years. *Dumbelton v. Beckford*, 2 Salk. 470.

NURSERY.

The well-known signification of the word "nursery," as used in respect to horticulture, is a place where young trees are propagated, for the purpose of being transplanted into orchards, plantations, etc. *Attorney General v. State Board of Judges*, 38 Cal. 291, 295.

NURTURE.

In reference to a guardian's duty to nurture his ward, "nurture" means to educate; to train; to bring up. *Regina v. Clarke*, 7 El. & Bl. 186, 193.

NUT LOCK.

"Nut lock" is defined to be a device for fastening a bolt nut in place and preventing its becoming loose by the jarring or tremulous motion of machinery. *Chicago Ry. Equipment Co. v. Interchangeable Brake Beam Co. (U. S.)* 99 Fed. 777, 779.

O

O/A.

"o/a," as used in mercantile accounts, means "our account." *Ogden v. Astor*, 6 N. Y. Super. Ct. (4 Sandf.) 311, 338.

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See "Affidavit."

Affirmation included.

"Oath" includes "affirmation." Pen. Code Ga. 1895, § 2. See, also, *Rev. St. Wyo.* 1899, §§ 2724, 5190; *Rev. St. Me.* 1883, p. 59, c. 1, § 6, subd. 11; *Rev. Codes N. D.* 1899, §§ 1176, 5135, 8507; *Civ. Code S. D.* 1903, § 2469; *Code Cr. Proc. S. D.* 1903, § 640; *Gen. St. Minn.* 1894, § 1511; *Rev. St. Fla.* 1892, § 1; *Rev. St. Okl.* 1903, §§ 2808, 5148; *Cobbey's Ann. St. Neb.* 1903, § 2376; *Pen. Code Tex.* 1895, art. 30; *Rev. St. Tex.*

1895, arts. 3270, 5064; *Mills' Ann. St. Colo.* 1891, § 4185, cl. 7; *Horner's Rev. St. Ind.* 1901, § 1285; *Ind. T. Ann. St.* 1899, § 4900; *Hurd's Rev. St. Ill.* 1901, p. 1493, c. 120, § 292, subd. 10; *Id.* p. 1720, c. 181, § 1, subd. 12; *Civ. Code Ala.* 1896, § 1; *Shannon's Code Tenn.* 1898, § 62; *Gen. St. N. J.* 1895, p. 3195, § 35; *Comp. Laws Mich.* 1897, § 1940; *Pub. St. R. I.* 1882, p. 77, c. 24, § 10; *Bates' Ann. St. Ohio* 1904, § 6794; *Rev. St. Utah* 1898, § 2498; *U. S. Comp. St.* 1901, pp. 3, 3419; *Rev. St. Mo.* 1899, § 9123; *Ballinger's Ann. Codes & St. Wash.* 1897, § 1658; *Civ. Code S. C.* 1902, § 265.

Unless the context shows that another sense was intended, the word "oath" includes an affirmation. *Bates' Ann. St. Ohio* 1904, §§ 1536-907, 4947.

"Oath" includes "affirmation" or "declaration." *Pen. Code Cal.* 1903, § 7; *Civ. Code Cal.* 1903, § 14; *Code Civ. Proc. Cal.* 1903, § 17; *Pol. Code Mont.* 1895, § 16; *Pen. Code Mont.* 1895, § 7; *Code Civ. Proc. Mont.* 1895, § 3463; *Civ. Code Mont.* 1895, § 4662.

The word "oath" includes "affirmation" in any case in which it may be substituted for an oath. *Sand. & H. Dig. Ark.* 1893, § 7218. See, also, *Code Iowa* 1897, § 48, subd. 12; *Gen. St. Kan.* 1901, § 7342, subd. 12; *Comp. Laws Mich.* 1897, § 50, subd. 11; *Pub. St. N. H.* 1901, p. 64, c. 2, § 24; *V. S.* 1894, 13; *Code Miss.* 1892, § 1510; *Gen. St. Minn.* 1894, § 255, subd. 10; *Comp. Laws N. M.* 1897, § 2900; *Code Va.* 1887, § 5; *Code N. C.* 1883, § 3765, subd. 5; *Rev. Code Del.* 1893, c. 5, § 1, subd. 9; *Gen. St. Conn.* 1902, § 1; *Rev. Laws Mass.* 1902, p. 88, c. 8, § 5, subd. 14; *Ky. St.* 1903, § 451; *Rev. St. Wis.* 1898, § 4971.

The term "oath" includes an affirmation and every other mode authorized by law of attesting the truth of that which is stated. *Pen. Code Cal.* 1903, § 119; *Pen. Code Idaho* 1901, § 4635; *Laws N. Y.* 1892, c. 677, § 14; *Ballinger's Ann. Codes & St. Wash.* 1897, § 7186; *Rev. St. Utah* 1898, § 4123; *Pen. Code S. D.* 1903, § 157.

The term "oath," as used in the Penal Code, defining the crime of perjury, includes an affirmation, and every other mode of attesting the truth of that which is stated, which is authorized by law, except so much of an oath of office as relates to the future performance of official duties. *Rev. St. Okl.* 1903, §§ 2075, 2076.

Wherever an "oath" is required by the Code, an affirmation shall be sufficient, if made by a person conscientiously scrupulous of taking an oath. *Pub. Gen. Laws Md.* 1888, p. 2, art. 1, § 8.

The word "oath" includes "affirmation"; and, whenever an oath is required or authorized by law, an affirmation in lieu thereof

may be taken by any person having conscientious scruples to taking an oath; and an affirmation has the same force and effect as an oath. Bates' Ann. St. Ohio 1904, § 1.

A solemn affirmation shall be equivalent to an oath in all cases, unless otherwise expressly provided, and the word "oath" shall be deemed to include an affirmation. Code W. Va. 1899, p. 132, c. 13, § 11.

Belief in God.

An oath is an appeal to God by the witness for the truth of what he declares and an imprecation of divine vengeance upon him if his testimony be false. Hence a witness must believe in the existence of God, and it is also held that a person who disbelieves in any punishment in a future state, though he believes in the existence of a Supreme Being and that men are punished in this life for their sins, is not a competent witness. *Atwood v. Welton*, 7 Conn. 66, 70.

If the witness believes in some superior being, whom he recognizes as a God who will punish for false swearing, an oath made, etc., according to his belief and such obligations will satisfy the requirements of a bill of rights providing that no religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing therein should be construed to dispense with oaths, since such oath binds the witness' conscience so as to influence him to speak the truth. The obligation is to be so administered as to most certainly bind the conscience. An oath is no more a part of Christianity than of any other religion in the world. "Yet," says Lord Stair, in his *Institutes of the Laws of Scotland*, "It is the duty of the judges, in taking oaths of witnesses, to do it in those forms that will most reach the consciences of the swearers according to their persuasion and custom." And this though the God of the witness' faith is according to the Christian belief a false God. As defined by Willes, C. J., in the case of *Omichund v. Barker*, Willes, 538, where the testimony of a person sworn according to the Gentoo religion was received, it may be stated: "All persons are competent to be witnesses who believe in the existence of a God who will punish him if he swears falsely." This rule in no way conflicts with liberty of conscience in matters of religious faith, as secured in the Bill of Rights. Liability to civil punishment alone for perjury, and the fear of such punishment, are held not to supply that sense of moral and conscientious obligation under which a witness is required to state facts as evidence, and which enlightened men believe to be secured by the sanctions of an oath, taken by one entertaining a belief that the God of his faith will punish false swearing. The purpose of

the oath is not to call the attention of God to the witness, but the attention of the witness to God; not to call upon Him to punish the false swearer, but on the witness to remember that He will assuredly do so. By thus laying hold of the conscience of the witness, and appealing to his sense of accountability the law best insures the utterance of truth. Under the Ohio Constitution, the character of a man's religious belief is not permitted to affect his competency as a witness; yet, to render him competent to take oath as a witness, his moral nature must be strengthened, and his conscientiousness be quickened, by a belief in a Supreme Being, who will certainly, either in this life or the life to come, punish perjury. Where the oath or affirmation cannot be dispensed with, the authorities all concur in the propriety of administering the oath to a witness in the mode by the witness believed to be most binding on his conscience. *Clinton v. State*, 33 Ohio St. 27, 32.

By Chief Justice Abbot "an oath is declared to be a call upon God to witness that what is said by the person sworn is true, and invoking the divine vengeance upon his head if what he says is false." Upon interrogatories put to the judges it was said that, "if the witness states he considers the oath binding on his conscience, it is perfectly unnecessary and irrelevant to ask any further questions." In many of our elementary treatises it is laid down as the infallible rule that, before a witness takes the oath, he may be asked whether he believes in the existence of a God, the obligations of an oath, and in a future state of rewards and punishments, and if he does not he cannot be sworn. It may be considered as pretty generally settled, both in England and the United States, that whoever believes in the moral influence and control of an overruling power in this life, and that oath is binding on his conscience, is competent to testify; for, aside from the penalties imposed by civil enactments, if the witness believes in the moral obligations of an oath, the reward of good and punishment of evil action by some power is irresistibly implied. Though a witness disbelieves in a future state of rewards and punishments, or the existence after death, it is consistent with the most perfect conviction of a superintending power or belief in the obligation of an oath, morally considered, and the influence of God's providence and government in this life, and hence he is competent to take oath to testify. *Brock v. Milligan*, 10 Ohio, 121, 123.

In construing the competency of a witness who did not believe in rewards and punishments after death, but who believed that the Almighty punished mankind for their misdeeds, but that there was no punishment, but universal and everlasting happiness, in the world to come, and he believed in a God,

the obligation of an oath, and that divine justice would punish perjury and all other offenses during this life, the court said: "If we consider the source of the obligation of an oath, it appears strange that the question should be raised in this enlightened age of the world. An oath is a solemn adjuration to God to punish the affiant if he swears falsely. The sanction of the oath is a belief that the Supreme Being will punish falsehood; and whether that punishment is administered by remorse of conscience, or in any other mode in this world, or is reserved for the future state of being, cannot affect the question, as the sum of the matter is a belief that God is the avenger of falsehood." *Blocker v. Burness*, 2 Ala. 354, 355, 356.

OATH OF ALLEGIANCE.

Act Cong. June 12, 1858, § 8 (11 Stat. 336), provides that it shall be lawful for any commissioned officer of the army to administer the prescribed oath of enlistment to recruits. Act Cong. Aug. 3, 1861, § 11 (12 Stat. 280), declares that in all cases of enlistment and re-enlistment in the military service of the United States the prescribed oath of allegiance may be administered by any commissioned officer of the army. Held, that "oath of allegiance" and "oath of enlistment," as used in the two statutes, refer to one and the same oath, inasmuch as only

one oath is prescribed by law to be taken by a person enlisted or enlisting in the service of the United States, which is an oath of allegiance. It is therefore properly called an oath of enlistment, as well as an oath of allegiance. Nor can there be any doubt that the intention and effect of the act of 1861 was to give to a commissioned officer of the army the power to administer the prescribed oath of allegiance in all cases of enlistment and re-enlistment in the military service of the United States. In *re Ferrens* (U. S.) 8 Fed. Cas. 1158, 1160.

OATH OF ENLISTMENT.

See "Oath of Allegiance."

OBEDIENT.

"Obedient" means to be submissive to authority, yielding compliance to commands, orders, or injunctions, performing what is required, or abstaining from what is forbidden. The word is of similar import to the word "amenable," and therefore a bond conditioned to render obedience to the order and process of the court is in compliance with Cr. Code, § 77, requiring such bonds to be conditioned that the defendant at all times render himself amenable to the orders and process of the court. *Miller v. Commonwealth* (Ky.) 1 Duv. 14, 17.

Ex. 7
31/12/29



